Passage of the

Protection of Children and
Prevention of Sexual
Offences (Scotland) Bill
2004

SPPB 82
Passage of the

Protection of Children and Prevention of Sexual Offences (Scotland) Bill 2004

SP Bill 30 (Session 2), subsequently 2005 asp 9

SPPB 82
For information in languages other than English or in alternative formats (for example Braille, large print, audio tape or various computer formats), please send your enquiry to Public Information Service, The Scottish Parliament, Edinburgh, EH99 1SP.

You can also contact us by fax (on 0131 348 5601) or by email (at sp.info@scottish.parliament.uk).
We welcome written correspondence in any language.


Applications for reproduction should be made in writing to:
Information Policy, Office of the Queen's Printer for Scotland (OQPS), St Clements House, 2-16 Colegate, Norwich NR3 1BQ, or by e-mail to licensing@oqps.gov.uk. OQPS administers the copyright on behalf of the Scottish Parliamentary Corporate Body.

Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by RR Donnelley.

Scottish Parliamentary Corporate Body publications

Contents

Foreword

Introduction of the Bill
Bill (As Introduced) (SP Bill 30) 1
Explanatory Notes (and other accompanying documents) (SP Bill 30-EN) 17
Policy Memorandum (SP Bill 30-PM) 28

Stage 1
Stage 1 Report, Justice 1 Committee 33
Scottish Executive Response to Stage 1 Report on the Protection of Children and Prevention of Sexual Offences (Scotland) Bill 257
Extract from the Minutes of the Parliament, 17 March 2005 260
Official Report, Meeting of the Parliament, 17 March 2005 261

Stage 2
Correspondence from Hugh Henry MSP, Deputy Minister for Justice to the Convener of the Justice 1 Committee, 11 April 2005 276
Extract from the Minutes, Justice 1 Committee, 12 April 2005 277
Official Report, Justice 1 Committee, 12 April 2005 278

Correspondence from Hugh Henry MSP, Deputy Minister for Justice to the Convener of the Justice 1 Committee, 15 April 2005 279
1st Marshalled List of Amendments for Stage 2 (SP Bill 30-ML1) 292
Groupings of Amendments for Stage 2 (Day 1) (SP Bill 30-G1) 296
Extract from the Minutes, Justice 1 Committee, 20 April 2005 297
Official Report, Justice 1 Committee, 20 April 2005 298

2nd Marshalled List of Amendments for Stage 2 (SP Bill 30-ML2) 313
Groupings of Amendments for Stage 2 (Day 2) (SP Bill 30-G2) 318
Extract from the Minutes, Justice 1 Committee, 27 April 2005 319
Official Report, Justice 1 Committee, 27 April 2005 320

Correspondence from Hugh Henry MSP, Deputy Minister for Justice to the Convener of the Justice 1 Committee, April 2005 339
3rd Marshalled List of Amendments for Stage 2 (SP Bill 30-ML3) 341
Groupings of Amendments for Stage 2 (Day 3) (SP Bill 30-G3) 349
Extract from the Minutes, Justice 1 Committee, 4 May 2005 350
Official Report, Justice 1 Committee, 4 May 2005 351
After Stage 2
Correspondence from Hugh Henry MSP, Deputy Minister for Justice to the Convener of the Justice 1 Committee, 12 May 2005
Correspondence from Hugh Henry MSP, Deputy Minister for Justice to the Convener of the Justice 1 Committee, 25 May 2005
Correspondence from Hugh Henry MSP, Deputy Minister for Justice to the Convener of the Subordinate Legislation Committee, 18 May 2005
Extract from the Minutes, Subordinate Legislation Committee, 24 May 2005
Official Report, Subordinate Legislation Committee, 24 May 2005

Stage 3
Marshalled List of Amendments selected for Stage 3 (SP Bill 30A-ML)
Groupings of Amendments for Stage 3 (SP Bill 30A-G)
Extract from the Minutes of the Parliament, 2 June 2005
Official Report, Meeting of the Parliament, 2 June 2005

Bill (As Passed) (SP Bill 30B)
Foreword

Purpose of the series

The aim of this series is to bring together in a single place all the official Parliamentary documents relating to the passage of the Bill that becomes an Act of the Scottish Parliament (ASP). The list of documents included in any particular volume will depend on the nature of the Bill and the circumstances of its passage, but a typical volume will include:

- every print of the Bill (usually three – "AsIntroduced", "As Amended at Stage 2" and "As Passed");
- the accompanying documents published with the “As Introduced” print of the Bill (and any revised versions published at later Stages);
- every Marshalled List of amendments from Stages 2 and 3;
- every Groupings list from Stages 2 and 3;
- the lead Committee’s “Stage 1 report” (which itself includes reports of other committees involved in the Stage 1 process, relevant committee Minutes and extracts from the Official Report of Stage 1 proceedings);
- the Official Report of the Stage 1 and Stage 3 debates in the Parliament;
- the Official Report of Stage 2 committee consideration;
- the Minutes (or relevant extracts) of relevant Committee meetings and of the Parliament for Stages 1 and 3.

All documents included are re-printed in the original layout and format but with minor typographical and layout errors corrected (with the exception of the Groupings of Amendments for Stage 2: a list of amendments in debating order was included in the original document to assist members during actual proceedings but is omitted here as the text of the amendments is already contained in the Marshalled Lists of Amendments for Stage 2). Extracts from the Official Report are re-printed as corrected for the archive version of the Official Report.

Documents in each volume are arranged in the order in which they relate to the passage of the Bill through its various stages, from introduction to passing. The Act itself is not included on the grounds that it is already generally available and is, in any case, not a Parliamentary publication.

Outline of the legislative process

Bills in the Scottish Parliament follow a three-stage process. The fundamentals of the process are laid down by section 36(1) of the Scotland Act 1998, and amplified by Chapter 9 of the Parliament’s Standing Orders. In outline, the process is as follows:

- Introduction, followed by publication of the Bill and its accompanying documents;
- Stage 1: the Bill is first referred to a relevant committee, which produces a report informed by evidence from interested parties, then the Parliament debates the Bill and decides whether to agree to its general principles;
- Stage 2: the Bill returns to a committee for detailed consideration of amendments;
• Stage 3: the Bill is considered by the Parliament, with consideration of further amendments followed by a debate and a decision on whether to pass the Bill.

After a Bill is passed, three law officers and the Secretary of State have a period of four weeks within which they may challenge the Bill under sections 33 and 35 of the Scotland Act respectively. The Bill may then be submitted for Royal Assent, at which point it becomes an Act.

Standing Orders allow for some variations from the above pattern in some cases. For example, Bills may be referred back to a committee during Stage 3 for further Stage 2 consideration. In addition, the procedures vary for certain categories of Bills, such as Committee Bills or Emergency Bills. For some volumes in the series, relevant proceedings prior to introduction (such as pre-legislative scrutiny of a draft Bill) may be included.

The reader who is unfamiliar with Bill procedures, or with the terminology of legislation more generally, is advised to consult in the first instance the Guidance on Public Bills published by the Parliament. That Guidance, and the Standing Orders, are available for sale from Stationery Office bookshops or free of charge on the Parliament’s website (www.scottish.parliament.uk).

The series is produced by the Legislation Team within the Parliament’s Clerking and Reporting Directorate. Comments on this volume or on the series as a whole may be sent to the Legislation Team at the Scottish Parliament, Edinburgh EH99 1SP.

Notes on this volume

The Bill to which this volume relates followed the standard 3 stage process described above.

This volume contains various pieces of correspondence from the Deputy Minister for Justice to the Justice 1 Committee which relate to the Bill with the aim of providing a fuller picture of events during the passage of the Bill.

Forthcoming titles

The next titles in this series will be:

• SPPB 83: Charities and Trustee Investment (Scotland) Bill 2004
• SPPB 84: Transport (Scotland) Bill 2004
• SPPB 85: Smoking, Health and Social Care (Scotland) Bill 2004
• SPPB 86: Management of Offenders etc. (Scotland) Bill 2005
Protection of Children and Prevention of Sexual Offences
(Scotland) Bill
[AS INTRODUCED]

CONTENTS

Section

Offence
1 Meeting a child following certain preliminary contact

Risk of sexual harm orders
2 Risk of sexual harm orders: applications, grounds and effect
3 Interpretation of section 2
4 RSHOs: variations, renewals and discharges
5 Interim RSHOs
6 Appeals
7 Offence: breach of RSHO or interim RSHO
8 Effect of conviction etc. under section 7 above or section 128 of Sexual Offences Act 2003

Sexual offences prevention orders
9 Prevention of sexual offences: further provision

General
10 Interpretation
11 Citation and commencement

Schedule—Offences for the purposes of section 1
Protection of Children and Prevention of Sexual Offences (Scotland) Bill
[AS INTRODUCED]

An Act of the Scottish Parliament to make it an offence to meet a child following certain preliminary contact and to make other provision for the purposes of protecting children from harm of a sexual nature; and to make further provision about the prevention of sexual offences.

Offence

1 Meeting a child following certain preliminary contact

(1) A person aged 18 or over (the “adult”) commits an offence if—

(a) having met or communicated with a person aged under 16 (the “child”) on at least two earlier occasions, the adult—

(i) intentionally meets the child; or

(ii) travels, in any part of the world, with the intention of meeting the child in any part of the world;

(b) at the time, the adult intends to do anything to or in respect of the child—

(i) during or after the meeting; and

(ii) in any part of the world,

which if done will constitute the commission by the adult of a relevant offence;

(c) the adult does not reasonably believe that the child is 16 or over; and

(d) at least one of the following is the case—

(i) one of the meetings or communications on earlier occasions referred to in paragraph (a) has a relevant Scottish connection;

(ii) the meeting referred to in sub-paragraph (i) of that paragraph or, as the case may be, the travelling referred in sub-paragraph (ii) of that paragraph, has a relevant Scottish connection;

(iii) the adult is a British citizen or resident in the United Kingdom.

(2) In subsection (1) above—
Protection of Children and Prevention of Sexual Offences (Scotland) Bill

(a) the reference to the adult’s having met or communicated with the child is a reference to the adult’s having met the child in any part of the world or having communicated with the child by any means from or in any part of the world (and irrespective of where the child is in the world);

(b) “relevant offence” means—
   (i) any offence mentioned in the schedule to this Act;
   (ii) anything done outside Scotland which is not an offence mentioned in that schedule but would be if done in Scotland; and

(c) a meeting or travelling has a relevant Scottish connection if it, or any part of it, takes place in Scotland; and a communication has such a connection if it is made from or to or takes place in Scotland.

(3) A person guilty of an offence under this section is liable—
   (a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;
   (b) on conviction on indictment, to imprisonment for a term not exceeding ten years or a fine or both.

(4) Subsections (6A) and (6B) of section 16B of the Criminal Law (Consolidation) (Scotland) Act 1995 (c.39) (which determines the sheriff court district in which proceedings against persons committing certain sexual acts outside the United Kingdom are to be taken) apply in relation to proceedings for an offence under this section as they apply to an offence to which that section applies.

(5) The Scottish Ministers may by order modify the schedule to this Act and, in particular, may add a reference to an offence to Part 1 of the schedule, delete any such reference from that Part or alter any such reference in that Part.

(6) An order under subsection (5) above shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of the Scottish Parliament.

Risk of sexual harm orders

Risk of sexual harm orders: applications, grounds and effect

(1) The chief constable of a police force may apply for an order under this section (a “risk of sexual harm order”) in respect of a person aged 18 or over who resides in the area of the police force or who the chief constable believes is in, or is intending to come to, that area if it appears to the chief constable that—
   (a) the person has on at least two occasions, whether before or after the commencement of this section, done an act within subsection (3) below; and
   (b) as a result of those acts, there is reasonable cause to believe that it is necessary for such an order to be made.

(2) An application under subsection (1) above may be made to any sheriff—
   (a) in whose sheriffdom the person against whom the order is sought resides;
   (b) in whose sheriffdom that person is believed by the applicant to be;
   (c) to whose sheriffdom that person is believed by the applicant to be intending to come; or
(d) whose sheriffdom includes any place where it is alleged that that person did an act within subsection (3) below.

(3) The acts referred to in subsections (1) and (2) above are—

(a) engaging in sexual activity involving a child or in the presence of a child;

(b) causing or inciting a child to watch a person engaging in sexual activity or to look at a moving or still image that is sexual;

(c) giving a child anything that relates to sexual activity or contains a reference to such activity;

(d) communicating with a child, where any part of the communication is sexual.

(4) On the application, the sheriff may make a risk of sexual harm order if satisfied that—

(a) the person against whom the order is sought has on at least two occasions, whether before or after the commencement of this section, done an act within subsection (3) above; and

(b) it is necessary to make such an order for the purpose of protecting children generally or any child from harm from that person.

(5) Such an order—

(a) prohibits the person against whom the order has effect from doing anything described in the order;

(b) subject to subsection (7) below, has effect for a fixed period (not less than 2 years) specified in the order.

(6) The only prohibitions that may be imposed by virtue of subsection (5) above are those necessary for the purpose of protecting children generally or any child from harm from the person against whom the order has effect.

(7) Where a sheriff makes a risk of sexual harm order in relation to a person already subject to such an order (whether made by that sheriff or another), the earlier order ceases to have effect.

3 Interpretation of section 2

For the purposes of section 2 above—

(a) the references in that section to protecting children generally or any child from harm from a person are references to protecting them or it from physical or psychological harm caused by that person doing any of the acts within subsection (3) of that section;

(b) “child” means a person under 16;

(c) “image” means an image produced by any means and whether of a real or imaginary subject;

(d) “sexual activity” means an activity that a reasonable person would, in all the circumstances but regardless of any person’s purpose, consider to be sexual;

(e) a communication is sexual if—

(i) any part of it relates to sexual activity (construed at large); or

(ii) a reasonable person would, in all the circumstances but regardless of any person’s purpose, consider any part of the communication to be sexual;
Protection of Children and Prevention of Sexual Offences (Scotland) Bill

(f) an image is sexual if—

(i) any part of it relates to sexual activity (construed at large); or

(ii) a reasonable person would, in all the circumstances but regardless of any person's purpose, consider any part of the image to be sexual.

4 RSHOs: variations, renewals and discharges

(1) Any of the persons within subsection (2) below may apply to the appropriate sheriff for an order varying, renewing or discharging a risk of sexual harm order.

(2) Those persons are—

(a) the person against whom the order has effect;

(b) the chief constable on whose application the order was made;

(c) the chief constable of the police force in the area of which the person against whom the order has effect resides;

(d) a chief constable who believes that that person is in, or is intending to come to, the area of the chief constable's police force.

(3) Subject to subsections (4) and (5) below, the sheriff, after hearing the person making the application and (if wishing to be heard) any of the other persons mentioned in subsection (2) above, may make any order varying, renewing or discharging the risk of sexual harm order that the sheriff considers appropriate.

(4) A risk of sexual harm order may be renewed or varied so as to impose additional prohibitions only if it is necessary to do so for the purpose of protecting children generally or any child from harm from the person against whom the order has effect (and any renewed or varied order may contain only such prohibitions as are necessary for that purpose).

(5) A risk of sexual harm order shall not be discharged before the end of 2 years beginning with the day on which the order was made without—

(a) where the application is made by a chief constable, the consent of the person against whom the order has effect;

(b) where the application is made by that person, the consent of the chief constable of the police force for the area in which that person resides.

(6) Section 3 above applies for the purposes of this section.

(7) In this section, “the appropriate sheriff” means a sheriff—

(a) for the sheriffdom of the sheriff who made the risk of sexual harm order;

(b) in whose sheriffdom the person against whom the order has effect resides;

(c) in whose sheriffdom that person is believed by the applicant to be; or

(d) to whose sheriffdom that person is believed by the applicant to be intending to come.

5 Interim RSHOs

(1) This section applies where an application for a risk of sexual harm order (“the main application”) has been intimated to the person against whom the application is made but has not been determined.
(2) An application for an order under this section ("an interim risk of sexual harm order")—
   (a) may be made by way of the main application; or
   (b) if the main application has been made, may be made, by application to a sheriff 
       for the sheriffdom of the sheriff to whom the main application was made, by the 
       person who made that application.

(3) The sheriff may, if considering it just to do so, make an interim risk of sexual harm 
    order prohibiting the person against whom the main application was made from doing 
    anything described in the order.

(4) Such an order—
   (a) has effect only for a fixed period specified in the order;
   (b) ceases to have effect, if it has not already done so, on the determination of the 
       main application.

(5) The applicant or the person against whom an interim risk of sexual harm order has effect 
    may apply to a sheriff for the sheriffdom of the sheriff who made the interim risk of 
    sexual harm order for the order to be varied, renewed or discharged.

6 Appeals

(1) An interlocutor granting, refusing, varying, renewing or discharging a risk of sexual 
    harm order or an interim risk of sexual harm order is an appealable interlocutor.

(2) Where an appeal is taken against an interlocutor granting, varying or renewing such an 
    order, the court may, in the appeal proceedings, suspend the interlocutor appealed 
    against pending the disposal of the appeal.

7 Offence: breach of RSHO or interim RSHO

(1) A person, who without reasonable excuse, does anything which the person is prohibited 
    from doing by—
    (a) a risk of sexual harm order; or
    (b) an interim risk of sexual harm order,
    commits an offence.

(2) The orders referred to in paragraphs (a) and (b) of subsection (1) above include, 
    respectively, orders under sections 123 and 126 of the 2003 Act (which make provision 
    for England and Wales and Northern Ireland corresponding to that made by sections 2 
    and 5 above).

(3) A person guilty of an offence under this section is liable—
    (a) on summary conviction, to imprisonment for a term not exceeding 6 months or a 
        fine not exceeding the statutory maximum or both;
    (b) on conviction on indictment, to imprisonment for a term not exceeding 5 years or 
        a fine or both.

(4) Where a person is convicted of an offence under this section, it is not open to the court 
    by which the person is convicted to make a probation order in respect of the offence.
8 Effect of conviction etc. under section 7 above or section 128 of Sexual Offences Act 2003

(1) This section applies to a person who—
   (a) is convicted of an offence under section 7 above or section 128 of the 2003 Act (breach of RSHO or interim RSHO in England and Wales or Northern Ireland);
   (b) is, in England and Wales or Northern Ireland, cautioned in respect of an offence under section 128 of that Act;
   (c) is found not guilty of one of those offences on the grounds or by reason of insanity; or
   (d) is found to be under a disability and to have done the act charged against the person in respect of one of those offences.

(2) Where the person—
   (a) was a relevant offender immediately before this section applied to the person; and
   (b) would (apart from this subsection) cease to be subject to the notification requirements of Part 2 of the 2003 Act while the relevant order (as renewed from time to time) has effect,
the person remains subject to those notification requirements.

(3) Where the person was not a relevant offender immediately before this section applied to the person—
   (a) the person, by virtue of this section, becomes subject to the notification requirements of Part 2 of the 2003 Act from the time this section first applies to the person and remains so subject until the relevant order (as renewed from time to time) ceases to have effect; and
   (b) that Part of that Act applies to the person subject to the modification set out in subsection (4) below.

(4) In that application, “relevant date” means the date on which this section first applies to the person referred to in it.

(5) In this section—
   “relevant offender” has the meaning given by section 80(2) of the 2003 Act;
   “relevant order” means—
   (a) where the conviction or finding referred to in subsection (1)(a), (c) or (d) above is in respect of a breach of a risk of sexual harm order under section 2 above or section 123 of the 2003 Act, that order;
   (b) where the caution referred to in subsection (1)(b) above is in respect of a breach of a risk of sexual harm order under section 123 of the 2003 Act, that order;
   (c) where the conviction or finding referred to in subsection (1)(a), (c) or (d) above is in respect of a breach of an interim risk of harm order under section 5 above or section 126 of the 2003 Act—
   (i) any risk of sexual harm order made upon the application to which the interim risk of sexual harm order relates; or
   (ii) if no such risk of sexual harm order has been made, the interim risk of sexual harm order;
(d) where the caution referred to in subsection (1)(b) above is in respect of a breach of an interim risk of sexual harm order under section 126 of the 2003 Act—

(i) any risk of sexual harm order under section 123 of that Act made on the hearing of the application to which the interim risk of sexual harm order relates; or

(ii) if no such risk of sexual harm order has been made, the interim risk of sexual harm order.

Sexual offences prevention orders

9 Prevention of sexual offences: further provision

(1) In section 105 of the 2003 Act (further provision as to sexual offences prevention orders)—

(a) in subsection (2)—

(i) for the words from “within” to the end of paragraph (a) there is substituted—

“(aa) within whose sheriffdom the person in respect of whom the order is sought resides;

(ab) within whose sheriffdom the person is believed by the applicant to be;

(ac) to whose sheriffdom the person is believed by the applicant to be intending to come;”; and

(ii) at the beginning of paragraph (b) there is inserted “within whose sheriffdom lies”; and

(b) in subsection (4), for “(1)(g)” there is substituted “(1)(e)”.

(2) In section 111 of that Act (appeals in relation to sexual offences prevention orders)—

(a) in paragraph (a)—

(i) the words “refusing, varying, renewing or discharging” are repealed;

(ii) after “order” where first occurring there is inserted “on an application under section 104(5) or 105(1)”;

(iii) after “order” where secondly occurring there is inserted “or refusing, varying, renewing or discharging either such order”;

(b) the word “and” immediately following that paragraph is repealed; and

(c) there is added at the end—

“(c) a sexual offences prevention order made in any other case and any order granting or refusing a variation, renewal or discharge of such a sexual offences prevention order are, for the purposes of appeal, to be regarded—

(i) in the case of solemn proceedings, as if they were orders of the kind referred to in section 106(1)(d) of the Criminal Procedure (Scotland) Act 1995 (c.46) (appeal against probation and community service orders);
(ii) in the case of summary proceedings, as if they were orders of the kind referred to in section 175(2)(c) of that Act (appeal against probation, community service and other orders); and

(d) where an appeal is taken by virtue of paragraph (c) above, the High Court of Justiciary may, in the appeal proceedings, suspend the order appealed against pending the disposal of the appeal.”.

(3) Section 112 of that Act (which provides for the application, with modifications, to Scotland of certain provisions of the Act relating to sexual offences prevention orders) is amended in accordance with subsections (4) and (5) below.

(4) In subsection (1)—

(a) paragraph (a) is repealed;

(b) in its place there is inserted—

“(aa) the references in subsection (2) and (3)(a) of section 104 to an offence listed in Schedule 3 or 5 shall be read as references to an offence listed at paragraphs 36 to 60 of Schedule 3;”;

(c) in paragraph (e)—

(i) the words “or interim sexual offences prevention order” are omitted;

(ii) for the words from “within” to the end of sub-paragraph (i) there is substituted—

“(ia) within whose sheriffdom the person in respect of whom the order is sought resides;

(ib) within whose sheriffdom that person is believed by the applicant to be;

(ic) to whose sheriffdom that person is believed by the applicant to be intending to come;”;

(iii) at the beginning of sub-paragraph (ii) there is inserted “within whose sheriffdom lies”;

(iv) in that sub-paragraph, for “the person in respect of whom the order is sought or has effect” there is substituted “that person”; and

(v) for “references to “the court” being” there is substituted “and, in relation to such an order, references to a court or the court shall be”;

(d) after that paragraph there is inserted—

“(ea) an application for an interim sexual offences prevention order—

(i) is made by way of the main application; or

(ii) if the main application has been made, is made, by application to a sheriff for the sheriffdom of the sheriff to whom the main application was made, by the person who made that application,

(and, in relation to such an order, references to a court or the court shall be construed accordingly),”;

(e) in paragraph (f)—
(i) for “either such order” there is substituted “a sexual offences prevention order which was made on an application under section 104(5) or 105(1) or an interim sexual offences prevention order”;

(ii) the word “or” immediately following sub-paragraph (i) is repealed;

(iii) for sub-paragraph (ii) there is substituted—

“(ia) within whose sheriffdom that person is believed by the applicant to be; or

(ii) to whose sheriffdom that person is believed by the applicant to be intending to come;”;

(iv) for references to “the court” being there is substituted “and, in relation to an application made by virtue of this paragraph, references to a court or the court shall be”;

(f) after paragraph (f) there is inserted—

“(g) an application for the variation, renewal or discharge of a sexual offences prevention order which was made where subsection (2) or (3) of section 104 applies may be made only by the person in respect of whom the order has effect or the prosecutor;

(h) such an application is made—

(i) where the sexual offences prevention order sought to be varied, renewed or discharged was made by the High Court of Justiciary, to that court;

(ii) where that order was made by the sheriff, to the appropriate sheriff.”.

(5) After that subsection there is inserted—

“(1A) In subsection (1)(h)(ii), the “appropriate sheriff” is—

(a) in a case where the person in respect of whom the order has effect is, at the time of the application for its variation, renewal or discharge, resident in a sheriffdom other than the sheriffdom of the sheriff who made the order, any sheriff exercising criminal jurisdiction in the sheriffdom in which the person is resident;

(b) in any other case, any sheriff exercising criminal jurisdiction in the sheriff court district of the sheriff who made the order.”.

(6) In section 142(3) of that Act (its Scottish extent) after “93” there is inserted “, 110”.

General

10 Interpretation

In this Act, “the 2003 Act” means the Sexual Offences Act 2003 (c.42).

11 Citation and commencement

(1) This Act may be cited as the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2004.
(2) This Act, except this section, comes into force on such day as the Scottish Ministers may by order made by statutory instrument appoint and different days may be so appointed for different purposes.

(3) An order under subsection (2) above may contain transitional, transitory or saving provision.
### SCHEDULE
(introduced by section 1)

**OFFENCES FOR THE PURPOSES OF SECTION 1**

#### PART 1

**LIST OF OFFENCES**

| 1   | Rape.                      |
| 2   | Abduction of woman or girl with intent to rape. |
| 3   | Assault with intent to rape or ravish.       |
| 4   | Indecent assault.               |
| 5   | Lewd, indecent or libidinous behaviour or practices. |
| 6   | Public indecency.               |
| 7   | Sodomy.                       |
| 8   | An offence under section 52 of the Civic Government (Scotland) Act 1982 (c.45) (taking and distribution of indecent images of children). |
| 9   | An offence under section 1 of the Criminal Law (Consolidation) (Scotland) Act 1995 (c.39) (incest). |
| 10  | An offence under section 2 of that Act (intercourse with a step child). |
| 11  | An offence under section 3 of that Act (intercourse with a child under 16 by a person in a position of trust). |
| 12  | An offence under section 5 of that Act (unlawful intercourse with a girl under 16). |
| 13  | An offence under section 6 of that Act (indecent behaviour towards girl between 12 and 16). |
| 14  | An offence under section 7 of that Act (procuring). |
| 15  | An offence under section 8 of that Act (abduction of girl under 18 for purposes of unlawful intercourse). |
| 16  | An offence under section 9 of that Act (permitting girl to use premises for intercourse). |
| 17  | An offence under section 10 of that Act (person having parental responsibilities causing or encouraging sexual activity in relation to a girl under 16). |
| 18  | An offence under section 13(5) of that Act (homosexual offences). |
| 19  | An offence under section 3 of the Sexual Offences (Amendment) Act 2000 (c.44) (abuse of position of trust). |
| 20  | An offence under section 22 of the Criminal Justice (Scotland) Act 2003 (asp 7) (traffic in prostitution). |
| 21  | An offence under section 311(1) of the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13) (non-consensual sexual acts). |
| 22  | An offence under section 313(1) of that Act (persons providing care services: sexual offences). |
PART 2

GENERAL AND SUPPLEMENTARY

A reference in Part 1 of this schedule to an offence includes—

(a) a reference to an attempt, conspiracy or incitement to commit the offence; and

(b) except in paragraphs 1 to 7 of that Part, a reference to aiding, abetting, counselling or procuring the commission of that offence.
Protection of Children and Prevention of Sexual Offences (Scotland) Bill
[AS INTRODUCED]

An Act of the Scottish Parliament to make it an offence to meet a child following certain preliminary contact and to make other provision for the purposes of protecting children from harm of a sexual nature; and to make further provision about the prevention of sexual offences.

Introduced by: Cathy Jamieson
On: 29 October 2004
Supported by: Peter Peacock, Hugh Henry
Bill type: Executive Bill
These documents relate to the Protection of Children and Prevention of Sexual Offences (Scotland) Bill (SP Bill 30) as introduced in the Scottish Parliament on 29 October 2004.

PROTECTION OF CHILDREN AND PREVENTION OF SEXUAL OFFENCES (SCOTLAND) BILL

EXPLANATORY NOTES

(AND OTHER ACCOMPANYING DOCUMENTS)

CONTENTS

1. As required under Rule 9.3 of the Parliament’s Standing Orders, the following documents are published to accompany the Protection of Children and Prevention of Sexual Offences (Scotland) Bill introduced in the Scottish Parliament on 29 October 2004:

   • Explanatory Notes;
   • a Financial Memorandum;
   • an Executive Statement on legislative competence; and
   • the Presiding Officer’s Statement on legislative competence.

A Policy Memorandum is printed separately as SP Bill 30–PM.
EXPLANATORY NOTES

INTRODUCTION

2. These Explanatory Notes have been prepared by the Scottish Executive in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

THE BILL

4. The Bill seeks to support the aims set out in the Policy Memorandum through the introduction of a new criminal offence and associated orders. The Bill introduces an offence of sexual grooming of a person under 16 by an adult aged 18 or over. The Bill also introduces risk of sexual harm orders which are designed to protect children from those who display inappropriate behaviour towards them, and the further use of sexual offences prevention orders so that they can be applied to those convicted of sex offences by the court when they are sentenced.

THE BILL – COMMENTARY ON SECTIONS

Section 1 – Meeting a child following certain preliminary contact

5. Subsection (1) makes it an offence for a person aged 18 or over intentionally to meet, or travel with the intention of meeting, a child under the age of 16, in any part of the world, if the adult has met or communicated with that child on at least two earlier occasions, and intends to commit a “relevant offence” against that child either at the time of the meeting or after the meeting. An offence is not committed if the adult reasonably believes the child to be 16 or over. Relevant offences are set out in schedule 1 to the Bill. This schedule lists offences of a sexual nature that could be committed against children.

6. The offence is intended to cover situations where an adult establishes contact with a child through, for example, meetings, telephone conversations or communications on the internet, and gains the child’s trust and confidence so that the adult can arrange to meet the child for the purpose of committing a “relevant offence” against the child. The course of conduct prior to the meeting that triggers the offence may but need not have an explicitly sexual content.

7. The offence would be complete when, following the earlier contacts, the adult meets the child or travels to meet the child with the intent to commit a relevant offence against the child. The intended offence does not have to take place. One or more of the necessary elements of the offence, namely the preliminary meeting or communication(s), the subsequent intentional meeting or any part of the travelling to meet with the child must have a “relevant Scottish connection” (defined in subsection (2)(c)), unless the accused is a British citizen or UK resident, in which case all of these elements may take place entirely outwith Scotland.
8. The evidence of the adult’s intention to commit an offence may be drawn from the communications between the adult and the child prior to the meeting, or may be drawn from other circumstances, for example if the adult travels to the meeting with condoms and lubricants.

9. Subsection (2)(a) provides that references in subsection (1) to meetings or communications with the child include meetings or communications that take place in or across any part of the world.

10. Subsection (3) provides that the offence can be prosecuted summarily or on indictment. Anyone found guilty of the offence is liable to punishment of six months imprisonment and/or a fine not exceeding the statutory maximum (currently £5,000) under summary procedure or to an unlimited fine and/or 10 years imprisonment on indictment.

11. Subsection (4) applies subsections (6A) and (6B) of section 16B of the Criminal Law (Consolidation) (Scotland) Act 1995 to proceedings for an offence under section 1 of the Bill. The effect of this is that where acts leading to the apprehension of an accused person have taken place outside the UK, the person may be proceeded against in the sheriff court district in which the person was apprehended or is in custody or in such other sheriff court district as the Lord Advocate may determine.

12. Subsections (5) and (6) confer power on Scottish Ministers to modify the list of offences in the schedule by statutory instrument. The order will be subject to negative resolution procedure.

Sections 2 and 3 – Risk of sexual harm orders: applications, grounds and effects and Interpretation of section 2

13. Section 2 introduces a new civil preventative order, the risk of sexual harm order (RSHO), for which the police can apply to a sheriff court in respect of a person over the age of 18, if that person has, on at least two occasions, engaged in sexually explicit conduct or communication with a child or children, and as a result there is reasonable cause to believe that the order is necessary to protect a child or children from harm arising out of future acts by that person. The RSHO is not a substitute for a criminal offence, but applies in circumstances where the behaviour of the adult gives reason to believe that a child or children are at risk from an individual’s conduct or communication and intervention at this earlier stage is necessary to protect the child or children.

14. The application may be made by a chief constable to the sheriff in whose sheriffdom the person resides, is believed to be in or is intending to come to, or where the alleged acts are said to have taken place.

15. The person against whom an order is sought may or may not have a conviction for a sexual (or other) offence. The child or children to be protected must be under 16.

16. Subsection (1) explains the circumstances in which an RSHO may be sought. The acts in subsection (3) which constitute the trigger behaviour for an order all involve explicitly sexual
communication or conduct with or towards a child. (The terms “image” and “sexual activity” are defined in section 3). The types of behaviour at subsections (3)(a), (b) and (d) may already amount to a criminal offence. However the trigger behaviour need not amount to criminal conduct. Subsection (3)(c) would, for example, cover a person giving condoms or a sex toy to a child. Subsection (3)(d) would cover a person sending pornographic images to a child over the internet or describing the sexual acts they would like to carry out on the child. An order would not be made unless the court is satisfied (under subsection (4)(b)) that further such acts would cause a child or children physical or psychological harm (see definition of protecting children from harm in section 3(a)).

17. For the purpose of the Bill, “image” includes photographs, cartoon strips, email attachments and drawings. The use of the words “but regardless of any person's purpose” in sections 3(d), (e)(ii) and (f)(ii) means that an activity, or communication, or image, would only be “sexual” for the purposes of this Bill if a reasonable person, purely from the nature and circumstances of the activity, communication or image, would consider it to be sexual, without having to enquire into the motive behind it.

18. Under section 2(5), an order entitles the court to prohibit the person concerned from doing anything described in it. It cannot require the person concerned to comply with conditions requiring positive action.

19. The minimum duration of an order is 2 years.

Section 4 – RSHOs: variations, renewals and discharges

20. Section 4 provides for variations, renewals and discharges of RSHOs. Variations, renewals and discharges can be made on application to the sheriff court by the person to whom the order applies, the chief constable who applied for the original order or a chief constable of the area in which the person resides, is in or intends to move to. It would be open to a person to apply for a RSHO to be varied or discharged if the child concerned reached the age of 16.

Section 5 – Interim RSHOs

21. This section allows the police to apply for an interim RSHO where an application has been made for a full order in respect of an individual, and intimated to that individual, but has not yet been determined. The interim order would be for a fixed period and would cease to have effect at the end of that period or, if earlier, when a decision is made on the full order.

Section 6 – Appeals

22. This section provides that a sheriff’s decision in relation to an RSHO can be appealed. The appeal will be dealt with in the first instance by the sheriff principal. An existing RSHO would continue to have effect until any appeal had been decided by a court unless it is suspended by the court.
Section 7 – Offence: breach of RSHO or interim RSHO

23. Breach of an RSHO or interim RSHO without reasonable excuse is a criminal offence that is triable either summarily (with a maximum penalty of 6 months imprisonment or a fine not exceeding £5,000 or both) or on indictment, with a maximum penalty on indictment of five years imprisonment or a fine or both.

24. Section 7 also makes it an offence under Scots law for a person to breach an RSHO or interim RSHO that was imposed in England and Wales under sections 123 or 126 of the Sexual Offences Act 2003 (e.g. if that person was in Scotland and breaches the terms of the order that was made in England and Wales).

Section 8 – Effect of conviction etc under section 7 above or section 128 of Sexual Offences Act 2003

25. Section 8 makes provision for different types of offender to ensure that a breach of an RSHO entails compliance with the notification requirements in the 2003 Act, which require persons convicted of specified offences to notify their details to the police on a regular basis. It applies to persons who are convicted of an offence under section 7 of the Bill (breach of an RSHO or interim RSHO made in Scotland or England and Wales). It also applies to persons who have been convicted in England and Wales of a breach of an RSHO or interim RSHO that was made in England and Wales. This is to ensure that such persons are subject to the notification requirements of Part 2 of the 2003 Act as a matter of Scots law, which is necessary to deal with the possibility that such persons might move to Scotland.

26. Subsection (2) provides that where the offender was already subject to the notification requirements but would cease to be subject to those requirements at a time when the RSHO still has effect then that person should remain subject to the notification requirements until the expiry of the RSHO, including any renewals.

27. Given that a person subject to an RSHO need not have been convicted of any sexual offence before the order was made, the person would not necessarily be subject to the notification requirements in Part 2 of the 2003 Act. Subsection (3) therefore provides that if the person was not already subject to these notification requirements then that person becomes subject to those notification requirements from the time of the conviction until the RSHO ceases to have effect.

Section 9 – Prevention of sexual offences: further provision

28. Section 9 of the Bill amends the 2003 Act so as to enable the courts in Scotland to impose a sexual offences prevention order (SOPO) where the court deals with the offender in respect of an offence listed in paragraphs 36 to 60 of Schedule 3 to the 2003 Act. The offences listed in paragraphs 36 to 59 are all sexual offences. Paragraph 60 covers any offence committed in Scotland where the court determines that there is a significant sexual element in the offender’s behaviour in committing the offence. There is power for Scottish Ministers to amend the list of relevant offences by a statutory instrument under section 130 of the 2003 Act.
29. A SOPO is intended to protect the public from the risks posed by sex offenders by placing restrictions on their behaviour.

30. At present, the 2003 Act provides that in Scotland a SOPO can be made only on application to a sheriff court by a chief constable in respect of an offender who has previously been dealt with in connection with an offence listed in Schedules 3 or 5 to the 2003 Act (except paragraphs 64 to 111 of Schedule 5). The list of trigger offences covers persons with convictions under both Scots law and the law of England and Wales and Northern Ireland to cover the situation in which a person with an English conviction lives in Scotland and is exhibiting sexually risky behaviour that causes concern. The list of offences also includes any offence committed in Scotland where the court determines that there is a significant sexual element in the offender’s behaviour in committing the offence. The court must be satisfied that an order is necessary to protect the public or an individual from serious sexual harm from the offender.

31. This kind of SOPO, granted on the application of the police (a “police SOPO”) under the 2003 Act replaced the power conferred on the police to apply for sex offender orders that were introduced in the Crime and Disorder Act 1998 for Scotland, England and Wales and Northern Ireland.

32. Separately, the 2003 Act also enabled the courts in England and Wales to impose a SOPO on conviction – a “court SOPO”. This court SOPO replaced the sex offender restraining order for England and Wales that had been introduced in 2000. The court there may impose a SOPO when it deals with an accused following a conviction for an offence listed in Schedule 1 or a finding that he or she is not guilty of such an offence by reason of insanity or that he or she is under a disability but has done the act charged. Included within Schedule 1, as a trigger offence for consideration of a SOPO, is any offence where the court determines that there is a significant sexual element in the offender’s behaviour in committing the offence, as recommended in the report of the Expert Panel on Sex Offending “Reducing the Risk – Improving The Response To Sex Offending”: Under the 2003 Act, court SOPOs were not available in Scotland.

33. Section 9 of the Bill therefore amends the 2003 Act so as to enable the Scottish courts to impose a SOPO on conviction, or on finding that a person is not guilty of an offence by reason of insanity or that he or she is under a disability but has done the act charged. It does this by amending section 112 of the 2003 Act which sets out the way in which the existing SOPO provisions apply to Scotland. Section 112 is amended so as to remove the current disapplication to Scotland of the sentencing court’s power to impose a SOPO on conviction (section 9(3)). The new court SOPO can be imposed by the sheriff court when exercising criminal jurisdiction or by the High Court. Section 9(1) amends section 111 of the 2003 Act to make provision for appeals against the new Scottish court SOPOs. The amendment to section 111 provides that the appeal process for the court SOPO is to be equivalent to the appeal process for other community justice disposals, such as probation and community service orders.

34. It is not necessary to apply to the court to make a SOPO at the point of sentence although the prosecutor may ask the court to consider making an order in appropriate cases.

35. As with the existing police SOPOs and court SOPOs for England and Wales, in order to make a Scottish court SOPO, the court must form a view that the offender presents a risk of
serious sexual harm to the public and that an order is necessary to provide protection from this. The evidence presented in the trial is likely to be a key factor in the formation of this judgement, together with the offender’s previous convictions, of which the sheriff would have a copy. Courts may also ask social enquiry report writers to consider the suitability of a SOPO on a non-prejudicial basis.

36. In line with the provisions for existing SOPOs, a Scottish court SOPO can contain only those prohibitions on the behaviour of the offender that are necessary for the purpose of protecting the public or any particular members of the public from serious sexual harm from the offender (section 107(2) of the 2003 Act). It cannot require the offender to comply with conditions requiring positive action. Prohibitions could include, for example, preventing an offender from contacting victims, or from taking part in sporting activities that involve close contact with children, or from living in a household with girls under 16. Also, in line with the existing provisions for SOPOs in the 2003 Act, the Scottish court SOPO will also have the effect of making the offender subject to the notification requirements of Part 2 of the 2003 Act for the duration of the order. This will apply even if the offender is already subject to notification, if notification would end during the currency of the order (section 107 of the 2003 Act). The notification period runs from the date that the order is served on the offender (not from the date of conviction) – see section 107(5) of the 2003 Act. The minimum duration for an order is five years (section 107(1)(b) of the 2003 Act). There is no upper limit.

37. Breach of a court SOPO, without reasonable excuse, would be a criminal offence. An accused convicted of such an offence on summary conviction would be liable to a term of imprisonment of up to six months or to a fine or both; an offender convicted on indictment would be liable to a term of imprisonment of up to five years (section 113 of the 2003 Act).

38. Section 9 of the Bill amends the 2003 Act so as to bring the procedure for applying for SOPOs in Scotland more closely into line with the normal jurisdictional arrangements applicable to orders made under civil law. The effect of this change is that an order can only be applied for in a sheriffdom where the person who would be subject to the order resides, is believed to be or is intending to come to, or where the alleged acts are said to have taken place. Section 9 also amends the 2003 Act so that an application for an interim SOPO must be made in the same sheriffdom as the main application.

FINANCIAL MEMORANDUM

COSTS ON THE SCOTTISH ADMINISTRATION

39. Discussions with the police and the Crown Office and Procurator Fiscal Service (COPFS) suggest that the introduction of a new grooming offence is not likely to produce a significant net increase in the numbers of prosecutions. In most cases where suspicious activity is reported to the police there are already prosecutions in serious cases for related offences such as lewd and libidinous behaviour, or in less serious cases what appears to be ill-advised behaviour is deterred by the police enquiries. Nevertheless there is a potential gap in the law and for the purposes of estimating financial costs it is assumed that there will be some prosecutions that would not
otherwise have taken place. It is not possible to produce a firm estimate of such prosecutions, but for these purposes we have illustrated the effects of 50 extra prosecutions for the grooming offence per annum. In practice the number may well be significantly lower than this number. The police advise that at present there are less than 100 enquiries throughout Scotland each year, and as is noted above, many of these are either already prosecuted on other charges or there is no evidence of criminal behaviour. It is also difficult to predict how many RSHOs and SOPOs might be imposed. Again discussions with police and COPFS suggest that 10 to 20 applications for each type of order would be a reasonable estimate.

Grooming offence

40. The introduction of this offence should not involve additional police costs as reports or indications of such behaviour are already investigated by the police.

41. The average cost of a summary court case is £1,260 including prosecution costs and the average indictment cost is £9,650. It is anticipated that 20% of these cases will proceed on indictment. Based on the estimate of 50 prosecutions per annum, this would therefore incur total court costs of £146,900.

42. There will also be additional legal aid costs. The average legal aid cost for a summary case would be £675; while the average for a solemn case would be £4,000. Based on the estimate of 50 prosecutions per annum, estimated total legal aid costs would therefore be £67,000. Appeals against convictions would also have an impact on legal aid.

43. If an offender is sentenced to a term of imprisonment there may also be costs to the Scottish Prison Service. Based on 2003-04 figures the average annual cost per prisoner place is £33,244. This figure is the Scottish Prison Service’s annual costs divided by the annual average number of prisoners. It is not the marginal cost of an extra prisoner.

Risk of sexual harm orders

44. For the purposes of this financial memorandum we anticipate that there will be about 10 to 20 applications per annum. The average cost to the Scottish Courts Service of a summary application is £1,260. In addition to these costs there may also be the need for additional social enquiry reports at a cost of £250 per report. There are also implications for legal aid and this is estimated at £2000 per case. Breaches and applications for variations would incur similar costs. There should not be any additional police costs as reports or indications of such behaviour are already investigated by the police. It is important to note that these orders may also generate savings as they would prevent offending and the costs associated with investigating, prosecuting offences, and providing support for victims.

Sexual offences prevention orders (SOPOs)

45. The extension in the use of sexual offence prevention orders (SOPOs) to allow them to be imposed at time of sentence should not lead to any significant cost implications as the cases will already have been investigated and heard. However it is possible that there may be some marginal lengthening of relevant court hearings to consider whether to make a SOPO. Set
against this, it is also noted that the imposition of a court SOPO should produce savings where a police SOPO would otherwise have been applied for, as there will not need to be a separate hearing with associated costs.

COSTS ON LOCAL AUTHORITIES

46. The introduction of the new grooming offence should not have any impact on the costs on local authorities other than in relation to costs associated with social enquiry reports. The introduction of RSHOs may have some impact on the work of social work departments as they may be called upon to participate in risk assessment. Similarly the use of SOPOs as a court disposal may also have some marginal effect in that courts may ask for social enquiry reports where they might not otherwise have done so, at a cost of £250 per report. In general though given the nature of the offences dealt with in this context it is likely that criminal justice social work departments will already be involved in these cases and that the new orders will represent additional tools to be employed rather than additions to their caseload.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

47. Individuals who are convicted of the new offence will be expected to pay any fine imposed on them by the court as a result of that conviction. There are no costs for other bodies or businesses.
SUMMARY OF COSTS

Grooming offence

<table>
<thead>
<tr>
<th>Description</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of prosecutions</td>
<td>50</td>
</tr>
<tr>
<td>Average summary court case cost</td>
<td>£1,935 (including prosecution costs and legal aid)</td>
</tr>
<tr>
<td>Average indictment cost</td>
<td>£13,650 (including legal aid)</td>
</tr>
<tr>
<td>Police costs</td>
<td>No additional costs – already investigating these incidents</td>
</tr>
<tr>
<td>Social work costs (inc SERs)</td>
<td>Would already be involved in cases of this nature. If additional SERs required this would be an average cost of £250 per case</td>
</tr>
<tr>
<td>Average Prison costs per person pa</td>
<td>£33,244 but see explanation in text above</td>
</tr>
</tbody>
</table>

**TOTAL SUMMARY CASE (based on 40 prosecutions and excluding prison costs)**

<table>
<thead>
<tr>
<th>Description</th>
<th>Costs</th>
</tr>
</thead>
<tbody>
<tr>
<td>TOTAL SUMMARY CASE</td>
<td>£87,400</td>
</tr>
<tr>
<td>TOTAL INDICTMENT (based on 10 prosecutions and excluding prison costs)</td>
<td>£139,000</td>
</tr>
<tr>
<td>TOTAL per annum excluding prison costs</td>
<td>£226,400</td>
</tr>
</tbody>
</table>

RSHOs

<table>
<thead>
<tr>
<th>Description</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of applications (inc variations etc)</td>
<td>10 to 20</td>
</tr>
<tr>
<td>Average summary application case cost</td>
<td>£3,260 including court costs and legal aid</td>
</tr>
<tr>
<td>Police investigation costs</td>
<td>No additional costs – already investigating these incidents</td>
</tr>
<tr>
<td>Social work costs (inc SERs)</td>
<td>No additional costs – already involved in managing these cases (if extra SERs are required this would be at the average cost of £250)</td>
</tr>
</tbody>
</table>

**TOTAL PER CASE**

<table>
<thead>
<tr>
<th>Description</th>
<th>Costs</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total for 10 orders</td>
<td>£35,500</td>
</tr>
<tr>
<td>Total for 20 orders</td>
<td>£71,000</td>
</tr>
</tbody>
</table>

EXECUTIVE STATEMENT ON LEGISLATIVE COMPETENCE

48. On 27 October 2004, the Minister for Justice (Cathy Jamieson MSP) made the following statement:

“In my view, the provisions of the Protection of Children and Prevention of Sexual Offences (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”
PRESIDING OFFICER’S STATEMENT ON LEGISLATIVE COMPETENCE

49. On 27 October 2004, the Presiding Officer (Rt Hon George Reid MSP) made the following statement:

“In my view, the provisions of the Protection of Children and Prevention of Sexual Offences (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”
PROTECTION OF CHILDREN AND PREVENTION OF SEXUAL OFFENCES (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. This document relates to the Protection of Children and Prevention of Sexual Offences (Scotland) Bill introduced in the Scottish Parliament on 29 October 2004. It has been prepared by the Scottish Executive to satisfy Rule 9.3.3(c) of the Parliament’s Standing Orders. The contents are entirely the responsibility of the Scottish Executive and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 30–EN.

POLICY OBJECTIVES OF THE BILL

2. The primary policy objective of this Bill is to better protect children from sex offenders. The Bill does this by strengthening the law to deal with those offenders who seek to “groom” children for the purpose of committing sexual offences. The Bill seeks to further enhance protection of children by introducing a new order that will impose restrictions on adults who display inappropriate sexual behaviour towards children. The Bill also extends protection to the wider public by allowing the use of sexual offence prevention orders to be applied to convicted offenders at the point of sentence rather than following subsequent evidence of inappropriate actions.

Grooming offence

3. Sex offenders have always sought to gain the confidence of child victims. However the development of new communications technologies, in particular the internet, while bringing widespread benefits, has also been shown to be used by predatory sex offenders seeking to make contact with and establish a relationship with potential child victims. This process is commonly known as grooming. Grooming is not however limited to the internet. It can take place through any communication medium or during face-to-face contact.

4. The law as it currently stands is able to deal with many cases that involve grooming behaviour. Possible offences include fraud; offences under the Communications Act 2003; offences under the Civic Government (Scotland) Act 1982; lewd and libidinous practices; and breach of the peace. It is conceivable however that at present someone could carefully tailor their behaviour to ensure that no offence was committed during the course of grooming. (Any subsequent sexual assault would of course constitute a serious offence.) At present therefore the
police could detect and stop grooming activity, but in some situations no charges might be brought.

5. The Bill aims to provide additional protection for children by creating a new offence which will have a maximum penalty of 10 years imprisonment on indictment. It is designed to catch those aged 18 or over who undertake a course of conduct with a child under 16 leading either to a meeting during or after which the adult intends to engage in sexual activity with the child or travelling with the intention of having such a meeting. It will enable action to be taken before any sexual activity takes place where it is clear that is what the offender intends. The Bill is intended to catch conduct that takes place in any part of the world, provided some aspect of the communicating, meeting or travelling takes place in Scotland or the offender is a British citizen or UK national.

Risk of sexual harm orders

6. The Bill introduces a new civil order, the risk of sexual harm order (RSHO), intended to protect children under 16 from inappropriate sexual behaviour by adults aged 18 or over. This would assist the police to impose early restrictions on those persons believed to be a risk to the safety of our children. The RSHO is a further development of sex offender orders which were relevant to convicted sex offenders. This order would be made by the courts, on application of the police, in respect of an adult who is deemed to be acting in such a way as to present a risk of sexual harm to children, irrespective of whether such a person has previously been convicted of a sex offence or not. An order will have effect for a fixed period of at least 2 years.

7. The order will contain such conditions as are necessary to protect a particular child or children in general from the person concerned. It is intended to complement the new criminal offence of grooming but will cover a much wider spectrum of behaviour, for example explicit communication with children via email or in chatrooms or loitering around schools or playgrounds. The penalty for breach of the order will be a maximum of five years imprisonment, a fine or both.

8. RSHOs can be applied for by a chief constable in respect of an adult of 18 or more who has displayed sexual behaviour in relation to a child of under 16. The sexual behaviour would need to have taken place on at least two occasions and would need to fall within one of the following categories:

- engaging in sexual activity involving or in the presence of a child;
- causing a child to watch a person engaging in sexual activity or to look at still or moving images that are sexual;
- giving a child anything that relates to a sexual activity;
- communicating with a child where any part of the communication is sexual.

9. In addition, prior to making an RSHO, the court must be satisfied that the order is necessary to protect children (or a particular child) from harm from the person to whom the order would apply.
Sexual offences prevention orders

10. Sexual offences prevention orders (SOPOs) are preventative orders designed to protect the public from serious sexual harm. A SOPO will specify certain actions, behaviour or locations which the offender must avoid. They were introduced in the Sexual Offences Act 2003. In Scotland, a SOPO can at present only be made on application to a sheriff court by a chief constable in respect of a defender with a previous conviction for an offence listed in Schedules 3 or 5 to the Sexual Offences Act 2003. The court must be satisfied that an order is necessary to protect the public or an individual from serious sexual harm from the defender. There may however be occasions when it would be appropriate for a court to impose a SOPO at the point of imposing sentence, rather than requiring a chief constable to make an application for an order. This would mean that the SOPO could apply to an offender immediately without waiting for subsequent evidence of risk to the public before applying for the order. The Bill addresses this policy objective by providing for courts to make a SOPO at the point of conviction of an offender for an offence listed at paragraphs 36 to 60 of Schedule 3 to the Sexual Offences Act 2003.

Cross-border issues

11. It will be important to ensure that SOPOs and RSHOs made in Scotland will be enforceable in England and Wales, and vice versa. Discussions are taking place with the UK Government about the best way of dealing with these issues. Section 104 of the Scotland Act 1998 enables the UK Government to make subordinate legislation to deal with the consequences of provisions made by an Act of the Scottish Parliament, and it is likely that this will be used to ensure cross-border enforcement.

ALTERNATIVE APPROACHES

12. In relation to the proposed new offence, the two main alternatives would be to leave the law as it stands or to seek to criminalise grooming activity in itself without any further evidence of intention to commit a sex offence. While the law in Scotland does already provide a number of ways of dealing with grooming, the fact that grooming behaviour could be constructed to avoid prosecution indicated that strengthening the law was a necessary step. In relation to the second alternative, the Bill seeks to strike a balance between ensuring that the police and Procurator Fiscal Service have the tools at their disposal to deal with grooming behaviour, but without criminalising what might be innocent activity. It is for this reason that the offence becomes complete when an adult meets or travels to meet a child following grooming activity, and that what might be perceived as grooming activity is not sufficient itself for the offence to have been committed.

13. No alternatives to providing protection to children and the wider public through RSHOs and SOPOs were identified.

CONSULTATION

14. A consultation paper was issued on 2 July to a wide range of bodies with an interest in justice and child protection issues. The consultation has now closed and seventy-two responses have been received from a wide range of groups and individuals. In the responses received there
was widespread support for the proposed new offence, introduction of RSHOs and the extension of SOPOs to allow them to be imposed at time of sentence. All responses to the consultation with the exception of those specified as confidential will be lodged in the Scottish Executive Library and made available to SPICe. A summary and analysis of the main themes emerging from the consultation will also be made available on the consultation pages of the Scottish Executive website by the end of November.

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

Equal opportunities

15. The purpose of the Bill is to create a specific offence of meeting a child following certain preliminary conduct, to introduce RSHOs and extend the use of SOPOs to allow them to be imposed at time of trial. It is not anticipated that this will have a differential effect on women or men, on different social groups or communities, on disabled or non disabled persons or on different ethnic or religious groups. No adverse comments were raised on this issue in the consultation responses.

Human rights

16. The proposals to introduce RSHOs and to extend the use of SOPOs raise issues in terms of article 8.1 of the ECHR and the right to a fair hearing under Article 6.1 of the ECHR.

17. Prohibiting a person from visiting certain locations and using certain means of communication interferes with the right to private and potentially also family life. However Article 8 is not an absolute right and the Executive considers that the limitation serves a legitimate aim and is proportionate to that aim. The aim is the prevention of disorder and crime, the protection of health and morals and the protection of the rights and freedoms of others. In the case of RSHOs which can be imposed on a person without a conviction, the interference is proportionate on account of the need to protect children from the significant physical and psychological harm flowing from instances of sexual abuse. Similarly in relation to SOPOs, the interference is proportionate on account of the need to protect the community from person with sexual convictions who pose a risk to the community. There is judicial control of the orders in both cases.

18. The Executive also considers that the proceedings for RSHOs would be regarded as civil for the purposes of Article 6 of the ECHR and that they do not involve the determination of a criminal charge. The aim of an RSHO is not to punish offenders but rather to protect the public and prevent harm. A similar approach was taken by the courts in relation to sex offender orders in the case of *B v Chief Constable of Avon and Somerset 2002 WLR 312*. The Executive also considers that there is sufficient protection in the court procedures to satisfy the requirements of Article 6.

Island communities, local government and sustainable development

19. The Bill has no special implications for island communities and sustainable development.
20. The introduction of the new grooming offence should not have any impact on the costs on local authorities other than in relation to costs associated with social enquiry reports. The introduction of RSHOs may have some impact on the work of social work departments as they may be called upon to participate in risk assessment. Similarly the use of SOPOs as a court disposal may also have some marginal effect in that courts may ask for social enquiry reports where they might not otherwise have done so, at a cost of £250 per report. In general though given the nature of the offences dealt with in this context it is likely that criminal justice social work departments will already be involved in these cases and that the new orders will represent additional tools to be employed rather than additions to their caseload.
Justice 1 Committee

5th Report, 2005 (Session 2)

Stage 1 Report on the Protection of Children and Prevention of Sexual Offences (Scotland) Bill

Published by the Scottish Parliament on 10 March 2005
REMIT AND MEMBERSHIP

REPORT
Introduction and background
Evidence taken by the committee
General reaction to the Bill
Structure of report
Offence of meeting a child following certain preliminary contact
Existing offences
Alternative approaches
Construction of the offence - issues raised
Conclusion on section 1 offence
Risk of Sexual Harm Orders (RSHOs)
Need for RSHOs
Standard of proof
Interaction with the criminal law
Disclosure
Jurisdiction
Interim orders
Sex education – potential criminalisation
Role of the chief constable
Monitoring RSHOs
Human rights
Conclusion on RSHOs
Sexual Offences Prevention Orders (SOPOs)
Proposed Executive amendments
Policy Memorandum
Financial Memorandum
Delegated powers provisions
Conclusion of the report
ANNEX A – REPORT FROM THE SUBORDINATE LEGISLATION COMMITTEE

ANNEX B – EXTRACTS FROM THE MINUTES

ANNEX C – ORAL EVIDENCE AND ASSOCIATED WRITTEN EVIDENCE

ANNEX D – OTHER WRITTEN EVIDENCE

38th Meeting 2004 (Session 2) 8 December 2004

Oral Evidence

Scottish Executive

Crown Office and Procurator Fiscal Service

40th Meeting 2004 (Session 2) 22 December 2004

Written Evidence

Barnardo’s Scotland

James Chalmers, University of Aberdeen

Oral Evidence

Barnardo’s Scotland

James Chalmers, University of Aberdeen

1st Meeting 2005 (Session 2) 12 January 2005

Written Evidence

Association of Chief Police Officers in Scotland

Law Society of Scotland

Scottish Police Federation

Oral Evidence

Association of Chief Police Officers in Scotland

Association of Scottish Police Superintendents

Scottish Police Federation

The Law Society of Scotland

Associated Written Evidence

Association of Chief Police Officers in Scotland
2nd Meeting 2005 (Session 2) 26 January 2005

Oral Evidence

Rachel O’Connell, University of Central Lancashire
Deputy Minister of Justice, Scottish Executive

Associated Written Evidence

Rachel O’Connell, University of Central Lancashire
Deputy Minister of Justice, Scottish Executive

Other Written Evidence

Aberdeen City Council
Angus Council
APEX Scotland
Association of Directors of Social Work
Childnet International
Children in Scotland
Children’s Panel Chairman’s Group
COSLA
Dundee City Council
Dyer, Marion
East Lothian Council
Educational Institute for Scotland
Fairbridge in Scotland
Feldman, Professor David,
General Teaching Council for Scotland
Highland Schools Trust
MacKinnon Donald
Maslin A.M.
National Association of People Abused in Childhood
Professional Association of Teachers, Scotland
Scottish Catholic Education Commission
Scottish Children’s Reporter Administration
Scottish Drug Enforcement Agency – National High-Tech Crime Unit (Scotland)
Scottish Police College
Scottish Pre-School Play Association
Stirling Council
South Lanarkshire Council
Youthlink Scotland
Remit:

To consider and report on matters relating to the administration of civil and criminal justice, the reform of the civil and criminal law and such other matters as fall within the responsibility of the Minister for Justice, and the functions of the Lord Advocate other than as head of the systems of criminal prosecution and investigations of deaths in Scotland.

Membership:

Pauline McNeill (Convener)
Marlyn Glen
Mr Bruce McFee
Margaret Mitchell
Mrs Mary Mulligan
Stewart Stevenson (Deputy Convener)
Mr Jamie Stone

Committee Clerking Team:

Clerk to the Committee
Callum Thomson

Senior Assistant Clerk
Douglas Wands

Assistant Clerk
Lewis McNaughton
Protection of Children and Prevention of Sexual Offences (Scotland) Bill

The Committee reports to the Parliament as follows—

INTRODUCTION AND BACKGROUND


2. The Bill’s stated policy objective is to create a new offence of sexual grooming of a person under 16 by an adult aged 18 or over. The Bill would also create risk of sexual harm orders, which are designed to protect children from those who display inappropriate behaviour towards them, and enable further use of sexual offences prevention orders, so that they can be applied to those convicted of sex offences by the court when they are sentenced.

EVIDENCE TAKEN BY THE COMMITTEE

3. The Justice 1 Committee issued a call for written evidence on the Bill and received 32 responses. The Committee also heard oral evidence over four sessions from the Scottish Executive Bill team, The Crown Office and Procurator Fiscal Service (Crown Office or COPFS); Barnardo’s Scotland, James Chalmers, University of Aberdeen; the Association of Chief Police Officers in Scotland (ACPOS), the Association of Scottish Police Superintendents (ASPS), the Scottish Police Federation (SPF), the Law Society of Scotland (Law Society); and Dr Rachel O’Connell, University of Central Lancashire and Hugh Henry MSP, the Deputy Minister for Justice (“the Minister”).

4. The Committee also hosted a consultative seminar at Holyrood on Wednesday 19 January 2005 in order to seek the views of a wide range of organisations with an interest in child protection and criminal justice issues on the policy objectives and practical implications of the Bill. The following organisations participated in the seminar:

- Association of Chief Police Officers in Scotland (ACPOS)
- Association of Directors of Social Work
• Association of Scottish Police Superintendents (ASPS)
• Barnardo’s Scotland
• Caledonia Youth
• Childline Scotland
• Children 1st
• Children in Scotland
• Commissioner for Children and Young People
• Coventry University
• The Crown Office and Procurator Fiscal Service (COPFS)
• East Renfrewshire Council
• Educational Institute of Scotland (EIS)
• Fairbridge in Scotland
• NCH Scotland
• North Ayrshire Council
• Scottish Borders Council
• Scottish Executive
• Scottish Police Federation (SPF)
• South Ayrshire Council
• Victim Support Scotland
• Youthlink Scotland

5. Supplementary written evidence was also received from the Scottish Executive, Victim Support Scotland, Professor David Feldman, Youthlink Scotland and the Scottish Drugs Enforcement Agency - National Hi-Tech Crime Unit (Scotland).

Scottish Executive consultation
6. In July 2004 the Scottish Executive launched a consultation on proposals to legislate to strengthen the protection of children from sexual harm. The consultation paper, Protecting Children from Sexual Harm, included a draft bill along very similar lines to the Bill as introduced.

7. The Consultation Paper stated that protection of children is a top priority for the Scottish Executive and is a key part of the Executive’s agenda for building safer communities. In the Ministerial foreword, the Minister for Justice cited a growing realisation in recent years of the extent of crimes which involve the sexual abuse of children and the associated impact of new technology.

“Modern technology has brought many benefits in extending the ways in which we can communicate with one another. Sadly sex offenders have also recognised this fact. It has become clear that they are exploiting modern technologies, in particular the internet, to contact children with the aim of luring them into situations where physical sexual abuse can take place – a process now commonly called “grooming”.”¹

8. An analysis of responses to the consultation was carried out by The Research Shop on behalf of the Scottish Executive. Copies of the analysis were provided to the Committee for consideration during its Stage 1 scrutiny of the Bill. In the

¹ Scottish Executive, consultation paper, Protecting Children from Sexual Harm, page 3
Policy Memorandum, the Scottish Executive stated that in the 72 responses received there was widespread support for this proposed new offence, introduction of risk of sexual harm orders (RSHOs) and the extension of sexual offence prevention orders (SOPOs).²

9. The Committee notes the confirmation from the Executive that no response to the Executive’s consultation exercise was received from the National Hi-Tech Crime Unit (Scotland) (NHTCU(S)), part of the Scottish Drugs Enforcement Agency.³ One of the Unit’s main functions is to carry out covert internet investigations on behalf of the Scottish Police Service. Members of the Committee met with a representative from the Unit to discuss its reaction to the provisions of the Bill.

10. The Committee welcomes the consultation exercise carried out by the Scottish Executive prior to the introduction of the Bill and the detailed analysis of the responses received. The Committee regrets, however, that the Executive did not directly approach the NHTCU(S) to obtain a practical insight into the work that it does to detect and disrupt paedophile activity on the internet. The Committee recommends that the Executive Bill team takes the opportunity to arrange such a meeting and to work with the Unit during the remaining passage of the Bill (and beyond during the implementation period should the Bill be enacted) in order to ensure that it reflects operational experience and needs.

GENERAL REACTION TO THE BILL

11. In general, respondents to the Committee’s call for evidence and oral witnesses have welcomed the proposals contained in the Bill as a means of extending the protection of children from sexual abuse, although it should be noted that this has not been without reservations. Many expressed the hope that the legislation will help to address the problem of the grooming of children for sexual abuse in particular via the internet and other new communication technologies. The majority also welcomed the proposal to introduce risk of sexual harm orders which will impose restrictions on adults who display inappropriate sexual behaviour towards children. They also welcomed the proposed application of sexual offence prevention orders to convicted sex offenders at the point of sentence.

STRUCTURE OF REPORT

12. This report sets out the findings of the Committee’s scrutiny of the main provisions of the Bill. Firstly, the report considers the proposed creation of a specific offence of meeting or travelling to meet a child, following preliminary contact, for the purpose of committing a sexual offence. Issues considered include the construction of the offence and possible alternative approaches. Secondly, the report goes on to discuss the proposed risk of sexual harm orders, the need for such orders, interaction with the criminal law and issues around disclosure and monitoring. The report then goes on to consider the

² Policy Memorandum, paragraph 14
³ Scottish Executive, supplementary written evidence, 22 February 2005, page 2
human rights implications of the proposals contained in the Bill with particular
emphasis on compliance with the European Convention on Human Rights. The
report also considers the proposal to allow sexual offences prevention orders to
be imposed by a court at the point of imposing sentence. Finally, the report
considers issues arising from the Policy Memorandum, Financial Memorandum
and Subordinate Legislation Committee report on delegated powers.

OFFENCE OF MEETING A CHILD FOLLOWING CERTAIN PRELIMINARY
CONTACT

13. In the Policy Memorandum, the Executive stated that the Bill aims to provide
additional protection for children by creating a new offence which will have a
maximum penalty of 10 years imprisonment on indictment. It is designed to
catch those aged 18 or over who undertake a course of conduct with a child
under 16 leading either to a meeting during or after which the adult intends to
engage in sexual activity with the child or travelling with the intention of having
such a meeting.4

14. The Executive considers that this will enable action to be taken before any
sexual activity takes place where it is clear that that is what the offender
intends. The Bill is intended to catch conduct that takes place in any part of the
world, provided some aspect of the communicating, meeting or travelling takes
place in Scotland or the offender is a British citizen or UK resident.5

15. The Committee notes the many references in both the Policy Memorandum
and the Explanatory Notes to ‘grooming’, ‘sexual grooming’ and a ‘grooming
offence’. Specifically, in the Policy Memorandum it is stated that the process by
which predatory sex offenders seek to make contact and establish a
relationship with potential child victims “is commonly known as grooming.”6 It
further acknowledges that “[g]rooming is not however limited to the internet. It
can take place through any communication medium or during face-to-face
contact.”7

16. When giving evidence to the Committee on 26 January 2005, the Minister
agreed to give further consideration to the question of whether specific
reference to grooming should be made in the Bill. Committee members
considered that this might help to clarify the type of behaviour which the offence
aimed to tackle. The Minister wrote to the Committee and indicated that having
given this matter further consideration, he did not think that a specific reference
to grooming would be helpful. His response continued—

“As is made clear in the Policy Memorandum, the Bill is intended to deal with
those offenders who seek to "groom" children for the purpose of committing
sexual offences. A criminal offence must be worded in clear and precise
terms to ensure that persons are aware of the types of behaviour which will
constitute an offence. I am satisfied that section 1 achieves that clarity in that
the provision is very specific as to the steps that must be taken for the

---

4 Policy Memorandum; paragraph 5
5 Ibid.
6 Ibid, paragraph 3
7 Ibid.
offence to be complete. It should be noted that the Bill does not require the earlier meetings or communications to have any sexual content, as might be implied if use were to be made of terms such as "sexual grooming".\textsuperscript{8}

17. The Committee is extremely concerned about the response from the Minister as the offence set out in section 1 of the Bill does not in fact seek to criminalise grooming per se, but rather targets action subsequent to the grooming process when a perpetrator moves towards committing a physical sexual offence against a child. The Committee has, therefore, sought to examine both existing offences and possible alternative approaches to tackle grooming behaviour directly.

Existing offences

18. The Committee has considered the range of existing offences which may currently be used to prosecute individuals who engage in inappropriate sexual contact with children in order to determine whether a new offence is required to fill a gap in the law.

19. The Scottish Executive has stated that:

"The law as it currently stands is able to deal with many cases that involve grooming behaviour. Possible offences include fraud; offences under the Communications Act 2003; offences under the Civic Government (Scotland) Act 1982; lewd and libidinous practices; and breach of the peace. It is conceivable however that at present someone could carefully tailor their behaviour to ensure that no offence was committed during the course of grooming. (Any subsequent sexual assault would of course constitute a serious offence.) At present therefore the police could detect and stop grooming activity, but in some situations no charges might be brought."

And also—

"In most cases where suspicious activity is reported to the police there are already prosecutions in serious cases for related offences such as lewd and libidinous behaviour, or in less serious cases what appears to be ill-advised behaviour is deterred by the police inquiries."\textsuperscript{9}

20. In oral evidence to the Committee on 12 January 2005, the Law Society set out some of the offences that are presently covered by common law and statute which could be applicable to behaviour that the Bill seeks to criminalise. Lewd and libidinous conduct, which covers acts of indecency towards children under the age of puberty, and the statutory extension of those provisions to girls in section 6 of the Criminal Law (Consolidation) (Scotland) Act 1995, is one such offence.\textsuperscript{10}

\textsuperscript{8} Scottish Executive, supplementary written evidence, 22 February 2005, page 1
\textsuperscript{9} Explanatory notes, paragraph 39
\textsuperscript{10} Ibid.
\textsuperscript{11} Official Report, Justice 1 Committee, 12 January 2005, c1485
21. In a recently reported case, a charge of lewd and libidinous conduct was brought against a 31 year old man from Dundee who, having claimed on-line to be 19, engaged in ‘cybersex’ with a 14 year old girl from Clackmannanshire and subsequently sought to meet her. The offender pleaded guilty and was sentenced to two years imprisonment, with a possible recall for a further three years if he offends again after release, and was placed on the sex offenders register.  

22. However, the Law Society also stated in its oral evidence that the Bill appears to try to strike at situations in which there has been conduct that might not appear to be offensive as “initial contact would be objectively innocent and therefore could not be covered by the law of lewd and libidinous conduct, breach of the peace or something of that nature.”

23. ACPOS acknowledged that the proposed legislation is “a helpful and useful step” as “the current law is not as robust as we would want it to be, particularly given the advent of internet grooming. That is why we support the proposals.”

24. The type of preparatory activity carried out by paedophiles with children may appear superficially innocent but this can mask serious criminal intent. For this reason, the Committee believes it may not be possible to utilise existing offences such as lewd and libidinous conduct or breach of the peace in cases where no inappropriate conduct has taken place during the course of communication.

Alternative approaches

25. In its Policy Memorandum the Scottish Executive stated that the two main alternatives would be to leave the law as it stands or to seek to criminalise grooming activity in itself without any further evidence of intention to commit a sex offence. In relation to the section 1 offence it stated, “While the law in Scotland does already provide a number of ways of dealing with grooming, the fact that grooming behaviour could be constructed to avoid prosecution indicated that strengthening the law was a necessary step.” In relation to the second alternative, the memorandum stated that the Bill “seeks to strike a balance between ensuring that the police and Procurator Fiscal Service have the tools at their disposal to deal with grooming behaviour, but without criminalising what might be innocent activity.” Grooming activity alone, therefore, without the adult meeting or travelling to meet the child is not sufficient itself for the offence at section 1 of the Bill to have been committed.

26. In its written submission, the Scottish Police Federation put forward the view that the offence should be complete when grooming activity alone takes place. In oral evidence the SPF expressed concern that the offence as currently drafted is too restrictive. It suggested that the drafting of section 1 of

---

12 BBC Online ref: http://news.bbc.co.uk/1/hi/scotland/4205497.stm
13 Official Report, Justice 1 Committee, 12 January 2005, c1485
14 Ibid, c1463
15 Policy Memorandum, paragraph 12
16 Ibid.
17 SPF, written evidence, 21 December 2004, page 2
the Bill follows the model of section 15 of the Sexual Offences Act 2003 which applies only in England and Wales, and that anecdotal evidence from forces in those jurisdictions is that it is not used to any extent. Section 14, however, which makes it an offence to arrange or facilitate the commission of a child sex offence, is used and the SPF stated that “if we were looking for an extremely useful new law, it would be along the lines of section 14 of the Sexual Offences Act 2003, rather than section 15.” 18

27. Section 14 of the Sexual Offences Act 2003, which applies in England and Wales only, is set out below—

14 Arranging or facilitating commission of a child sex offence

(1) A person commits an offence if-

(a) he intentionally arranges or facilitates something that he intends to do, intends another person to do, or believes that another person will do, in any part of the world, and

(b) doing it will involve the commission of an offence under any of sections 9 to 13. 19

(2) A person does not commit an offence under this section if-

(a) he arranges or facilitates something that he believes another person will do, but that he does not intend to do or intend another person to do, and

(b) any offence within subsection (1)(b) would be an offence against a child for whose protection he acts.

(3) For the purposes of subsection (2), a person acts for the protection of a child if he acts for the purpose of-

(a) protecting the child from sexually transmitted infection,

(b) protecting the physical safety of the child,

(c) preventing the child from becoming pregnant, or

(d) promoting the child's emotional well-being by the giving of advice,

and not for the purpose of obtaining sexual gratification or for the purpose of causing or encouraging the activity constituting the offence within subsection (1)(b) or the child's participation in it.

(4) A person guilty of an offence under this section is liable-

18 Official Report, Justice 1 Committee, 12 January 2005, c1466
19 The offences set out in sections 9 to 13 are: sexual activity with a child; causing or inciting a child to engage in sexual activity; engaging in sexual activity in the presence of a child; causing a child to watch a sexual act; and child sex offences committed by children or young persons
(a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;

(b) on conviction on indictment, to imprisonment for a term not exceeding 14 years.

28. The Committee considers that section 14 (and associated sections defining offences) of the Sexual Offences Act 2003 may represent an alternative model for framing legislation which would offer additional protection to children from sexual harm. The Committee will return to this provision later in the report.

Construction of the offence - issues raised

29. While the vast majority of respondents and witnesses have welcomed the proposal to create a specific offence, a number of issues have been raised in relation to the construction of the offence. These were focused around four elements in particular:

- requirements for proving the offence;
- whether grooming activity should be an offence without any subsequent action;
- age limits of both the offender and the victim; and
- prior communication – whether communication on two previous occasions should be required.

Proving the offence

30. In order for the offence to be complete all of the following elements must exist:

- the alleged offender (‘the adult’) must be 18 or over and the intended victim (‘the child’) under 16;
- the adult has met or communicated with the child on at least two occasions (‘preliminary contact’);
- subsequent to this preliminary contact, the adult intentionally meets the child or travels with the intention of meeting the child;
- at the time of such meeting or travel, the adult intends to do anything to or in respect of the child which if done would constitute the commission by the adult of a ‘relevant offence’;
- the adult does not reasonably believe that the child is 16 or over.

31. ACPOS stated that the offence at section 1 of the Bill would be difficult to prove although it may provide a basis for prevention or disruption of paedophile activity. It suggested that due to the difficulty in obtaining evidence, it is likely that the new offence would only be used in a very small number of cases and therefore not address the problem of on-line grooming as effectively as intended.\footnote{21}

\footnote{20} The intention of the adult could be to carry out those actions at the meeting itself, or subsequent to that meeting.

\footnote{21} ACPOS, written evidence, 21 December 2004, page 1
Evidence of intent
32. There was some concern from respondents to the Executive’s consultation and the Committee’s call for evidence about the suggestion in the Consultation Paper, and repeated in the Explanatory Notes, that the adult’s intention to commit an offence might be based on the fact that the adult had travelled to a meeting with condoms and lubricants. It was felt that such a message might work against efforts of health professionals to reduce the incidence of unwanted pregnancies and sexually transmitted infections by encouraging the use of condoms. Whether or not carrying condoms etc. is seen as incriminating in any particular case would depend on the surrounding circumstances. This issue is considered further in relation to RSHOs later in this report.

33. The written submission from the Scottish Children’s Reporter Administration suggested that the offence may be difficult to prosecute successfully due to the need to infer intention from “behaviour that may easily be shown to have alternative innocent explanations, particularly since the communications need not have an explicit sexual content.”

34. ACPOS submitted that because of the various elements which must be in place for the offence to be complete, the Bill may not bring about a large number of cases. One such element would be the requirement to prove that “there is an intention to engage in inappropriate sexual behaviour” which ACPOS suggested may be “very difficult.”

35. In its oral evidence, the Law Society acknowledged that in order to prove the offence it would be necessary to prove that the accused had the intent to commit one of the 22 offences listed in the schedule to the Bill. It was suggested that this “would be drawn from the facts and circumstances of the case. Evidence might be led and the inference would be drawn from the facts and circumstances.”

36. The Committee believes that the offence at section 1 of the Bill as currently constructed will make only a marginal difference in tackling the threat posed to children by paedophiles. Although a small number of prosecutions may result, evidence suggests that the offence will be extremely difficult to prove, particularly in cases where there is no explicit sexual content in previous communications between the offender and the victim which would clearly demonstrate the intent of the offender.

Age limits
37. The Bill provides that the alleged offender must be 18 or over and that the child (intended victim) must be under 16. Many respondents to the Committee’s call for evidence considered that the minimum age for prosecution should be lowered to 16 or suggested that the issue requires further examination. For example, Barnardo’s Scotland recommended that the age for the offender be set at 16 but with conditions including the creation of guidance to help draw

---

22 Consultation paper, paragraph 20
23 Explanatory notes, paragraph 8
24 SCRA, written evidence, 21 December 2004, page 1
26 Ibid, c1494
distinctions between grooming behaviour and normal adolescent ‘romantic exchanges’ and the creation of treatment programmes for young offenders.27 In oral evidence, Barnardo’s Scotland explained that this was based on its own services’ experience of working with young people who are exhibiting sexually problematic behaviour including those aged 16 and 17 who were capable of using, and had used, the internet.28 The Scottish Police Federation stated that it would prefer the age to be 16 as this would be more consistent with other aspects of the criminal law, but that it may also be appropriate to consider the age of the “child” relative to the age of the “adult”.29 Children in Scotland expressed the strong belief that the age of an adult should not be lowered below 18 and highlighted a specific example that a 16 year old boy could be having a consensual relationship with a 15 year old girl and should not be criminalised.30 COSLA’s submission explained that of 13 councils who have expressed a view on the matter, three recommended that 18 should be the minimum age and ten recommended 16.31

38. In oral evidence the Association of Scottish Police Superintendents pointed out that, as currently drafted, the legislation “suggests that grooming can only be downwards—an older person grooming a younger person”. However, ASPS went on to suggest that this is not always the case, “It can be the other way about; the younger person can be the predator.”32

39. At the consultative seminar held on 19 January 2005, the views of organisations who work with children and young people were gathered and opinion appeared to crystallise around setting the age of the offender at 18, as currently proposed in the Bill. The reasons for this centred upon a desire not to use the criminal law to deal with 16 and 17 year olds accused of the offence but rather to utilise the Children’s Hearings system in order to provide an appropriate response including treatment options for the offender.

40. In earlier oral evidence, Barnardo’s Scotland suggested that while it would like to set the age of the offender at 16, it would also like the Bill to specify that, for 16 and 17 year olds, “the offence should be dealt with through the Children’s Hearings system.”33 James Chalmers, lecturer in criminal law at the University of Aberdeen and a member of the Scottish Law Commission’s advisory group on reform of the law of rape and other sexual offences, stated in oral evidence that he tended towards the view that “the age that the Bill currently specifies, which is 18, may need to be reduced. I agree that prosecution might not be the normal response but at least the matter would be clearly covered by the criminal law.”34 He pointed to a Home Office study published in 1998 which suggested...

---

27 Barnardo’s Scotland, written evidence, 15 December 2004, page 3
28 Official Report, Justice 1 Committee, 22 December 2004, c1411
29 Scottish Police Federation, written evidence, 5 January 2005, page 1
30 Children in Scotland, written evidence, 21 December 2004, page 3
31 COSLA, written evidence, 21 December 2004, page 1
32 Official Report, Justice 1 Committee, 12 January 2004, c1470
33 Official Report, Justice 1 Committee, 22 December 2004, c1411
34 Ibid, c1425
that adolescents might be responsible for as many as a third of sexual
offences.\textsuperscript{35}

41. The National Hi-Tech Crime Unit (Scotland), expressed concern that in the Bill
as currently drafted, a person must be 18 years of age or over to commit the
offence—

“It is well recognised by psychologists who have studied paedophiles and this
whole area of sex offending, that the majority of paedophiles are aware of
their interest in young children from a young age. Almost certainly by the age
of 18 they have acknowledged this interest.”\textsuperscript{36}

42. The NHTCU(S) response went on to give an example of a situation where a
15-year-old male could conduct the act of grooming a 12-year-old girl online
and fulfil the criteria set out in section 1 of the Bill—

“In such an instance there would be no legislative recourse via the new Act to
prosecute the offender and, perhaps just as important, have a mechanism in
place via the Sex Offenders Register to monitor their future conduct.”\textsuperscript{37}

43. The NHTCU(S) also drew a parallel with a 15-year-old male being charged with
having sexual intercourse with a 12-year-old girl, stating that “this would be
reported to the Procurator Fiscal and dealt with accordingly. Similarly, a 16-
year-old male would also be charged if he had sexual intercourse with a 15-
year-old girl.” The response pointed out that the police have a duty to report
such cases to Procurators Fiscal and at that stage all the circumstances are
taken into account as to whether a prosecution is necessary and in the public
interest. It was suggested that the same considerations should be applicable to
the new Act.\textsuperscript{38}

44. In oral evidence, the Deputy Minister for Justice discussed with the Committee
the rationale for fixing the age of the offender at 18. He acknowledged that a
young person, whether 14, 16 or 18 years of age could be equally capable of
committing the same offence and that the impact on the victim would be
indistinguishable. However, he stated that the relative maturity of a person at
each of these ages could be very different. Although young people in Scotland
gain many rights at the age of 16, the Minister explained that development
issues still need to be considered and the Executive wanted to avoid
adolescents being inadvertently caught up in criminal activity as a result of the
Bill.\textsuperscript{39} He acknowledged that “an argument could be made for setting the limit
at 16 rather than 18, but we decided on a limit of 18.”\textsuperscript{40}

45. The Minister also confirmed that the Executive had considered an alternative
approach which would take into account the difference in age between the
perpetrator and victim but had concluded that this too was fraught with

\textsuperscript{35} Ibid.
\textsuperscript{36} NHTCU(S), written evidence, 23 February 2005, page 2
\textsuperscript{37} Ibid.
\textsuperscript{38} Ibid.
\textsuperscript{39} Official Report, Justice 1 Committee, 26 January 2005, c1538-1539
\textsuperscript{40} Ibid, c1540
difficulties. He contended that if, for example, an age gap of four years was set, someone would point to circumstances in which a gap of three years would be more appropriate.\textsuperscript{41}

**Children’s Hearings System**

46. The Children’s Panel is a statutory tribunal under the Inquiry and Tribunals Act 1992. The Children’s Hearings system draws its statutory authority in the main from the Children (Scotland) Act 1995.\textsuperscript{42} Generally, the upper age limit for referral to the Children’s Hearing is 16, unless the child is already subject to a supervision requirement, then it is 18.\textsuperscript{43}

47. Where the ground of referral to the hearing is that the child has committed an offence, there is no restriction on the type of offence. So the fact that the offence in question is a sexual one is not, of itself, a reason for prosecuting rather than dealing with the matter by referral to a Children’s Hearing. Even quite serious sexual offences can be referred to the Children’s Hearings system.

48. The Scottish Children’s Reporter Administration stated in written evidence—

“Where there is prosecution of a child under 16 years of age, a young person aged 16 or 17 subject to a supervision requirement, or a young person aged 16 to 17½ not subject to a supervision requirement, the court has various powers and duties under section 49 of the Criminal Procedure (Scotland) Act 1995 to seek advice from the Children’s Hearing or remit to the Children’s Hearing for disposal. This means that a welfare and treatment approach rather than a punitive one would be available to most younger offenders. Accordingly SCRA would support the reduction of the minimum age.”\textsuperscript{44}

49. If it was thought appropriate to permit referral to the Children’s Hearings system in the case of a person within six months of his or her 18th birthday who is not already subject to a supervision requirement, this would require an amendment to section 92 of the Children (Scotland) Act 1995.

50. **The Committee considers that, on the basis of evidence received, there may be cases where young people between 16 and 18 years of age commit the section 1 offence.**

**Age of the child**

51. The maximum age of the “child” (currently under 16) was also questioned in written submissions from several organisations. Children in Scotland noted that the proposals do not seek to protect young people over the age of 16. It noted that young people aged 16 and 17 can still be vulnerable to abuse from older adults, whilst also noting that it would be difficult to make it illegal for an adult to groom a 16 or 17 year old without changing the age limits in other legislation.\textsuperscript{45}

\textsuperscript{41} Official Report, Justice 1 Committee, 26 January 2005, c1543
\textsuperscript{42} Children’s Panel Chairmen’s Group, written evidence, 21 December 2004, page 1
\textsuperscript{43} Children (Scotland) Act 1995, s. 93(2)
\textsuperscript{44} SCRA, written evidence, 21 December 2004, page 2
\textsuperscript{45} Children in Scotland, written evidence, 21 December 2004, pages 2 & 3
(Scotland) Act 2003 defines a child up to 18 years and that the Bill does not acknowledge those children of 16 to 18 years who are very vulnerable and who would be likely targets for sex offenders.\footnote{ADSW, written evidence, 21 December 2004, page 1} In its response, COSLA recommended that the Scottish Executive should seek to include vulnerable adults within this legislation also.\footnote{COSLA, written evidence, 21 December 2004, page 3}

**Conclusion on age limits**

52. The Committee considers that the key factor which must be taken into account in determining the age limits in the definition of the section 1 offence to be the relative position of power and influence exerted by the offender over the child. Although an imbalance of power can occur between people of similar ages and a young person can in certain circumstances exert influence over a vulnerable older person, the Committee recognises that the offence set out in the Bill is intended principally to strike at seasoned predatory paedophiles who will tend to be considerably older than the victims they seek to prey upon. However, the Committee also acknowledges evidence that a proportion of sex offenders or individuals demonstrating sexually problematic behaviour are under 18 years of age.

53. The Committee has heard persuasive arguments to set the age of the offender at 16 to ensure that 16 and 17 year olds do not escape prosecution for the grooming of younger children. It has also heard arguments for retaining 18 as the minimum age of the offender to prevent such young people from becoming inadvertently criminalised. The Committee has considered this question carefully and believes that it is important to ensure that the offence can be used to tackle grooming activity by predatory young people as well as adults. In order to ensure the widest possible application of the offence, the Committee recommends that no age should be specified for the offender. However, it should be left to the Crown Office, social work and other agencies to determine the correct intervention in the case of a young person accused of committing the offence. This may be through criminal prosecution, referral to the Children’s Hearings system or alternative interventions. Such discretion should be supported by appropriate guidelines issued by the Lord Advocate.

54. The Committee is content that for the purposes of section 1 of the Bill, a child is defined as a person under the age of 16.

**Married couples**

55. The Committee was made aware of the variations in the age of consent and marriage around the world. Among the 15 countries which made up the European Union prior to May 2004, for example, in Finland, Sweden, Denmark and France, the age of consent for both heterosexual and homosexual sex is 15 years of age.\footnote{House of Commons Library research paper 00/15} In Spain, there is no statutory age of consent, but in general, consensual sexual relations are not penalised from the age of 12.\footnote{A person aged over 16 who has sex with a person aged between 12 and 16 may be liable to prosecution.}
the age at which young people can legally marry, the Committee is aware of several countries around the world where this is under 16. For example in Chile, males over 14 years old and females over 12 years can marry, while in Pakistan, the age of consent for marriage is 18 for males and 14 years for females.  

56. The Committee considered whether there should be a marriage exemption in the Bill to prevent the criminalisation of couples legally married in another country with a lower age of consent than in the UK. When questioned about this, Scottish Executive Bill team members acknowledged that if all elements of the offence, as currently drafted, are present an offence would be committed in Scots law irrespective of whether the offence that was intended was not an offence in another country. However, they stated that in determining whether it was in the public interest to prosecute an offender, prosecutors would take into account the overall circumstances of the offence including factors such as a pre-existing relationship.

57. In his oral evidence, the Minister rejected the option of a marriage exemption, stating that there could be circumstances in which it would be right to prosecute someone seeking to have sexual relations with a spouse aged under 16. He instead favoured the retention by the Crown Office and Procurator Fiscal Service of discretion in deciding whether it was in the public interest to prosecute.

58. In his written submission to the Committee, Professor David Feldman suggested that there should be a marriage exemption. He considered that if the marriage would be recognised as valid under Scots law, it would be an unjustifiable infringement of Article 8 of the European Convention on Human Rights to criminalise the making of arrangements for the parties to meet for sexual purposes. Even if, for public policy reasons, the marriage would not be recognised by Scots law, but would be recognised by the lex loci celebrationis (the law of the place where the marriage is celebrated) and the law of the parties' domicile(s), Professor Feldman suggested that it would be difficult to justify interfering with marital intercourse through use of the criminal law. He concluded—

"Without a marriage exemption, there would appear to me to be a significant risk that the legislation would be held to be an unjustifiable interference with the private lives of parties to the marriage."

59. The Executive responded in writing to Professor Feldman's evidence and stated that—

"It is recognised that some countries have differing age limits for marriage. This has not prevented the operation of section 5 of the Criminal Law..."
(Consolidation) (Scotland) Act 1995 which makes it an offence for any person, in Scotland, to have sexual intercourse with a girl under the age of 16. Before bringing any prosecution under this provision, the Crown will take all the circumstances of the case into account and consider whether it is in the public interest to prosecute. However, a blanket marriage exemption is not considered appropriate either in the context of the section 1 of the Bill or section 5 of the 1995 Act. In both cases, the provisions could operate so as to bring proceedings against adults who exploit lower age limits for marriage in other countries in order to commit acts which, in terms of the law of Scotland, amount to sexual offences against children."  

60. The Committee notes the respective positions of Professor Feldman and the Scottish Executive relating to the need for a marriage exemption. The Committee understands that the reason why there is no analogous problem in respect of section 5 of the Criminal Law (Consolidation) (Scotland) Act 1995 is because it refers, explicitly, to a person having “unlawful” sexual intercourse. For the purposes of these offences “unlawful” has been interpreted as meaning “extra-marital”. This means that none of the offences under section 5 can be committed by a person having sexual intercourse with their spouse. In other words, the issue which arises under section 1 of the Bill has been expressly addressed in section 5 of the 1995 Act.

61. The Committee remains concerned that there might be a challenge to criminal proceedings brought under section 1 of the Bill if the parties were married, because that would give rise to a possible breach of article 8 of the ECHR. It therefore calls on the Executive to respond to the Committee on this matter in advance of the Stage 1 debate.

Prior communication

62. In relation to the requirement for previous preliminary contact to have taken place, the Bill requires that the adult has met or communicated with the child on at least two earlier occasions. Several respondents questioned this requirement. The Association of Directors of Social Work considered it to be prohibitive as a meeting can be set up with just one communication. The Scottish Children’s Reporter Administration recommended revising the requirement to one prior communication in order to more accurately reflect the reality of some children’s vulnerability and some perpetrators’ skill in exploiting it.

63. In its written submission the Law Society questioned why there is a necessity for the accused to have met or communicated with a child on at least two earlier occasions. It recommended that the reference to two earlier occasions should be deleted from the offence provision. In oral evidence Law Society witnesses confirmed their belief that there need be only one communication.

---

56 Scottish Executive, supplementary written evidence, 22 February, annex, paragraph 3
57 ADSW, written evidence, 21 December 2004, page 1
58 SCRA, written evidence, 21 December 2004, page 1
59 Law Society, written evidence, 7 January 2005, page 2
60 Official Report, Justice 1 Committee, 12 January 2005, c 1486
64. In oral evidence, The Association of Chief Police Officers in Scotland (ACPOS) suggested that while more than one contact may often be made in the grooming of children for sexual abuse—

“If contact had been made on a single occasion and the circumstances and other information that was available to us suggested that the contact was illegitimate it would not be helpful if we were required to wait until another contact had been made or the person had travelled with the intention of meeting the child and for more evidence that the meeting was likely to lead to sexual abuse, before we could intervene.”

65. In his evidence, James Chalmers also questioned the requirement for two previous communications—

“One lengthy internet conversation could last hours or the best part of a day and could be much more significant than two short conversations. That is why I have my doubts about the limitation of requiring two previous meetings or communications. I am not sure that that provision serves any useful purpose.”

66. Dr Rachel O’Connell, Director of Research, Cyberspace Research Unit, University of Central Lancashire, gave evidence to the Committee that, in her experience, grooming can take place over a period of many months, but in at least one case in Wigan, a girl went to a meeting with a paedophile after only a few conversations during one day on-line.

67. In its submission to the Committee, the National Hi-Tech Crime Unit (Scotland) stated—

“There is no evidence to suggest that a paedophile will not carry out the grooming process during the first communication and arrange to meet up with a child. This is no doubt the case in many instances. The aim of the new legislation is the protection of children and this loophole may well be one that the paedophile would utilise to avoid prosecution.”

68. In response to a question on this issue, the Minister explained that the requirement for prior communication on two occasions was in order to clearly demonstrate the intent of the accused to commit a criminal act. One prior communication, he suggested, “might catch out people who were inadvertent or who had not thought their actions through and who, once they had done so, might not engage further.” He argued that requiring two communications would demonstrate clear intention to the courts. The Minister acknowledged that one long chat, perhaps with a break, might raise an issue about whether

---

61 Official Report, Justice 1 Committee, 12 January 2005, c1465
62 Official Report, Justice 1 Committee, 22 December 2004, c1427
63 Official Report, Justice 1 Committee, 26 January 2005, c1521-1522
64 NHTCU(S), supplementary written evidence, 23 February 2005, page 2
65 Official Report, Justice 1 Committee, 26 January 2005, c1543
there were one or two communications but that “that would be a matter for the prosecution to argue and for the court to decide.”

69. The Committee understands that by specifying the requirement to demonstrate communication between the adult and the child on at least two occasions prior to the adult meeting or travelling with the intention of meeting the child, the Executive is trying to avoid catching innocent or inadvertent communication within the scope of the offence. The Committee shares this concern but considers that it is the content and context of communications which is key to proving the offence rather than the number of communications. There is a clear possibility that a particularly skilled paedophile could, in one communication, arrange a meeting with a vulnerable child.

70. The Committee recommends that this element of the offence should be reduced to only one prior communication.

71. The Committee is also concerned that a would-be perpetrator could evade prosecution if, by acting in concert with others in a paedophile ring, he or she travels to meet a child with the intention of committing a relevant offence but has had no direct previous communication with the child. On the face of it, this type of would-be perpetrator would not be caught by the section 1 offence as it currently stands but would be caught by the terms of section 14 of the Sexual Offences Act 2003 (which does not apply to Scotland). If there is no existing criminal law provision in Scotland which can strike at such behaviour, the Committee recommends that the Executive bring forward an amendment at Stage 2 to close this apparent loophole. The Committee would be grateful for a response from the Executive on this point in advance of the Stage 1 debate.

Travel element of offence

72. The Law Society raised a concern that as drafted, the offence would only be complete if the adult travelled to meet the child. This appeared to exclude the possibility that the child could be induced to travel to meet the adult.

73. The Committee is concerned at this apparent loophole in the construction of the offence and calls upon the Executive to re-examine this element. The Committee calls upon the Executive to provide a response on this point in advance of the Stage 1 debate.

Defence of reasonable belief

74. Section 1(1)(c) of the Bill establishes that an offence will not be constituted unless the adult had a reasonable belief that the child was under 16. In its written submission, the Law Society questioned whether the test of “reasonable belief” would be determined on the basis of a subjective or objective test. In oral evidence, the Law Society provided further clarification of the issue, explaining that the offence might be difficult to prove because, as drafted, the onus would be on the Crown to show that the accused did not have a

---

66 Official Report, Justice 1 Committee, 26 January 2005, c1544
67 Official Report, Justice 1 Committee, 12 January 2005, c1489
68 Law Society of Scotland, written evidence, 7 January 2005, page 2
reasonable belief that the child was over 16. It suggested that, in keeping with other Scottish offences, the process could be inverted—

“Instead of placing the onus on the Crown to prove the reasonable belief of the accused in relation to the victim, the provision is framed in the way of a defence—showing that the accused had a reasonable belief that the person was over the age is a defence to a charge. We have given that considerable thought and think that it might be easier to prove the offence if we use the formula that is used in the Criminal Law (Consolidation) (Scotland) Act 1995 and other existing Scottish offences.”

75. In relation to whether the test should be subjective or objective, the Law Society suggested that existing case law from the 1995 Act “shows that the accused has to make due inquiry and cannot just rely, for example, on the appearance of another person.”

76. The Minister acknowledged the argument put forward by the Law Society and indicated that the Executive would give further consideration to whether it would be appropriate to shift the burden of proof on to the accused. He gave a commitment to let the Committee know when a conclusion had been reached. In subsequent correspondence, the Minister indicated that he was continuing to consider the issue and would write to the Committee when a conclusion had been reached.

77. The Committee recommends that the Executive amend this provision in order to place the onus on the accused to prove that he or she held a reasonable belief that the child was over 16 years of age. The Committee also calls upon the Executive to provide a response on this point in advance of the Stage 1 debate.

Other forms of abuse

78. The Committee also heard oral evidence from Dr Rachel O’Connell about research she has conducted into the structure and organisation of paedophile activity on the internet, including on-line grooming practices. Dr O’Connell outlined for the Committee a range of behaviours exhibited by adults engaging in what she referred to as ‘cybersexploitation’, that is adults or adolescents engaging children in varying degrees of sexually explicit conversations which may or may not progress to ‘fantasy enactment’ (the enactment of sexual fantasies and in some instances to cyber-rape scenarios). Grooming is a subset of cybersexploitation which may or may not involve explicit conversations of a sexual nature or online enactment of fantasies but the ultimate intention is to sexually abuse a child in the real world.

---

69 Official Report, Justice 1 Committee, 12 January 2005, c1487
70 Ibid.
71 Official Report, Justice 1 Committee, 26 January 2005, c1545
72 Scottish Executive, supplementary written evidence, 22 February 2005, page 3
73 J1/S2/05/2/5 “A typology of cybersexploitation and on-line grooming practices” – Dr R. O’Connell
74 J1/S2/05/2/5 “A typology of cybersexploitation and on-line grooming practices” – Dr R.
O’Connell, page 4
79. While supportive of the provisions contained in the Bill, Dr O’Connell highlighted the psychological harm that can be done to children through on-line abuse by adults without the requirement for a meeting to take place. Upon hearing this evidence, the Committee was extremely concerned that adults could abuse children and young people in this way without falling foul of the offence proposed in the Bill. This highlighted to the Committee the potential limitations of the offence as presently constructed.

80. The response from the National Hi-Tech Crime Unit (Scotland) also pointed out that—

“a paedophile may not necessarily reach the stage where they want to meet up with the child. Consideration must be given as to whether the legislation should create a new offence for this type of activity or whether a common law Breach of the Peace is appropriate in the circumstances. If the latter is deemed to be the appropriate offence then the legislation governing the Sex Offenders Register must be reviewed to incorporate an offence of Breach of the Peace involving this type of activity. The whole essence of this amendment is the control of the offender after the fact.”

81. The Committee accepts the need for the creation of an offence of grooming a child for sexual abuse in order to fill a gap in existing criminal law. In such circumstances, where intent to commit sexual offences against children is clear, an appropriate charge should be available to the Crown. However, the Committee is alarmed at evidence of the extent of other ‘cybersexploitation’ offences against children and extremely concerned that such offences will not be captured by the offence at section 1 of the Bill. The Committee questions whether the reliance on existing offences such as breach of the peace is sufficient.

82. The Committee strongly recommends to the Executive that it should bring forward additional measures to tackle grooming head on, rather than only relying on the offence in section 1 of the Bill. The Committee considers that one option would be to include in the list of sexual offences in Part 1 of the Sexual Offences Act 2003, breach of the peace, where the nature or circumstances of the offence are clearly of a sexual nature. This would then allow an individual convicted of such an offence to be included on the Sex Offenders Register.

Internet service providers

83. The Committee was keen to know what action internet service providers (ISPs) were taking to warn children and young people about the use of chatrooms, particularly those unsuitable for a younger age group. Dr O’Connell explained that some of the larger ISPs do issue warnings—

“AOL, Yahoo! and MSN put up messages and MSN has shut down its chatrooms in the United Kingdom—those chatrooms can be accessed only

---

75 NHTCU(S), written evidence, 23 February 2005, page 2
76 America Online
77 Microsoft Network
through premium rate services, so people have to pay for the service. Moreover, there are moderators in the chatrooms. The big companies are putting out the message in relation to chat and instant messaging, but there are many smaller operations that have to be brought in to toe the line.  

‘Blogging’

84. Dr O’Connell also outlined for the Committee the potential dangers for children of creating online journals or ‘blogs’, a popular new activity on the internet. She described such sites as “a paedophile’s dream because you have children uploading pictures, giving out details of their everyday life because it’s an online journal.” The expansion in the use of mobile camera phones which are capable of uploading images directly to such sites would only exacerbate this problem. She explained that predatory adults could use an RSS feeder program - a syndication tool - to be instantly e-mailed any picture when it was added to a blogging site and described a scenario where a group of paedophiles could exchange information on a child’s movement, potentially leading to abduction without necessarily having to have any prior contact with the child.  

85. In terms of the safety information or guidance provided on such sites, Dr O’Connell suggested that ‘blogging sites typically provide absolutely no safety information or guidance. I mean zero. The whole point of blogging is to give out personal information in order to network and to make contact. Indeed, MSN launched a blogging site that is linked to its instant messenger. 

86. The Committee was extremely concerned to learn about the emergence of new potential risks to young people posed by paedophiles exploiting the information contained in weblogs. It is clear that these on-line journals may contain sufficient information about a young person to allow a paedophile to identify his or her location, school and regular activities. The Committee recognised that the providers of internet services used by Scots children may be based in any country of the world and that therefore any action to ensure that appropriate warnings and guidance for children is dependent on international co-operation. The Committee considers that the Executive should undertake further research into controls that parents, schools and others could be required to install on computers used by children that would assist these children to use the internet safely. 

Promotion of child internet safety

87. The Committee welcomes the current ‘Chatsafer’ Child Protection on the Internet campaign, supported by the Scottish Executive, designed to encourage safe use of internet chatrooms by children. This is the fourth consecutive year that the Executive has supported such a campaign. Through public awareness activity, and associated web-based resources, children and young people, their

---

78 Official Report, Justice 1 Committee, 26 January 2005, c1527
79 Ibid, c1528
80 MSN Messenger is a software application which allows real time chat between individuals via the internet.
81 Official Report, Justice 1 Committee, 26 January 2005, c1529
parents, and schools and education authorities are all encouraged to ensure that children and young people are using the internet safely.

88. The Committee recommends that the Executive continue to maintain and update the Child Protection on the Internet campaign, in light of emerging technology and internet services, in order to inform young people, their parents and education professionals about how to use the internet safely and to protect young people from possible harm.

89. The Committee also urges the Executive to work with others to achieve international action which will improve advice and guidance for users.

CONCLUSION ON SECTION 1 OFFENCE

90. The Committee supports the policy intention behind the creation of the offence at section 1 of the Bill. There is a clear justification for the introduction of legislation in order to ensure that the criminal law can adequately protect children from potential harm by predatory paedophiles.

91. Having taken evidence from the police and academics with considerable knowledge and experience in this area, the Committee recognises that while the offence at section 1 of the Bill fills a gap in the existing criminal law, it is, nonetheless, concerned that this offence may not significantly enhance the ability of the police and prosecutors to bring to trial predatory paedophiles who use the internet to groom their intended victims. The proposed offence is complex, with a requirement to prove four separate elements in order to secure a conviction. This may be particularly resource intensive for the police to investigate in order to obtain the necessary evidence to bring a charge and also present difficulties for the Crown to prove in court.

92. The separate components of the proposed offence, all of which require to be present, may represent considerable opportunities for paedophiles to structure their activities to ensure that at least one requirement cannot be proved. Accordingly, the Committee concludes that further amendments that focus on the intent of the offender be considered, as legislation which relies on the actions of the offender can create too many loopholes.

93. In order to ensure that the offence is effective in tackling the type of behaviour it is designed to strike at, the Committee recommends that the Executive should consider bringing forward a number of amendments to simplify the offence at section 1 of the Bill. These are repeated below—

- In order to ensure the widest possible application of the offence, the Committee recommends that no age should be specified for the offender;

- It should be left to the Crown Office, social work and other agencies to determine the correct intervention in the case of a young person accused of committing the offence. This may be through criminal prosecution, referral to the Children’s Hearings system or alternative interventions.
Such discretion should be supported by appropriate guidelines issued by the Lord Advocate;

- The Committee considers that, on the basis of evidence received, there may be cases where young people between 16 and 18 years of age commit the section 1 offence;

- The Committee remains concerned that there might be a challenge to criminal proceedings brought under section 1 of the Bill if the parties were married, because that would give rise to a possible breach of article 8 of the ECHR. It therefore calls on the Executive to respond to the Committee on this matter in advance of the Stage 1 debate;

- The Committee recommends that the requirement to demonstrate communication between the adult and the child on at least two occasions prior to the adult meeting or travelling with the intention of meeting the child should be reduced to only one prior communication;

- The Committee invites the Executive to consider the terms of section 14 of the Sexual Offences Act 2003 as one potential model to ensure that all members of a paedophile ring involved in planning and perpetrating the offence at section 1 of the Bill can be successfully prosecuted. If there is no existing criminal law provision in Scotland which can strike at such behaviour, the Committee recommends that the Executive bring forward an amendment at Stage 2 to close this apparent loophole. The Committee would be grateful for a response from the Executive on this point in advance of the Stage 1 debate;

- The Committee is concerned at the apparent loophole in the construction of the offence in relation to whether the offence would be complete if the child rather than the adult travelled to a meeting and calls upon the Scottish Executive to re-examine this element. The Committee calls upon the Executive to provide a response on this point in advance of the Stage 1 debate;

- The Committee recommends that the Executive amend the provision relating to the defence of reasonable belief in order to place the onus on the accused to prove that he or she held a reasonable belief that the child was over 16 years of age; and

- The Committee strongly recommends to the Executive that it should bring forward additional measures to tackle grooming head on, rather than only relying on the offence in section 1 of the Bill. The Committee considers that one option would be to include, in the list of sexual offences in Part 1 of the Sexual Offences Act 2003, breach of the peace, where the nature or circumstances of the offence are clearly of a sexual nature. This would then allow an individual convicted of such an offence to be included on the Sex Offenders Register.
RISK OF SEXUAL HARM ORDERS

94. As stated in the Policy Memorandum, the risk of sexual harm order is intended to protect children under 16 from inappropriate sexual behaviour by adults aged 18 or over. The Executive considers that this would assist the police to impose early restrictions on those persons believed to be a risk to the safety of children. RSHOs would be made by the courts, on application of the police, in respect of an adult who is deemed to be acting in such a way as to present a risk of sexual harm to children, irrespective of whether such a person has previously been convicted of a sex offence or not. An order will have effect for a fixed period of at least 2 years.83

95. As civil orders, RSHOs would permit significant sanctions to be applied to a person believed to present a risk of sexual harm to children even though he or she may not have committed an offence. In most cases the conduct contemplated by section 2(3) could constitute a criminal offence.84

Sexual Offences Act 2003
96. The provisions in the Bill on RSHOs are very similar to provisions in the Sexual Offences Act 2003. Sections 123 to 129 of the 2003 Act make provision for RSHOs in England, Wales and Northern Ireland. Those provisions came into force on 1 May 2004 but do not extend to Scotland.85

Need for RSHOs
97. In the Policy Memorandum, the Scottish Executive describes RSHOs as “a further development of sex offender orders which were relevant to convicted sex offenders.” It suggests that such orders would “assist the police to impose early restrictions on those persons believed to be a risk to the safety of our children.”86

98. The Scottish Police Federation welcomed the proposal for RSHOs and considered that they would be applied for in situations where there is no corroborative evidence or independent witnesses or evidence falls short of the requirements that the fiscal would need to bring a case to court.87 ACPOS also welcomed the potential introduction of the orders and suggested, “that they will make a difference.”88 However, in the oral evidence session none of the police witnesses were able to give examples of the type of case in response to which they considered RSHOs would be used.

99. When asked for examples of situations in which it would be appropriate to seek the imposition of an RSHO, Scottish Executive Bill team members were also unable to give specific concrete examples. Witnesses did, however, state that “RSHOs are intended as an extra tool when we consider how to deal with a

83 Policy Memorandum, paragraph 6
84 Section 2(3) defines the acts which if done by an individual on at least two occasions will provide grounds for a chief constable to make an application for an RSHO.
85 SPICe briefing 04-88 December 2004, page 14
86 Policy Memorandum, paragraph 6
87 Official Report, Justice 1 Committee, 12 January 2005, c1478
88 Ibid.
situation that is causing concern,” allowing “early intervention” to prevent harm or damage arising from sexual offences against children.  

100. In oral evidence, the Minister provided some further background information on the reasons for introducing the orders—

“Child protection professionals tell us of cases in which they know that someone represents a risk to children or to a particular child. Although the way in which those people are acting does not necessarily constitute an offence, it is inappropriate and it suggests that an actual sex offence could be just round the corner. If we know that the risk is there, we need to ask ourselves whether we are prepared to do something about it. I would argue that it is our responsibility to do something about it if we know that there is a risk.”

“The new order will give us the power to stop predatory sex offenders before they are able to commit an offence and before they do serious harm to children.”

101. However, the Minister also resisted the invitation to give specific examples of circumstances in which it would be appropriate to apply for an RSHO. He instead stated—

“The detail will be in orders that follow the Bill. To some extent, the identification of a scenario would be speculation on my part that would have no substance. I am not sure that it would be wise to engage in speculation at this stage.”

102. Following his appearance before the Committee, the Minister responded in writing to a further request for such examples. He suggested that RSHOs could be used “in cases where behaviour which would constitute a criminal offence is said to have taken place, but where it is difficult to find sufficient corroborated evidence to raise criminal proceedings.”

103. His response also reflected the acts specified in section 2(3) of the Bill as grounds for an RSHO application. These are—

(a) engaging in sexual activity involving a child or in the presence of the child;

(b) causing or inciting a child to watch a person engaging in sexual activity or to look at a moving or still image that is sexual;

(c) giving a child anything that relates to sexual activity or contains a reference to such activity;

89 Official Report, Justice 1 Committee, 8 December 2004, c1329
90 Ibid, c1330
91 Ibid, c1356
92 Ibid.
93 Ibid.
94 Scottish Executive, supplementary written evidence, 11 February 2005, page 2
(d) communicating with a child, where any part of the communication is sexual.

104. The Minister’s response continued—

“The Committee will appreciate that the list above covers a wide range of activity from that which is a serious offence, for example engaging in sexual activity with a child, to that which might be entirely innocent and proper behaviour, for example sex education lessons. In between these extremes will be a range of behaviour and actions, some of which will not be unlawful but nonetheless gives rise to serious concerns about the motivation and future actions of the adult concerned and the consequent risk of harm to children.”

105. In supplementary written evidence, ACPOS provided the Committee with examples of actual scenarios where police forces consider that an RSHO may have been appropriate. These scenarios included cases where individuals had been charged with breach of the peace for offences with a clear sexual element or where the Crown had marked cases ‘no proceedings’ or failed to obtain a conviction due to a lack of corroborating evidence. The response also gave a general scenario regarding cases of a sexual nature—

“There are several examples whereby cases of a sexual nature have gone to court and the case has been abandoned due the child victim’s failing to give their evidence in open court. The introduction of video interviews of children will reduce this but there will still be occasions when this will occur. As a result the suspects are un-censured and at large. If the suspects conduct still gives cause for concern then an RSHO would provide the Police with some degree of control, if certain aspects of their behaviour could be prohibited.”

106. The Committee notes the further information supplied by the Minister and ACPOS in relation to examples of circumstances in which it would be appropriate to apply for an RSHO.

Standard of proof

107. Proving that a person has engaged in a sexual act with a child in the criminal courts requires proof beyond reasonable doubt, and corroboration of all elements required to establish the offence. Since the application for an RSHO is a civil proceeding the standard of proof is “on a balance of probabilities” and there is no requirement of corroboration. The Law Society provided further clarification that in civil proceedings “hearsay evidence is admissible and corroboration is not required, although the individual might have to respond to the evidence.”

108. Written evidence received from Professor David Feldman reflected decisions taken in England on anti-social behaviour orders (ASBOs) and sex offender

95 Scottish Executive, supplementary written evidence, 11 February 2005, page 2
96 ACPOS, supplementary written evidence, 23 February 2005, annex, page 2
97 Official Report, Justice 1 Committee, 12 January 2005, c1499
orders under the Crime and Disorder Act 1998 which suggested that the making
of an RSHO will not be regarded as the determination of a criminal charge,
because it is civil and preventative rather than criminal and punitive. In a
judgement in relation to ASBOs in England, the House of Lords held that the
ASBO was a civil order; and that meant that the restrictions on the type of
evidence that were relevant to criminal proceedings were not relevant to
proceedings for obtaining an ASBO. However, in the judgement, the Lords
were clear that the standard of proof for an ASBO was not the ordinary civil
standard. They talked about a "heightened" civil standard, but then a majority
went on to say that for all practical purposes the standard would be the criminal
standard.

109. In his oral evidence to the Committee, the Minister acknowledged that there
are “concerns about the use of civil orders in what might be seen as a criminal
context.” In response to questions about whether the criminal standard of
proof would be more appropriate given the seriousness of the consequences for
the person subject to an RSHO, the Minister rejected that option as he
considered “it is a civil matter and we think that the civil law test is the right
one.”

110. In further written evidence, the Executive stressed that it had given careful
consideration to the decision in the McCann case—

“We are not convinced that the Scottish courts would follow it in so far as it
concluded that the applicable standard of proof for anti-social behaviour
orders was effectively the criminal standard. In a number of cases in recent
years, the Scottish judiciary has emphasised that there are only two
standards of proof in Scots law (see, for example, Mullan v Anderson 1993
SLT 835, 1st Indian Cavalry Club Ltd. v Commissioners of Customs and
Excise 1998 SC 126 and, most recently, the decision of the Inner House in
Robert Napier v Scottish Ministers, issued on 10 February 2005, at
paragraph 20).

“The criminal standard of proof has only been applied by the Scottish courts in
cases not involving prosecution for a criminal offence where what was
directly at issue was the possibility of the defender losing his or her liberty, as
in the case of proceedings for breach of interdict, contempt of court and
breach of probation. It is not sufficient, as in the case of an application for an
RSHO, that proceedings may operate as a first step in a process by which a
person may ultimately lose his liberty by virtue of a failure to obey an order
duly made in that first step. Accordingly, we are of the view that the

98 Professor D Feldman, supplementary written evidence, 31 January 2005, page 3
WL 131, [2002] 4 All ER 593, HL
100 Ibid.
101 Official Report, Justice 1 Committee, 26 January 2005, c1536
102 Ibid, c1551
applicable standard of proof in proceedings involving an RSHO application is the civil standard.\footnote{Scottish Executive, supplementary written evidence, 22 February 2005, annex, paragraphs 7 and 8}

111. The Committee is aware of the views of Lord Hope in the \textit{McCann} case, in which he agrees with the majority view that a higher standard of proof is required in relation to ASBOs. In doing so, he draws attention to the opinions in the case of \textit{Constanda v M} 1997 SC 217, in which it was held by the Inner House of the Court of Session that where, in a referral to a Children’s Hearing (which is a civil proceeding), there is an allegation of criminal behaviour (even if the ground of referral is not that the child has committed an offence but some other ground), the appropriate standard of proof is the criminal standard.

112. The Committee also notes that since an application for an RSHO would be regarded as a civil proceeding, the rules which govern matters of evidence in civil proceedings would apply. This would mean, for example, that the corroboration requirement which would apply in criminal proceedings would not apply in proceedings for an RSHO. Similarly, rules that might result in evidence being excluded in criminal proceedings (such as hearsay evidence) would not apply in the context of an application for an RSHO.

113. On the balance of the evidence, the Committee is not convinced that it is necessarily the case that the civil standard of proof would be adopted by the Scottish courts in an application for an RSHO.

114. The Committee is concerned that given the serious stigma which will be attached to the imposition of a risk of sexual harm order, to require only the ordinary civil standard of proof may not adequately safeguard the rights of the accused. The Committee invites the Executive to re-examine the decisions of the House of Lords in relation to anti-social behaviour orders in England and Wales and the Court of Session in the \textit{Constanda} case to assess whether either case has a direct bearing on the standard of proof which should be required for RSHOs in Scotland.

115. In its written submission, the Law Society also expressed concern that section 2 of the Bill makes no specific provision in relation to representation of the party against whom the order is sought. Given the potential repercussions of making such an order, the Law Society recommended that provision is made for the party against whom the order is sought to make representations directly to the sheriff before an order or interim order is granted\footnote{Law Society of Scotland, written evidence, 7 January 2005, page 2}.

116. With regard to representation of the person against whom an interim order is sought, the Minister stated in correspondence—

“Depending on the circumstances, the sheriff may require the person against whom the interim order is sought to be invited to attend a hearing at which s/he would be entitled to make representations. In cases of extreme urgency, the sheriff might arrange for the application to be decided in the...
absence of the adult. However, bearing in mind the requirement that courts must always act in accordance with ECHR, there would have to be a clear justification for such an approach.”

117. The Committee notes the statement by the Minister regarding the duty of the courts to act in accordance with ECHR. However, the Committee remains concerned about the implications of the potential non-representation of the party against whom an RSHO is sought at hearings for an interim order. It, therefore, asks the Executive to clarify these provisions in advance of the Stage 1 debate.

118. Human rights issues and, in particular, compatibility with the European Convention on Human Rights are considered further later in the report.

Interaction with the criminal law

119. In its written submission, the Law Society indicated that it saw some merit in having RSHOs but questioned how they would interact with the criminal law. It suggested that "strict protocols would have to be established to ensure that criminal proceedings are given priority and that evidence that would subsequently be used in a criminal prosecution would not be contaminated in any way.” In oral evidence, the Law Society went on to suggest that the criminal law should be given primacy so that where there is sufficient evidence for a criminal prosecution “the matter should be passed to the procurator fiscal for a decision on whether prosecution is in the public interest. Only when there is a clear indication that a criminal prosecution will not go ahead should consideration be given to whether a civil order would be appropriate.”

120. The Law Society also addressed the question of whether, in circumstances when an RSHO was sought in advance of a criminal prosecution, that the outcome of the prosecution could be prejudiced. It stated that “the right to a fair trial is paramount” and that in cases concerning “a criminal prosecution and a civil process, both should be dealt with expeditiously and we suggest that there should be a strict time limit, with the criminal prosecution taking the primary role.”

121. In his oral evidence, the Minister stated that a risk of sexual harm order would not be used instead of a criminal prosecution. He went on—

“A risk of sexual harm order is not a substitute for a criminal prosecution. Criminal prosecutions should still be pursued if they are relevant. An order could and should apply where a criminal prosecution might not necessarily be relevant. The making of an order does not preclude a criminal trial from taking place.”

105 Scottish Executive, supplementary written evidence, 22 February 2005, page 2
106 Law Society, written evidence, 7 January 2005, page 2
107 Official Report, Justice 1 Committee, 12 January 2005, c 1497-1498
108 Ibid, c1498
109 Official Report, Justice 1 Committee, 26 January 2005, c1549
122. When asked about whether it would be possible to use an order where a criminal prosecution had resulted in a not guilty or not proven verdict, the Minister confirmed that this would be possible. He emphasised his view that the orders are completely separate from criminal proceedings—

“In fact, even where there has been a not guilty verdict, if there were sufficient concerns about the potential future activities of an individual, a sheriff could decide that an order might apply, if it was required to protect a child. The sheriff would not be trying to revise or rehearse what had already happened in a court of law. They would look at the information that was provided to him or her and then decide whether an order was necessary—not to punish that individual, but to protect the child. It would not matter what the verdict was. The issue is whether the sheriff believes that added protection is needed for the child at some point in the future on the basis of the information provided.”

123. In supplementary written evidence, the Minister sought to clarify the relative status of criminal proceedings and risk of sexual harm orders—

“It is important to be clear, though, that the Crown will always prosecute where there is sufficient credible and reliable evidence and it is in the public interest to do so. There is no question that RSHOs will be used instead of prosecution in cases where criminal proceedings would otherwise have been raised. In cases where it is unclear whether criminal proceedings or an RSHO would be the correct option, I would expect police and prosecutors to discuss the best course of action, bearing in mind the nature of the acts alleged to have taken place, the evidence available, and the perceived risk to a child or children.”

124. The Committee considers it vital that the interaction between RSHOs and potential criminal proceedings be clearly established. It agrees with the statement by the Law Society that the right to a fair trial is paramount and believes that this must be protected at all costs. To this end, the Committee recommends that the primacy of criminal proceedings is made explicit on the face of the Bill. It calls upon the Executive to provide a response to this point in advance of the Stage 1 debate.

Disclosure

125. Several organisations referred in their submissions to the procedure for disclosure of risk of sexual harm orders by Disclosure Scotland. COSLA recommended that adults served with an RSHO should be placed on the Sex Offenders Register and made easily identifiable to potential employers. Apex Scotland asked that consideration be given to how this information would be shared with it and other voluntary agencies working with clients subject to an RSHO. The General Teaching Council for Scotland asked how RSHOs will be reported to it other than what is contained in a Disclosure Scotland “other

---

110 Official Report, Justice 1 Committee, 26 January 2005, c1553
111 Scottish Executive, supplementary written evidence, 11 February 2005, page 2
112 COSLA, written evidence, 21 December 2004, page 2
113 Apex Scotland, written evidence, 21 December 2004, page 2
information” section as the Scottish Criminal Records Office (SCRO) only applies to criminal convictions.\textsuperscript{114}

126. In its response, the SCRO stated that as RSHOs are not convictions, neither the Criminal Justice Information Bureau nor Disclosure Scotland can automatically disclose but Disclosure Scotland may be able to disclose as part of an Enhanced Disclosure as this level allows for the disclosure of non-conviction information held on police records.\textsuperscript{115}

127. In oral evidence, the Minister explained that “any information that the police hold, including information about civil orders, could be disclosed under an enhanced disclosure if, in the chief constable’s opinion, it is relevant to the inquiry in question.” The Minister acknowledged that there are no provisions to require automatic notification of other people such as employers, local authorities and child protection professionals, but that following the recommendations of the Bichard Inquiry the Executive needs to consider the wider issues of disclosure of information.\textsuperscript{116}

128. The Committee acknowledges the concerns raised by a wide range of organisations about the process for disclosure of the existence of an RSHO by Disclosure Scotland. As RSHOs are not convictions, it is unclear whether current procedures would allow disclosure even as part of an Enhanced Disclosure. The Committee, therefore, calls upon the Executive to review this position as part of its examination of wider issues relating to disclosure in light of the Bichard recommendations and to provide a response to the Committee before the Stage 1 debate.

Disclosure of RSHO during criminal proceedings
129. The Committee also raised concerns about the possible disclosure of the existence of an RSHO by the prosecution in criminal proceedings which might prejudice a person’s right to a fair trial. A comparison was drawn with the impact which might result from the revelation of a previous conviction. The Minister replied that it is always for the courts to decide whether information might impact on the fairness of a trial. However, he agreed to consider further the point raised by the Committee.\textsuperscript{117}

130. In subsequent correspondence, the Minister confirmed that, in general, the Crown Office takes the view that disclosure of the fact that the accused was the subject of an RSHO would be likely to be prejudicial to a fair trial because it would point to what might be regarded as offending behaviour. He stated—

“If it were to be disclosed in the course of a trial, it is likely that the defence would ask for proceedings to be deserted as it would raise in the minds of the jury / judge that a court had found the accused to have displayed sexually

\textsuperscript{114} GTC Scotland, written evidence, 21 December 2004, page 2
\textsuperscript{115} Scottish Criminal Record Office, written evidence, 21 December 2004, page 2
\textsuperscript{116} Official Report, Justice 1 Committee, 26 January 2005, c1557
\textsuperscript{117} Ibid, c1559
inappropriate behaviour towards children in the past. It would then of course be for the judge to decide on whether the trial should continue."\(^{118}\)

131. The Minister acknowledged, however, that there may be circumstances where the Crown may argue that the existence of an RSHO was relevant to the issue being considered. He gave as an example, occasions where it would be relevant in terms of public protection when considering an application for bail. He suggested there may also be occasions where the existence of an RSHO is considered to be relevant information that the Crown has a duty to bring to the attention of the court when an accused is sentenced following conviction. This might arise where the offence the accused had been convicted of was similar in nature to the behaviour which triggered the RSHO—

“It would be for the court to decide on what weight to give to the existence of the RSHO in setting a sentence in these circumstances.”\(^{119}\)

132. **The Committee thanks the Minister for his response on this point.**

**Jurisdiction**

133. A further suggestion made by the Law Society was that orders should go through the Court of Session process so that they are valid throughout Scotland rather than being granted by a sheriff within the jurisdiction of his or her sheriffdom alone.

134. **The Committee sees merit in this suggestion as this would prevent the need for orders to be regularly varied and renewed as and when individuals subject to orders move residence between sheriffdoms. The Committee, therefore, recommends that the Executive give consideration to this proposal.**

**Interim orders**

135. Section 5 of the Bill makes provision for an application for an interim RSHO, to take effect while waiting for the determination of an application for a full RSHO. An interim RSHO would last for a fixed period specified in the order or on determination of the main application. Section 5(3) states that the sheriff may make such an order if he/she considers it “just to do so.”

136. In oral evidence to the Committee, the Law Society raised concerns regarding the test which would be applied by the sheriff when determining an application for an interim order. It was explained that, “the test for an interim RSHO is whether it is just that it should be granted. That seems to be a lesser standard than whether it is necessary.”\(^{120}\)

137. The Law Society was also concerned that there is nothing in the Bill to prevent an interim order from going on for an indefinite period. Section 5(4)(a) of the Bill states that an interim RSHO, “has effect only for a fixed period

---

\(^{118}\) Scottish Executive, supplementary written evidence, 11 February 2005, page 2

\(^{119}\) Scottish Executive, supplementary written evidence, 11 February 2005, page 3

\(^{120}\) Official Report, Justice 1 Committee, 12 January 2005, c1501
specified in the order” but there is no maximum period specified. It submitted that there should be some provision that stipulated that the interim order should be allowed to exist only for a fixed period until the matter was brought to court. It suggested that this period should be 3 months.\textsuperscript{121}

138. The Law Society did agree, however, that interim RSHOs will have advantages in urgent situations in which a child is perceived to be at real risk. However, the Law Society was keen to ensure that the application of an interim order “is accompanied by various rights of representation and the subject of the order’s right to be heard.”\textsuperscript{122}

139. The Committee sought clarification from the Minister as to why there should be a different test for an interim order than for a full order, in contrast to anti-social behaviour orders where the tests are the same. He responded that this reflected practicality and the degree of urgency for the imposition of an interim RSHO. He suggested that the degree of urgency of the situation associated with an application for an RSHO could be very different from what someone who needs the protection of an ASBO.\textsuperscript{123}

140. In further written evidence, the Executive sought to address the concern that an interim order could continue for an indefinite period—

“It should be noted that the Bill contains a key safeguard which is designed to ensure that there should not be long delays between the making of the interim RSHO and the determination of the main application. Section 5(2) of the Bill limits the circumstances in which interim RSHOs can be sought to situations in which either (i) the main application is being made at the same time as the interim application or (ii) the main application has been made prior to the interim application. Accordingly, whenever an interim application is made, a full application must also be in process. Both applications will be subject to the normal summary civil process.”\textsuperscript{124}

“An additional safeguard is contained in section 5(4) of the Bill. This provides that an interim RSHO has effect only for a fixed period specified in the order and ceases to have effect, if it has not already done so, on the determination of the main application. Furthermore, an application may be made for the interim order to be varied, renewed or discharged at any stage (section 5(5)). Any interlocutor which grants, varies, renews or discharges an interim RSHO is also appealable (section 6).”\textsuperscript{125}

141. The Committee notes the assurances given by the Minister in relation to interim RSHOs but remains concerned about the inconsistencies between the provisions in the Bill relating to full risk of sexual harm orders and interim orders. In particular, given the serious implications for an individual which could arise from the granting of an interim order, the

\textsuperscript{121} Ibid, c1504
\textsuperscript{122} Official Report, Justice 1 Committee, 12 January 2005, c1504
\textsuperscript{123} Official Report, Justice 1 Committee, 26 January 2005, c1556
\textsuperscript{124} Scottish Executive, supplementary written evidence, 22 February 2005, annex, paragraph 12
\textsuperscript{125} Ibid, paragraph 13
Committee considers that the test which the sheriff should apply should be the same as for a full order.

142. It also recommends that the maximum period of duration for an interim order should be three months, as suggested by the Law Society, and this should be specified on the face of the Bill.

Sex education – potential criminalisation

143. Written evidence from the Educational Institute for Scotland (EIS) expressed concern that as drafted, the provisions of the Bill relating to RSHOs could be open to misinterpretation or misapplication and will be seen as threatening or worrying to any teacher who delivers sex education.\(^\text{126}\) The General Teaching Council for Scotland expressed strong concerns for a wrongly accused teacher made the subject of such an order or interim order due to the effect this would have upon his or her life and career.\(^\text{127}\) The Scottish Catholic Education Commission expressed concern that teachers should not be left vulnerable to malicious complaints and suggested that there may be a case for providing a specific exclusion from the legislation for teachers teaching sexual health in accordance with an approved syllabus.\(^\text{128}\) Fairbridge in Scotland expressed concern that its youth workers could be at risk of criminalisation when delivering informal education about sexual health and related issues.\(^\text{129}\) East Lothian Council sought greater clarity in defining the grounds for RSHOs to categorically exclude the provision of education and advice (both formal and informal) on sexual matters.\(^\text{130}\)

144. The Committee notes that in section 14 of the Sexual Offences Act 2003, an exemption from prosecution is given for persons acting for the protection of a child when engaged in activities which might otherwise constitute an offence. This could include, for example, giving sex education lessons which may involve causing a child to watch a sexual act.

145. At the consultative seminar these concerns were raised again by organisations that have an interest in the delivery of these services. Many suggested that there should be a specific exception included on the face of the Bill for teachers, youth workers and health professionals delivering formal and informal sex education and advice to young people.

146. When presented with these concerns, the Minister sought to reassure individuals and organisations working with young people that they should not feel threatened by the provisions of the Bill. He pointed out that only if an individual deviated from the agreed curriculum or guidelines for these sessions in an inappropriate way would he or she risk being subject to the provisions. He expressed the view that to introduce class exemptions from the provisions of

\(^{126}\) EIS, written evidence, 20 December 2004, page 1
\(^{127}\) GTC Scotland, written evidence, 21 December 2004, page 1
\(^{128}\) Scottish Catholic Education Commission, written evidence, 17 December 2004, page 1
\(^{129}\) Fairbridge in Scotland, written evidence, 21 December 2004, page 3
\(^{130}\) East Lothian Council, written evidence, 13 December 2004, page 1
the Bill for particular groups would not be wise as it could be a person from within that group who commits an offence.\(^{131}\)

147. The Committee notes the concerns expressed by organisations providing sex education and advisory services to young people but agrees that it would not be appropriate to include a class exemption in the Bill. In order to allay these genuine concerns, the Committee recommends that the Executive incorporate information on the provisions of the Bill into sexual health and sex education guidelines.

Role of chief constable

148. Section 2 of the Bill specifies that it is the chief constable of a police force who may apply for a risk of sexual harm order in respect of a person who resides in the area of the police force or who the chief constable believes is in, or is intending to come to, that area.

149. At the consultative seminar organised by the Committee, criminal justice social work representatives sought assurances that a chief constable would consult relevant agencies prior to making an application for an RSHO. Police representatives confirmed that they expected to work in close partnership with such agencies. In earlier oral evidence, ACPOS had stated that, “although it is the chief constables who will apply for them, we will need to work in close partnership with other agencies in relation to the information that we will consider.”\(^{132}\)

150. The Committee asks the Executive to consider whether there should be a stronger onus on a chief constable to demonstrate that they have had appropriate consultation with other agencies when considering a potential application for an RSHO.

Monitoring RSHOs

151. Several respondents to the Committee’s call for evidence made reference in their submissions to the need to provide adequate resources to monitor those subject to both RSHOs and SOPOs. South Lanarkshire Council submitted that there is no indication of how these orders are to be monitored.\(^{133}\) Aberdeenshire Council made the same point and suggested that the onus will be on the family of the victim or concerned members of the public to report a breach.\(^{134}\) Youthlink Scotland suggested that when making an application for an RSHO, a chief constable should be required to specify the resources which will be made available to ‘police the offender’s compliance’.\(^{135}\) In supplementary written evidence, Youthlink stated that “the provision of sufficient

---

\(^{131}\) Official Report, Justice 1 Committee, 26 January 2005, c1554-1555
\(^{132}\) Official Report, Justice 1 Committee, 12 January 2005, c1479
\(^{133}\) South Lanarkshire Council, written evidence, 21 December 2004, page 2
\(^{134}\) Aberdeenshire Council, written evidence, 21 December 2004, page 1
\(^{135}\) Youthlink Scotland, written evidence, 21 December 2004, page 3
resources will be essential if RSHOs are to protect children and young people from harm or the risk of harm.”

152. ACPOS pointed out that as a result of the introduction of RSHOs and extension of SOPOs, forces will be duty-bound to monitor the subjects of orders for compliance. ACPOS considered that the demand for resources, particularly for covert methods, may be significant in terms of both people and finance.

153. In its oral evidence, the Scottish Police Federation reflected on the resource implications arising from the creation of RSHOs—

“As with everything else in police work, one would assume that the more offences that are created the more people will be picked up for them. There will be more investigating time, more reporting time, more police time in court and, in relation to the offences that we are talking about, there will be monitoring time. All that will impact on police resources.”

154. The Committee believes that the implementation of risk of sexual harm orders can only be effective through the proactive monitoring of individuals subject to such orders. The Committee is unclear from evidence received from police organisations whether current police resources are sufficient to carry this out. The Committee would expect there to be in existence a strategy which is adequately resourced in order to effectively monitor RSHOs.

Human rights

155. The Committee has considered the human rights implications stemming from the creation of risk of sexual harm orders. The Committee wanted to test whether these proposals were compatible with the European Convention on Human Rights (ECHR). The Committee took evidence on this point from several witnesses and additionally sought the view of Professor David Feldman, Rouse Ball Professor of English Law at the University of Cambridge and former Legal Adviser to the Parliamentary Joint Select Committee on Human Rights.

RSHOs

156. The Policy Memorandum notes that the proposals to introduce RSHOs (and extend the use of SOPOs) raise possible issues in terms of article 8 (right to respect for private and family life) and article 6 (right to a fair trial) of the ECHR. The Scottish Executive’s reasons for believing that the Bill’s provisions are compatible with the requirements of the ECHR are set out in paragraphs 17 and 18 of the Policy Memorandum.

Compatibility with ECHR

157. James Chalmers gave evidence that in his view RSHOs are compatible with the ECHR. He explained that “the basis for any ECHR challenge would be the argument that the orders are criminal penalties and that it is inappropriate to

---

136 Youthlink Scotland, supplementary written evidence, 2 February 2005, page 3
137 ACPOS, written evidence, 15 December 2004, pages 1&2
138 Official Report, Justice 1 Committee, 12 January 2005, c1478
139 Policy Memorandum, paragraphs 17 and 18
apply the safeguards that apply in civil proceedings to criminal cases." 

However, he went on to explain that case law of the European Court of Human Rights makes it clear that court proceedings that cannot result in a penalty are not criminal proceedings for the purposes of the Convention. This supports the Executive’s assertion that the proceedings for RSHOs would be regarded as civil proceedings for the purposes of Article 6 of the ECHR as they do not involve the determination of a criminal charge. The Policy Memorandum states that the aim of an RSHO "is not to punish offenders but rather to protect the public and prevent harm." 

158. In their respective evidence, both James Chalmers and Professor Feldman made a direct comparison between RSHOs and ASBOs. Mr Chalmers highlighted the case of McCann v Manchester Crown Court in 2002, where the House of Lords held that ASBOs were compatible with the ECHR, at least under English law. In reference to the same case, Professor Feldman suggested that because of the seriousness of the consequences for the person subject to an order, the ‘balance of probability’ test will not be considered to have been met if there is any reasonable doubt that the necessary facts have been proved.

159. Professor Feldman provided further detail in relation to this issue in his written submission. He submitted that—

"English decisions on anti-social behaviour orders and sex offender orders under the Crime and Disorder Act 1998 suggests that the making of an RSHO will not be regarded as the determination of a criminal charge, because it is civil and preventative rather than criminal and punitive. Instead, it would be the determination of a civil right or obligation for the purposes of ECHR Article 6.1. However, this may not be accepted by the European Court of Human Rights, since the nature and severity of the possible suffering of the person subject to an order may make it a criminal charge for Article 6 purpose."

160. He went on to explain,

"If an application for an order is regarded as a criminal charge for the purposes of Article 6.1, it would bring into play the rights contained in Article 6.2 and 6.3. This would make it more difficult to rely on hearsay evidence, as that might prevent the person from examining the witnesses against him or

---

140 Official Report, Justice 1 Committee, 22 December 2004, c1429-1430
141 Official Report, Justice 1 Committee, 22 December 2004, c1429-1430
142 Policy Memorandum, paragraph 18
143 Official Report, Justice 1 Committee, 22 December 2004, c 1429
145 Professor D Feldman, written evidence, 31 January 2005, page 3
her. It would also bring the presumption of innocence into play although if the 'beyond reasonable doubt' standard of proof applies (as in McCann) that would make little difference.

Article 6 of ECHR

161. Article 6 of the European Convention on Human Rights is set out below:

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not the means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Respect for privacy: Article 8 of the ECHR:

162. The terms of Article 8 of the European Convention on Human Rights are set out below:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the

---

147 Professor D Feldman, written evidence, 31 January 2005, page 3
economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

163. In his written submission to the Committee, Professor Feldman explained that to justify an interference under Article 8.2, the public authority must show that it is:

i) in accordance with the law, i.e. has a sufficient basis in positive law which is sufficiently clear and accessible to allow people likely to be affected by it to understand (with appropriate advice if necessary) what their potential liability and obligations are;

ii) serving one of the legitimate aims set out in Article 8.2; and

iii) necessary in a democratic society for that purposes, i.e. a proportionate response to a pressing social need, without subjecting minorities to repressive or discriminatory treatment.  

164. Professor Feldman also submitted that “there is no doubt that any requirement imposed by an RSHO or by an interim RSHO would be likely to engage rights under Article 8.1, since (for example) restrictions on the places one can go and the people with whom one can mix affect one’s private life,” and that, “Any such requirement must be justifiable under Article 8.2. The requirements that can be imposed by an RSHO are unrestricted by anything on the face of the Bill.”

165. Professor Feldman suggested that this raises the question of whether the interference could be said to be ‘in accordance with the law’ for the purpose of Article 8.2. If it is in accordance with the law, it would probably serve a legitimate aim, and the necessity provision would ensure that it is likely to meet the ‘pressing social need’ test. However, he contends, it might not satisfy the proportionality test, because the order must remain in force for at least two years (section 2(5)(b)), and cannot be discharged within two years on the application of the person against whom it is made unless the chief constable of the area consents (section 4(5)). This means that in principle there is a limitation on the ability of the sheriff who makes the order to ensure that it fits the needs of the case and the demands of proportionality.

166. The Executive contends that the limitation to privacy and potentially also to family life arising from an RSHO “serves a legitimate aim and is proportionate to that aim.”

Discharging RSHOs
167. Professor Feldman’s submission also considered the question of how an order may be discharged. In his consideration, on an application to have the

---

149 Professor D Feldman, written evidence, 31 January 2005, page 4, section i)
150 Ibid, pages 4 and 5, section i)
151 Policy Memorandum, paragraph 17
order discharged, the chief constable (one of the parties to the case) effectively has a veto under clause 4(5) of the Bill—

“That might violate both the principle of proportionality in relation to Article 8.2, and the requirements for determination of civil rights and obligations by an independent tribunal and for equality of arms between the parties under Article 6.1. The same potential problem afflicts section 125(5) of the Sexual Offences Act 2003, except that that Act would not be invalid by reason of an incompatibility with a Convention right, whereas the provision would be outside the competence of the Scottish Parliament under the Scotland Act 1998 if it were held to be incompatible with a Convention right or rights.”

Interim RSHOs

168. A final point in relation to RSHOs considered by Professor Feldman in his submission to the Committee concerned interim orders. In his view, “[a]n interim RSHO is a short-term measure, so the risk of the restrictions imposed by it being disproportionate is reduced. On the other hand, the risk of the interference not being ‘in accordance with the law’ is increased, because clause 5(3) lays down no substantive precondition to the making of an interim RSHO except that the sheriff must consider it just to do so. Presumably the sheriff in an individual case would be constrained by section 6 of the Human Rights Act 1998 to consider matters of necessity and proportionality, but it could be persuasively argued that the conditions for imposing potentially draconian restrictions on a person’s private and family life (albeit for a relatively short period) are laid down insufficiently clearly in the Bill to meet the ‘in accordance with the law’ test in Article 8.2. In that event, the provision would be in danger of being held to be outside the competence of the Scottish Parliament under the Scotland Act 1998.”

169. Professor Feldman pointed out that the possibility that this provision is incompatible with Article 8 applies equally to the equivalent provision in the Sexual Offences Act 2003, but of course provisions in the Westminster statute would not be invalid by reason of the incompatibility (Human Rights Act 1998, section 3(2)).

Response from the Scottish Executive

170. In response to concerns raised by the Committee about the compatibility of RSHOs with the ECHR, the Minister stated that in relation to the points raised by Professor Feldman, the Lord Advocate had considered the matter carefully and reached a different conclusion.

Conclusion on RSHOs

171. The Committee remains concerned about the proposed introduction of risk of sexual harm orders. It has been difficult to obtain from the Scottish Executive or

---

152 Professor D Feldman, written evidence, 31 January 2005, page 5, section ii)
153 Court of Appeal Civil Division judgment R (M) v. Secretary of State for Constitutional Affairs and others [2004] EWCA Civ 312, [2004] 1 WLR 2298, CA
154 Professor D Feldman, written evidence, 31 January 2005, page 5, section ii)
155 Official Report, Justice 1 Committee, 26 January 2005, c1550-1551
enforcement agencies, detailed examples of cases in which it is envisaged that the orders would be used.

172. Given the potentially criminal nature of the offences which could lead to such an order being sought against an individual, the Committee also questions whether a civil standard of proof is appropriate for determining the imposition of an RSHO. Committee has also considered the interaction between civil proceedings for RSHOs and potential criminal proceedings for related offences and has concluded that the primacy of criminal proceedings should be made explicit on the face of the Bill.

173. The proposed introduction of risk of sexual harm orders represents a significant shift in public policy from attempting to deal with offending behaviour of a sexual nature exclusively through the criminal justice system, to an increase in the use of civil procedures. This has been driven, it appears, by difficulties encountered in relation to the standard of evidence and proof required in order to secure a criminal conviction for certain sexual offences against children. One option would be to water down the rules of evidence required in criminal proceedings or, alternatively, to remove the question entirely from the context of criminal procedure and deal with the issue via a civil route. One major concern about the selection of the latter option is that the traditionally accepted protections which an accused person derives from the criminal justice system, including enhanced protection from the ECHR, is not applicable to civil proceedings. A lower standard of evidence (including hearsay evidence) and a lower standard of proof (on the balance of probabilities) would, therefore, make it easier to impose a civil RSHO on an individual than securing a conviction for a criminal offence.

174. The Committee recognises the need to protect children from sexual harm and acknowledges the arguments in favour of introducing risk of sexual harm orders as a preventative tool. The Committee believes, however, that there is a need to balance protection of children with protection of the rights of individuals who may find themselves subject to an application for an RSHO.

175. The Committee remains concerned about the questions which have been raised surrounding human rights. It therefore seeks assurances from the Executive that it is confident that the legislation will be held to be ECHR compliant if tested.

Sexual Offences Prevention Orders (SOPOs)

176. The Policy Memorandum explains that sexual offences prevention orders (SOPOs) are preventative orders designed to protect the public from serious sexual harm. They were introduced in the Sexual Offences Act 2003. In Scotland, a SOPO can at present only be made on application to a sheriff court by a chief constable in respect of a defender with a previous conviction for an offence listed in Schedules 3 or 5 to the Sexual Offences Act 2003. The court must be satisfied that an order is necessary to protect the public or an individual...
from serious sexual harm from the defender. A SOPO will specify certain actions, behaviour or locations which the offender must avoid.\textsuperscript{156}

177. The Executive considers that there may be occasions when it would be appropriate for a court to impose a SOPO at the point of imposing sentence, rather than requiring a chief constable to make an application for an order. This would mean that the SOPO could apply to an offender immediately without waiting for subsequent evidence of risk to the public before applying for the order. The Bill addresses this policy objective by providing for courts to make a SOPO at the point of conviction of an offender for an offence listed at paragraphs 36 to 60 of Schedule 3 to the Sexual Offences Act 2003.\textsuperscript{157}

178. Respondents to the Committee’s call for evidence were generally supportive of the proposed change. Stirling Council considered it sensible to allow the SOPO to be imposed at the point of sentencing.\textsuperscript{158} Barnardo’s Scotland stated that it would welcome the extension of SOPOs as it is clear that there will be occasions when it would be useful for a court to impose a SOPO when disposing of an offender rather than requiring a chief constable to make an application for an order.\textsuperscript{159} The Scottish Police Federation expressed its support for the extension of the use of SOPOs.\textsuperscript{160}

179. The Committee supports the proposed extension to the use of SOPOs, allowing their imposition by a court at the time of sentencing. It considers that this provision could enhance the protection of children from convicted sex offenders where they continue to pose a threat.

Proposed Executive Amendments

180. The Executive has confirmed that it proposes to bring forward amendments to the Protection of Children and Prevention of Sexual Offences (Scotland) Bill. The purpose of these amendments is to amend the law of Scotland to the extent necessary (a) to permit United Kingdom ratification of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography; and (b) to conform to the obligations imposed on the United Kingdom under the Council Framework Decision on Combating the Sexual Exploitation of Children and Child Pornography.

181. The Committee will consider of the effect of these measures on Scots law when the Executive publishes in detail its amendments. However, a number of general observations can be made at this stage.

182. The first of these is that the law of England and Wales has already been amended in these areas. So, for example, the offence of possessing an indecent photograph of a child now extends to possession of such photographs of persons under 18, whereas the previous law applied only where the person in question was under 16.

\textsuperscript{156} Policy Memorandum, paragraph 10
\textsuperscript{157} Policy Memorandum, paragraph 10
\textsuperscript{158} Stirling Council, written evidence, 16 December 2004, page 3
\textsuperscript{159} Barnardo’s Scotland, written evidence, 15 December 2004, page 4
\textsuperscript{160} Scottish Police Federation, written evidence, 21 December 2004, page 2
183. The most important changes will arise because of the definition of “child” (in both documents) as a person under the age of 18. Generally speaking Scots law identifies the age of 16 as the age at which a person may engage in consensual sexual behaviour without threat of criminal sanction. The introduction of the age of 18 will mean that a range of conduct not presently reached by the criminal law will become criminal.

Evidence received
184. In general, witnesses have been reluctant to discuss these proposed amendments preferring instead to reserve comment until they had seen the detail of what is intended. The Law Society suggested that with regard to indecent representations or photographs, it could “understand why it might be seen as desirable in such cases to extend the protection that is given to children under 18”, but that “there are problems with making that fit with other areas of consent in law.” It went on to suggest that it might be necessary to provide exemptions in certain situations for those who are lawfully married or in a civil partnership.

185. In correspondence with the Committee, the Minister stated that the detail of the amendments is currently being considered, but that he would be pleased to give further evidence to the Committee on these amendments at Stage 2.

186. The Committee considers that as the proposed amendments have yet to be published by the Executive it is not possible to reach a conclusion regarding their relative merits in this report. The Committee may, therefore, require to take further evidence on these particular proposals prior to the commencement of Stage 2 proceedings. The Committee repeats its request for publication of the amendments before the Stage 1 debate.

POLICY MEMORANDUM

187. The Policy Memorandum sets out the bill’s policy objectives, what alternative approaches were considered, the consultation undertaken and an assessment of the effects of the bill on equal opportunities, human rights, island communities, local government, sustainable development and other matters considered relevant. Many of these issues are considered elsewhere in this report.

Consultation
188. The Policy Memorandum makes reference to the consultation process conducted by the Executive including the formal written consultation paper Protecting Children from Sexual Harm which was issued in July 2004. The memorandum notes that 72 responses to the paper. An analysis of these consultation responses was carried out in November 2004 and provided to the Committee in December.

161 Official Report, Justice 1 Committee, 12 January 2005, c1505
162 Ibid.
163 Scottish Executive, supplementary written evidence, 11 February 2005, page 4
164 Policy Memorandum, paragraph 14
**Equal opportunities**

189. The Executive says in the Policy Memorandum that it is not anticipated that the Bill will have “a differential effect on women or men, on different social groups or communities, on disabled or non disabled persons or on different ethnic or religious groups”. The policy memorandum states that no adverse comments were raised on this issue in consultation responses.

190. The Committee asks the Executive to reconsider the terms of the Policy Memorandum relating to equal opportunities as the provisions of the Bill are likely to impact to a greater extent on men than women.

**FINANCIAL MEMORANDUM**

191. Under Standing Orders, Rule 9.6, the lead committee in relation to a bill must consider and report on the bill’s Financial Memorandum at Stage 1. In doing so, it is obliged to take account of any views submitted to it by the Finance Committee.

192. In September 2004 the Finance Committee agreed a new approach to the way they scrutinise Financial Memoranda, with the aim of freeing up committee time for other work. For those Executive Bills involving a relatively small sum of money the Committee will decide on an individual basis whether it wishes to take any formal, oral evidence or whether it wishes to leave the scrutiny of the Bill to the relevant lead Committee.

193. At its meeting on 9 November 2004, the Finance Committee agreed to adopt level 1 scrutiny for the Financial Memorandum of the Bill, i.e. that it should take no oral evidence on the Financial Memorandum, but should instead seek written comments from relevant organisations through its agreed questionnaire, and then pass these comments to the lead committee.

194. The Finance Committee received only one response to its questionnaire. The response from ACPOS stated that the Financial Memorandum accurately reflects the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise.

195. The Financial Memorandum states that discussions with the police and the Crown Office and Procurator Fiscal Service (COPFS) suggest that the introduction of a new grooming offence is not likely to produce a significant net increase in the numbers of prosecutions. In most cases where suspicious activity is reported to the police there are already prosecutions in serious cases for related offences such as lewd and libidinous behaviour, or in less serious cases what appears to be ill-advised behaviour is deterred by the police enquiries.

---

165 Policy Memorandum, paragraph 15
166 Ibid.
167 Finance Committee, 22nd Meeting, 2004 (Session 2), 14 September 2004
168 Finance Committee, 28th Meeting, 2004 (Session 2), 9 November 2004
169 Financial Memorandum, paragraph 39
196. However, police witnesses had suggested that work to proactively detect grooming of children by paedophiles via the internet is resource intensive. ASPS suggested that if the police were in a position to be able to monitor what was going on in internet chat rooms, experience from America shows that this would be “massively demanding on resources.”

197. For the purposes of estimating financial costs the Executive has assumed that there will be some prosecutions that would not otherwise have taken place but it is unable to produce a firm estimate of such prosecutions, choosing to illustrate cost estimates based upon the effects of 50 extra prosecutions for the grooming offence per annum. The Financial Memorandum states that in practice the number may well be significantly lower than this number.

198. The police advised the Executive that at present there are fewer than 100 enquiries throughout Scotland each year, and as is noted above, many of these are either already prosecuted on other charges or there is no evidence of criminal behaviour. It is also difficult to predict how many RSHOs and SOPOs might be imposed. The Executive states that discussions with police and COPFS suggest that 10 to 20 applications per year for each type of order would be a reasonable estimate.

199. The total additional costs created by what the Financial Memorandum terms the grooming offence are estimated by the Scottish Executive to be £226,400 per annum, excluding prison costs. For RSHOs, the total additional costs for 20 orders is estimated at £71,000 per annum.

200. The Committee notes the assumptions made by the Scottish Executive in compiling the Financial Memorandum. The Committee is concerned at the degree of uncertainty surrounding the anticipated numbers of RSHOs and SOPOs which might be imposed as a consequence of the Bill’s enactment. Given the wide range of scenarios in which the Executive considers RSHOs, in particular, may be employed for the purpose of protecting children from harm, the Committee considers the estimated number of orders and associated costs given in the Financial Memorandum to be lower than might be expected.

201. The Committee also notes that the Financial Memorandum makes no reference to the resources which may be required to monitor the adherence by individuals subject to RSHOs and SOPOs to restrictions contained in an order. The Committee believes that without adequate resources for the police or other agencies to carry out such monitoring, the imposition of an RSHO or SOPO will be ineffective at protecting children from sexual harm.

202. The Committee recommends that the Executive keep under review on an annual basis, the number of RSHOs and SOPOs applied for and
granted and the associated resource impact on police forces, Crown Office, courts and criminal justice social work services.

Delegated Powers Provisions

203. The Subordinate Legislation Committee has considered the delegated powers provisions in the Protection of Children and Prevention of Sexual Offences (Scotland) Bill and submitted its report to the Justice 1 Committee, as the lead committee for the Bill, under Rule 9.6.2 of Standing Orders.

204. The Executive provided the Subordinate Legislation Committee with a memorandum on the delegated powers provisions in the Bill. A copy of the memorandum is attached as part of the evidence related to this report.

205. The Executive’s response to points which the Subordinate Legislation Committee raised during its consideration is also attached as part of the evidence related to this report.

Section 1(5) Meeting a child following certain preliminary contact

206. The Subordinate Legislation Committee noted that section 1 of the bill creates a new “grooming” offence when, following earlier contacts, an adult meets, or travels to meet, a child with the intention of committing a relevant offence. The Subordinate Legislation Committee examined the delegated power at section 1(5) which relates to the amendment of “relevant offences”, which are set out at Part 1 of the schedule to the bill.

207. The Subordinate Legislation Committee was content that this was an appropriate delegation of the power as it accepted the requirement to make amendments to the offences contained in the schedule to the bill. The Subordinate Legislation Committee, however, noted that this power allowed the amendment of primary legislation by subordinate legislation and was therefore in effect a Henry VIII power. Given the width of this power and its potential impact on how the bill operates, the Committee was not satisfied that negative procedure should be adopted for this provision.

208. The Executive in its response has undertaken “to take full account of the Subordinate Legislation Committee’s views on this matter when considering laying amendments for Stage 2 of the Bill”173.

209. The Subordinate Legislation Committee welcomed this undertaking and further agreed to suggest to the Executive that it considers the option of negative procedure being adopted for routine amendment to the schedule, with more substantive amendments being subject to affirmative procedure.

210. The Subordinate Legislation Committee therefore draws this proposal to the attention of the lead Committee, together with its concerns in relation to the provision as currently drafted. The Subordinate Legislation Committee also wishes to draw the lead Committee’s attention to the Executive’s undertaking to

take full account of the views of the Subordinate Legislation Committee when considering the lodging of amendments at Stage 2.

Section 11(2) Commencement

211. The Subordinate Legislation Committee was content with this power as drafted.

212. The Justice 1 Committee notes the Subordinate Legislation Committee’s concerns about the adoption of negative procedure for the delegated power at section 1(5) which relates to the amendment of “relevant offences”, which are set out at Part 1 of the schedule to the Bill. The Justice 1 Committee also notes the Executive’s undertaking to take full account of the views of the Subordinate Legislation Committee when considering the lodging of amendments at Stage 2. The Justice 1 Committee, therefore, invites the Minister to confirm the intention of the Executive in this regard before the Stage 1 debate.

CONCLUSION OF THE REPORT

213. Overall, the Committee considers that this Bill has the potential to be a useful addition to the current law to protect children and to prevent sexual offences.

214. However, the Committee has reservations that the way in which the proposed new offence is constructed will mean that it will have only a marginal difference in tackling the threat posed to children by paedophiles. This report has highlighted several aspects of detail in the Bill which the Committee considers will need to be tightened up to afford greater protection to Scotland’s children. The Committee requests that the Executive reconsider its position on these matters.

215. The Committee also has reservations, in the areas of ECHR compliance, admissibility of evidence and standards of proof, as to how the risk of sexual harm orders will operate in practice. The Committee wishes to draw to the attention of the Parliament that the proposed introduction of RSHOs represents a significant shift in public policy from attempting to deal with offending behaviour of a sexual nature exclusively through the criminal justice system, to an increase in the use of civil procedures.

216. The Committee is content to recommend to the Parliament that the general principles of the Bill be agreed to. Nonetheless, the Committee has strong reservations about certain aspects of the Bill which it considers can be addressed at Stage 2.
ANNEX A: REPORT FROM THE SUBORDINATE LEGISLATION COMMITTEE

The Committee reports to the Justice 1 Committee as follows—

Introduction

At its meetings on 1 and 8 February 2005, the Subordinate Legislation Committee considered the delegated powers provisions in the Protection of Children and Prevention of Sexual Offences (Scotland) Bill at Stage 1. The Committee submits this report to the Justice 1 Committee, as the lead committee for the Bill, under Rule 9.6.2 of Standing Orders.

The Executive provided the Committee with a memorandum on the delegated powers provisions in the Bill, which is reproduced at Annex 1.

The Executive’s response to points which the Committee raised during its consideration is reproduced at Annex 2.

Delegated Powers Provisions

Section 1(5) Meeting a child following certain preliminary contact

The Committee noted that section 1 of the bill creates a new “grooming” offence when, following earlier contacts, an adult meets, or travels to meet, a child with the intention of committing a relevant offence. The Committee examined the delegated power at section 1(5) which relates to the amendment of “relevant offences”, which are set out at Part 1 of the schedule to the bill.

The Committee was content that this was an appropriate delegation of the power as it accepted the requirement to make amendments to the offences contained in the schedule to the bill. The Committee, however, noted that this power allowed the amendment of primary legislation by subordinate legislation and was therefore in effect a Henry VIII power. Given the width of this power and its potential impact on how the bill operates, the Committee was not satisfied that negative procedure should be adopted for this provision.

The Executive in its response has undertaken “to take full account of the Committee’s views on this matter when considering laying amendments for Stage 2 of the Bill”\(^\text{174}\).

The Committee welcomed this undertaking and further agreed to suggest to the Executive that it considers the option of negative procedure being adopted for routine amendment to the schedule, with more substantive amendments being subject to affirmative procedure.

The Committee therefore draws this proposal to the attention of the lead Committee, together with its concerns in relation to the provision as currently drafted. The Committee also wishes to draw the lead Committee’s attention to the Executive’s undertaking to take full account of the views of the Subordinate Legislation Committee when considering the lodging of amendments at Stage 2.

Section 11(2) Commencement

The Committee was content with this power as drafted.

\(^{174}\) Scottish Executive response, Annex 2
MEMORANDUM TO THE SUBORDINATE LEGISLATION COMMITTEE BY THE SCOTTISH EXECUTIVE

PROTECTION OF CHILDREN AND PREVENTION OF SEXUAL OFFENCES (SCOTLAND) BILL

Purpose

This Memorandum has been prepared by the Scottish Executive to assist consideration by the Subordinate Legislation Committee, in accordance with Rule 9.6.2 of the Parliament’s Standing Orders, of provisions in the Protection of Children and Prevention of Sexual Offences (Scotland) Bill (SP Bill 30) conferring powers to make subordinate legislation. It describes the purpose and nature of each provision. This Memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill (documents SP Bill 30-EN and SP Bill 30-PM, respectively).

Policy Context

The primary policy objective of the Bill is to improve protection from sexual harm, with particular emphasis on the protection of children.

Section 1 of the Bill strengthens the law by creating a specific offence to deal with those offenders who attempt to “groom” children for the purpose of committing sexual offences. The offence would occur when an adult has met or communicated with a particular child under 16 on at least 2 occasions, and then meets, or travels to meet, that child with the intention of committing a sexual offence against that child.

The offence is intended to cover situations where an adult establishes contact with a child through, for example, meetings, telephone conversations or communications on the internet, and gains the child’s trust and confidence so that the adult can arrange to meet the child for the purposes of committing a sexual offence.

The Bill also introduces a new civil order – the Risk of Sexual Harm Order (RSHO) – which would assist the police to impose early restrictions on an adult who is deemed to be acting in such a way as to present a risk of sexual harm to children. This order would complement the new criminal offence of grooming, but will cover a much wider spectrum of behaviour, for example explicit communication with children via email or in chatrooms, or loitering around schools or playgrounds.

Finally, the Bill extends the availability of Sexual Offences Prevention Orders (SOPOs) in Scotland. The SOPO is used to place restrictions on an offender who is deemed to pose a risk of serious sexual harm following conviction of or caution in respect of a relevant offence, a finding of not guilty by reason of insanity or a finding that the act was committed but the person was under a disability. At present in Scotland, a SOPO can only be made on application to a Sheriff Court by a Chief Constable in respect of an offender who has previously been dealt with by the court, but who is continuing to exhibit sexually risky behaviour that causes concern. The Bill amends the Sexual Offences Act 2003 to allow courts in Scotland to impose a SOPO at the same time as dealing with the offender in respect of the relevant offence, if the court considers that the offender presents a risk of serious sexual harm to the public.

Subordinate Legislative Powers

The Bill gives the Scottish Ministers power to make subordinate legislation:

- in relation to the sexual offences which an adult might intend to commit against a child as part of the “grooming” offence in part 1 (Section 1(5)); and
- for commencement orders including transitional, transitory or saving provisions (Section 11).

Relevant Sexual Offences – Section 1(5)

Power conferred on: The Scottish Ministers
The new "grooming" offence is complete when, following the earlier contacts, the adult meets, or travels to meet, the child with the intention of committing a relevant offence against the child. The list of relevant offences is set out in Part 1 of the schedule to the Bill, and consists of offences of a sexual nature that could be committed against children. Part 2 of the schedule provides that references to any of these offences in Part 1 also include a reference to an attempt, conspiracy or incitement to commit the offence and, with the exception of certain specified offences, a reference to aiding, abetting, counselling or procuring the commission of that offence.

Section 1(5) confers power on Scottish Ministers to modify the list of offences in the schedule by statutory instrument. This allows additional offences to be added in the light of experience or if new relevant offences are created.

Section 1(6) makes provision for any order made under section 1(5) to be subject to annulment in pursuance of a resolution of the Parliament.

The intention behind taking subordinate legislation powers is to ensure flexibility to respond quickly to changing circumstances in this important and sensitive area without the necessity for further primary legislation.

**Commencement – Section 11(2)**

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary Procedure: None

Section 11(2) provides for the Scottish Ministers by order to specify the day or days when the provisions of the Bill shall come into force. It allows different days to be specified for different purposes. Section 11(3) provides for such an order to make such transitional, transitory or saving provisions as they think necessary.

This commencement provision is intended to enable effective commencement of the Bill.
PROTECTION OF CHILDREN AND PREVENTION OF SEXUAL OFFENCES (SCOTLAND) BILL

On 1 February 2005, the Committee asked the Executive to respond to the following view:

Section 1(5) Relevant sexual offences

The Committee noted that this provision concerns criminal offences and that it is a Henry VIII power, the use of which could affect the way in which the bill operates. The Committee therefore considered that this provision should be subject to affirmative rather than negative procedure and asks the Executive for its comments on this matter.

The Scottish Executive responds as follows:

Section 1(5) allows the Scottish Ministers to modify the schedule to the Bill and, in particular, to add a reference to an offence to Part 1 of the schedule, delete any such reference from the Part or alter any such reference in that Part.

The Executive notes that the Committee considers that the provision should be subject to affirmative rather than negative procedure and asks the Executive for its comments on this matter.

Part 1 of the schedule contains the list of sexual offences that fall within the definition of “relevant offence”. For the proposed new offence in section 1 of the Bill to be complete, it must be established that, in addition to earlier meetings or communication with a child, the adult met or travelled with the intention of meeting the child and committing a “relevant offence”.

The order making power is intended to ensure that the list of “relevant offences” remains up to date. For example, if new sexual offences are created or existing offences are amended or repealed, then the schedule could be amended by order to reflect these changes. The order making power could not be used to change the substance of the proposed new offence: the preparatory steps noted above would always need to be undertaken and the accused person would need to intend to commit a relevant offence. Accordingly, the Executive considers that the order making power constitutes a relatively routine power to ensure that the list of offences in the schedule reflects a complete and current range of sexual offences against children and, as such, the negative procedure would seem to be appropriate.

Nevertheless, the Executive will take full account of the Committee’s views on this matter when considering laying amendments for Stage 2 of the Bill. The Executive’s intentions in this regard will be confirmed by Hugh Henry, Deputy Minister for Justice, in due course.

Hugh Dignon
For the Scottish Executive
Protection of Children and Prevention of Sexual Offences (Scotland) Bill: The Committee considered its approach to the Bill; agreed an initial list of witnesses to invite to give oral evidence, and agreed to hold a seminar with a cross-section of organisations with an interest in the Bill, to seek an informal meeting with the Sheriffs’ Association and to invite members of the Scottish Executive bill team to an informal meeting in advance of the formal evidence session.
Present:
Marlyn Glen                        Pauline McNeill (Convener)
Margaret Mitchell                 Mrs Mary Mulligan
Margaret Smith                    Stewart Stevenson

Apologies were received from Mr Bruce McFee.

Also present: Professor Christopher G ane, adviser to the Committee on the Protection of Children and Prevention of Sexual Offences (Scotland) Bill.

The meeting opened at 11.18 am.

**Protection of Children and Prevention of Sexual Offences (Scotland) Bill:**
The Committee took evidence at stage 1 from—

Hugh Dignon, Bill team leader, and Kirsten Davidson, Bill team member, Scottish Executive Justice Department; Paul Johnston, Senior Principal Legal Officer, Office of the Solicitor to the Scottish Executive, and Lindsey Anderson, Principal Procurator Fiscal Depute, Policy Group, the Crown Office and Procurator Fiscal Service.
Present:

Marlyn Glen  Mr Bruce McFee
Pauline McNeill (Convener)  Margaret Mitchell
Mrs Mary Mulligan  Margaret Smith
Stewart Stevenson

Also present: Professor Christopher Gane, adviser to the Committee on the Protection of Children and Prevention of Sexual Offences (Scotland) Bill.

The meeting opened at 10.11 am.

**Protection of Children and Prevention of Sexual Offences (Scotland) Bill:**
The Committee took evidence at stage 1 from—

Tam Baillie, Assistant Director (Policy), Barnardo’s Scotland.

There was a suspension from 11.30 am to 11.35 am. The Committee then took evidence from—

James Chalmers, University of Aberdeen.

**Protection of Children and Prevention of Sexual Offences (Scotland) Bill:**
The Committee agreed to delegate authority in respect of witness expenses to the Convener.
Present:
Mr Bruce McFee
Margaret Mitchell
Margaret Smith
Pauline McNeill (Convener)
Mrs Mary Mulligan
Stewart Stevenson

Apologies were received from Marlyn Glen.

The meeting opened at 9.39 am.

Protection of Children and Prevention of Sexual Offences (Scotland) Bill:
The Committee considered submissions of written evidence on the general
principles of the Bill at stage 1,

Protection of Children and Prevention of Sexual Offences (Scotland) Bill:
The Committee took evidence at stage 1 from—

Robert Ovens, Association of Chief Police Officers in Scotland; Douglas Keil
Scottish Police Federation, and Tom Buchan, Association of Scottish Police
Superintendents;

There was a suspension from 11.39 am to 11.47 am. The Committee then took
evidence from—

Gerry Brown, Convener of the Criminal Law Committee; Iain Fleming, member of
the Criminal Law Committee, and Anne Keenan, Deputy Director of the Law
Reform Department, the Law Society of Scotland.
Present:
Marlyn Glen            Mr Bruce McFee
Pauline McNeill (Convener)   Margaret Mitchell
Mrs Mary Mulligan          Margaret Smith
Stewart Stevenson

Also present: Professor Christopher Gane, adviser to the Committee on the Protection of Children and Prevention of Sexual Offences (Scotland) Bill.

The meeting opened at 10.14 am.

Protection of Children and Prevention of Sexual Offences (Scotland) Bill: The Committee took evidence at stage 1 from—

Rachel O’Connell, Director of Research, Cyberspace Research Unit, University of Central Lancashire;

Hugh Henry MSP, Deputy Minister for Justice, Hugh Dignon, Bill team leader, Kirsten Davidson, Bill team member, and Paul Johnston, senior principal legal officer, the Scottish Executive.

Items in private: The Committee agreed to consider in private at future meetings a draft stage 1 report on the Protection of Children and Prevention of Sexual Offences (Scotland) Bill and a draft report on its inquiry into the effectiveness of rehabilitation programmes in prisons.
Present:
Mr Bruce McFee Pauline McNeill (Convener)
Margaret Mitchell Mrs Mary Mulligan
Stewart Stevenson Mr Jamie Stone

Apologies were received from Marlyn Glen.

The meeting opened at 9.52 am.

Protection of Children and Prevention of Sexual Offences (Scotland) Bill (in private): The Committee agreed to defer consideration of a draft report on the Bill at stage 1.
Present:
Marlyn Glen  Mr Bruce McFee
Pauline McNeill (Convener)  Margaret Mitchell
Mrs Mary Mulligan  Stewart Stevenson
Mr Jamie Stone

The meeting opened at 9.38 am.

Protection of Children and Prevention of Sexual Offences (Scotland) Bill (in private): The Committee considered a draft report. Various changes were agreed.
Present:
Marlyn Glen  Mr Bruce McFee
Pauline McNeill (Convener) Margaret Mitchell
Mrs Mary Mulligan Stewart Stevenson (Deputy Convener)
Mr Jamie Stone

The meeting opened at 10.09 am.

Protection of Children and Prevention of Sexual Offences (Scotland) Bill (in private): The Committee considered a draft Stage 1 report and agreed various changes. It was also agreed that a further draft would be considered at the next meeting of the Committee.
Present:
Marlyn Glen  Mr Bruce McFee
Pauline McNeill (Convener)  Margaret Mitchell
Mrs Mary Mulligan  Stewart Stevenson (Deputy Convener)
Mr Jamie Stone

The meeting opened at 9.30 am.

1. **Protection of Children and Prevention of Sexual Offences (Scotland) Bill (in private):** The Committee concluded its consideration of the draft Stage 1 report by agreeing various changes.

The meeting closed at 1.05 pm.
Scottish Parliament

Justice 1 Committee

Wednesday 8 December 2004

[THE CONVENER opened the meeting at 11:18]

Protection of Children and Prevention of Sexual Offences (Scotland) Bill: Stage 1

The Convener (Pauline McNeill): I welcome everyone to the 38th meeting in 2004 of the Justice 1 Committee. I apologise for the late start—our previous private session ran on and we had then briefly to discuss lines of questioning.

Our only item of business is stage 1 consideration of the Protection of Children and Prevention of Sexual Offences (Scotland) Bill. For our first discussion of the bill, I welcome to the meeting the bill team, which comprises Hugh Dignon, the bill team leader; Kirsten Davidson, the bill team member from the Scottish Executive Justice Department; Paul Johnston, the senior principal legal officer from the office of the solicitor to the Scottish Executive; and Lindsey Anderson, principal procurator fiscal depute of the policy group of the Crown Office and Procurator Fiscal Service. We are also joined by Sarah Keenan and Susan Robb.

As I said, this is the committee’s first opportunity to ask about the bill’s content. Hugh, do you want to start by giving an overview of the bill or are you happy to go to questions?

Hugh Dignon (Scottish Executive Justice Department): I am happy to go to questions.

Stewart Stevenson (Banff and Buchan) (SNP): I want to begin with the age of consent in other countries. In particular, I want to put it on record that, according to a House of Commons library document, the age of consent in Austria is 14; in Denmark, Finland and France it is 15; in Italy it is generally 14; in Spain it is 12; and in Sweden it is 15. One slight anomaly is Northern Ireland, where the age of consent is 17.

Is it the policy intention behind the bill that a resident of, for example, Spain who visits Scotland for seasonal work and who communicates with someone who is over the age of consent in Spain, which is 12, but under the age of consent in this country, which is 16, will be committing an offence?

Hugh Dignon: The grooming offence that is set out in the bill contains three elements: communication with a child; travelling to or meeting a child; and intending to commit a relevant offence. If all those elements are present, an offence would be committed in Scots law irrespective of whether the offence that was intended was not an offence in another country. The example would constitute an offence if it involved communication, travelling and the intention to commit an offence in Scots law.

However, we also have to take into account issues such as whether prosecution of an offence would be in the public interest. We would expect the prosecution service to consider all the circumstances and to take a view on whether it was indeed in the public interest to prosecute.

Stewart Stevenson: Without making a binding decision, is the prosecution service likely to differentiate between the continuance of a relationship that existed before a Spanish itinerant worker came to Scotland, and the establishment of a relationship while he was in Scotland through making initial communication with someone back in the home country?

Hugh Dignon: I do not think that it would be appropriate to set out now how the prosecution service would view any particular set of circumstances. I imagine that it would take into account factors such as the pre-existence of a relationship, but it would not be right to say which circumstances would or would not result in a prosecution.

It might be helpful if my colleague Lindsey Anderson was to add to my comments.

Lindsey Anderson (Crown Office and Procurator Fiscal Service): We do not want to be overly prescriptive about our policy at this stage. Our prosecution code says that even if we have sufficient admissible, credible and reliable evidence we have to consider whether it will be in the public interest to prosecute. The code also sets out some of the factors that we would have to consider and weigh up in that respect, such as the offender’s age and background, their relationship to the victim and the overall circumstances of the offence. However, as I said, I do not want to be overly prescriptive.

Stewart Stevenson: I want to complete the loop on the question of age of consent by considering the case of Northern Ireland, where the age of consent outwith marriage is 17, and the case of Portugal, where it can be 18. In those countries, it would be an offence for sexual activity to take place between people under those ages. Would the bill cover an act that was not an offence under Scots law but was an offence in those countries?

Hugh Dignon: No. The relevant offence would need to be an offence under Scots law.

Stewart Stevenson: Finally, on an issue relating to grooming but not to age, would...
communication have to be initiated by the adult for the offence to exist? If the communication was initiated by the child, would that be sufficient for the adult to escape the reach of the bill?

Hugh Dignon: I think that communication could be initiated by either party. The important fact about communication is that there would need to be more than one communication, as well as the other elements. There is no specification in the bill as to who would initiate communication.

Stewart Stevenson: Is it not the essence of communication that it must include active participation by both parties? To give an example of a simplex communication, if a child were to send an e-mail or a text message to an adult and the adult did not respond, would that fall within the bill’s definition of communication?

Hugh Dignon: I find it hard to see how that would fall within a definition of a person aged 18 or over having communicated with a person under 16, which implies some sort of active communication on the part of the adult.

Margaret Smith (Edinburgh West) (LD): On what it would be in the public interest to prosecute, would it be a defence to a charge under section 1 of the bill that the accused was lawfully married to the child at the time of the alleged offence, or reasonably believed that they were? I am thinking about people who get married in the jurisdiction of another country, where such a marriage was legal.

Hugh Dignon: It would not be a statutory defence, as such, but I am sure that it is the sort of circumstance that the prosecution would take into account in deciding whether it was in the public interest to prosecute.

Margaret Smith: Might there be an argument for including something about such a circumstance in the bill?

Hugh Dignon: Clearly, one could do that. We would be concerned about situations in which people were exploiting a low or non-existent age of consent in order to have sexual relations with children or young people and were possibly even marrying them for the purposes of doing so. The prosecution would want to examine the individual circumstances of each case to determine whether that was the sort of activity that was taking place.

Margaret Smith: Are you thinking about a situation in which a family in another country has—for economic or other reasons—in effect sold a child into marriage, possibly against the child’s will? Is that the sort of situation that you are trying to cover?

Hugh Dignon: That is exactly correct.

Margaret Smith: In situations involving consensual marriage, would you leave it to the prosecutor’s discretion to decide what was in the public interest?

Hugh Dignon: Yes. The bottom line is that we do not think that it would be appropriate for prosecutions in this country to be constrained by the fact that there is different law—or, indeed, no law—in another jurisdiction.

Margaret Smith: Have you thought about extending the legislation to cover vulnerable adults?

11:30

Hugh Dignon: That would be a policy alternative. We have identified difficulties with doing that and, for that reason, we have constructed the offence so that it will apply only to children. The sort of difficulties that I have in mind relate to the fact that we would need to construct a relevant offence, which would mean that the person who was undertaking the grooming would have to have intended to commit an offence of having sexual relations with a vulnerable adult. We are aware that some offences already cover having sexual relations with people who are unable to give informed consent.

However, vulnerability is a wide condition and there would certainly be room for argument in a court about what sort of person constitutes a vulnerable adult. The other aspect is that there might be difficulties in trying to prove that someone who undertakes grooming was aware that the person whom they sought to groom was a vulnerable adult or that they should have known that that person was a vulnerable adult. For those reasons, we felt that it was better to stick to the protection of children.

Margaret Mitchell (Central Scotland) (Con): Given that a child is deemed to be someone under 16 and the age of consent is 16, why has the alleged offender’s age been set at 18 years and over in the bill? That means that the bill would not cover a 16-year-old who was potentially grooming a seven-year-old.

Hugh Dignon: That is correct. The bill seeks to strike at behaviour by adults who seek to exploit the trust and win the confidence of children with the purpose of committing sexual offences. Experience suggests that that is the kind of grooming behaviour that has taken place, so that is how the offence is constructed. At present, there are all sorts of circumstances in which we want to ensure that the grooming offence does not apply; for example, in the case of a 16-year-old boy and his 15-year-old girlfriend.

Margaret Mitchell: If we are looking at the offence in terms of reasonable behaviour—I think that we are, to a large extent—could the
circumstances that I described be considered? I ask because it would not be reasonable behaviour for a 16-year-old who was not a child any more and who has the power of consent to groom a seven-year-old or a nine-year-old.

Hugh Dignon: It is clear that that would be unacceptable behaviour; it would be possible to construct the offence so that it covered a 16-year-old. As I said, there are arguments on the other side of the equation about establishing a clear differential between the groomer and the person who is being groomed. In this case, we are ensuring that there is at least a two-year age difference. As far as we are aware, most grooming behaviour that has been seen to date has tended to involve adults who are considerably older than 18.

Mrs Mary Mulligan (Linlithgow) (Lab): I will ask a small supplementary to Stewart Stevenson’s question before I ask my own question. It concerns who initiates contact. If, for example, a young person was making contact through an internet chat room, but believed that the older person who they were contacting was of a similar age, could it be used as a defence of the older person that they had not initiated the contact and that it had been done by the young person?

Hugh Dignon: Again, that would depend on the circumstances of the case. The bill is explicit in saying that there must be at least two occasions when communications have taken place. A reasonable definition of communications would involve at least two parties, so a communication that just involved contact that had been initiated by the young person, with no response from the older person, could not properly be called communication. However, if the older person chose to enter into dialogue with the younger person, that would seem to be communication.

Mrs Mulligan: Would the dialogue have to involve an intention to do something to the child?

Hugh Dignon: No. The communication need not carry indication of an intention. The simple fact of the communication will be sufficient for the purposes of the communication element of the offence. However, the prosecution will need to show that the person who carried out the grooming intended to commit a relevant offence, although that need not necessarily be shown in the content of the communication.

Stewart Stevenson: I have a technical question. The drafting of the bill suggests that the communication could take place when the accused is under 18, even though the offence might crystallise only after the person was 18. Is that the intention? An offence will be committed if “having met or communicated” with a child, the adult then met the child with the intention of committing a relevant offence. To take an extreme example, if a person was to communicate with a child on two occasions while the child was in primary school and subsequently—years later—met the child, would that constitute communication under the bill? Alternatively, is it intended that the communication must take place when the person is an adult?

Hugh Dignon: I do not know the answer to that question. Clearly, the intention is that the offence will apply to adults who are 18 or over. We will need to take advice on whether communication that took place when a person was not 18 would count as relevant communication. At least some elements of the offence will have to take place when the adult is 18 or over, but I will have to take advice on whether that applies to all the elements. Perhaps my colleague Paul Johnston can comment.

Paul Johnston (Scottish Executive Legal and Parliamentary Services): I have not considered that issue, but it strikes me from section 1(1)(a) that the initial meetings or communications with a person aged under 16 could take place when the potential offender was under 18. Certainly, intentionally meeting or travelling with the intention of committing the offence must take place when the accused person is 18 or over.

The Convener: I seek clarification on a point that arises from the line of questioning about the nature of the communication that is involved. Given that the bill is not explicit on the issue, is the statement in the explanatory notes the policy position? Paragraph 6 of the notes states:

“The offence is intended to cover situations where an adult establishes contact with a child through, for example, meetings”.

That means that only an adult’s communication with a child will be relevant. Should that be made explicit in the bill?

Hugh Dignon: We will need to consider that further. The intention is that the offence can be committed only by someone who is 18 or over. I suppose that circumstances in which the communication element of the offence took place when the person was younger than 18 might arise fairly infrequently. The prosecution would need to consider the circumstances in deciding whether all the elements were in place to allow the person to be prosecuted.

The Convener: I am trying to find out whether the communication that is referred to in the bill is communication from the adult to the child, rather than from the child to the adult. We could take it from the bill that it is intended to cover situations in which a child communicates with an adult and the adult responds. Will it matter who initiates the contact? The explanatory notes are clear that the bill covers
“situations where an adult establishes contact with a child”.

Which of those situations do you want the bill to reflect? Do you want the provision to be open-ended or to be as explained in the explanatory notes?

Hugh Dignon: I am not sure that “establishes” necessarily means “initiates”. The important point is that the adult would have to communicate consciously and knowingly—that is, deliberately—with the child. The issue of who initiated that communication will not be directly relevant.

The Convener: It is relevant that the bill be clear that that is the policy intention—I can see why you would want it to be. If the child initiated contact and the adult responded, you would want to ensure that the offence covered that situation. I would have thought that you might want to make it clear in the bill that what matters is not who initiates communication, but the establishment of contact on the adult’s part. I take your point that “establishes” does not mean “initiates”, but when I read the explanatory notes, I took it to mean that.

Hugh Dignon: We would be happy to look at that and determine whether further clarification is needed.

Marlyn Glen (North East Scotland) (Lab): There seems to be consensus that the new offence of grooming is necessary, but what does it add to existing criminal law and what is the scale of the problem that section 1 seeks to address?

Hugh Dignon: There is no doubt that the criminal law as it stands is able to deal with many instances of grooming behaviour. In the explanatory notes, we set out some of the offences that might apply to such behaviour, but it is clear that someone who was intent on carrying out grooming behaviour might carefully construct that behaviour so as not to fall foul of any offences such as fraud, lewd and libidinous behaviour or offences under the Civic Government (Scotland) Act 1982. That is why we want to be certain that, in all instances, there will be some way of dealing with people who undertake grooming behaviour with the purposes of committing a sexual offence, and that is what we set out to do in the bill.

As far as the scale of the problem is concerned, you might be better speaking to the Association of Chief Police Officers in Scotland or other police bodies for evidence on that. From discussion with them, I think that they are talking about 12 cases throughout Scotland being under investigation at any one time. I would not be able to say how that equates to cases per annum, but that is the information that I have from speaking to the police.

Marlyn Glen: There is some concern that the bill does not include grooming within families. Did you consider including that?

Hugh Dignon: I guess that, if all the elements of the offence are present and identifiable, grooming within families is not excluded. However, the bill is to strike at the sort of behaviour in which predatory sex offenders go out of their way to establish contact with children and seek to win their trust. Such behaviour would be difficult to identify in those terms within a family. Within a family, one would expect there to be communication and meetings, so it would be difficult to identify those as happening as a prelude to commission of a sexual offence under the bill. However, the bill does not exclude the possibility that an offender and a victim might be related.

11:45

Marlyn Glen: Why is prior meeting or communication with a child a necessary part of the offence?

Hugh Dignon: The offence is constructed to identify people who behave in a way that indicates that they intend to commit a serious offence, while avoiding innocent or unwitting communications or meetings between an adult and a child. We have tried to assemble a number of elements that together will add up to the offence. Those elements are communications on more than one occasion, meeting—or travelling to meet—a child, and evidence of the intention to commit an offence. It is necessary that all those elements be found together to constitute the offence in question.

Marlyn Glen: I can see the point of trying to exclude innocent or unwitting communications—that is eminently sensible—but I am still not clear about the idea of having to make contact on at least two earlier occasions. We are talking about internet communications, for instance. Some young people go into chatrooms and leave them on all day, which means that that communication could be over a lengthy period. Would that still count as a single communication?

Hugh Dignon: Again, that would depend on the circumstances of the case and whether the communication could be separated into more than one occasion. I would not like at this stage to speculate about what time difference or degree of separation would be required to constitute two separate communications. That is something that the prosecution service would need to consider in each case. I go back to my earlier point that the purpose of specifying two communications is to attempt to identify a pattern of behaviour so that we can seek to exclude circumstances in which people unwittingly find themselves in such a position.

Margaret Smith: Prior meeting or communication with the child is a necessary part
A conspiracy is a

Paul Johnston: That would not be covered by

the statutory offence as constructed in section 1.

The adult must communicate with or meet the

person under 16 on at least two occasions. There

may be other ways of catching the situation, for

instance when a number of persons are involved

in grooming activity as some sort of grooming ring.

In such cases we might be considering, for

example, conspiracy to commit the relevant

offence, or art and part—our Crown Office

colleague might wish to comment on that.

Lindsey Anderson: A conspiracy is a

completed crime when there is an agreement to

affect the common purpose; it does not matter

whether the relevant offence is actually committed.

If it can be proved that there is an agreement

between parties, there may be sufficient evidence

that there is a conspiracy to commit one of the

sexual offences, which would be a common-law

crime. With art and part guilt, it has to be shown

that a number of individuals are acting together for

a common purpose, which would be to commit

one of the relevant offences. There is also art and

part guilt that would allow a number of accused

persons to be libelled as having committed an

offence under section 1 of the bill.

Margaret Smith: So, you are quite content that

there would be a way to prosecute somebody who

committed an offence in that way, bearing in mind

the fact that such people are renowned for being

able to get around legislation. You are content that

we could able deal with that.

Hugh Dignon: On the basis of advice from

Crown Office colleagues, I believe that there

would be potential ways forward in terms either of

proving conspiracy or of using another power. I

would never say that we are quite content; however, there would be options for us.

Stewart Stevenson: I am sorry—I have another

variant to put to you. If a British citizen who was

permanently resident in Spain was communicating

by telephone or other means with a 14-year-old

Spanish girl who was visiting Scotland on holiday

with her parents, would an offence be committed

by the adult who was resident in Spain?

Hugh Dignon: Yes. We think that that would be

an offence under Scots law.

Stewart Stevenson: Would that be the case

even though that person had not been in Scotland

since immediately after their birth, at which point

they had achieved British citizenship, and although

they had never subsequently visited these shores?

Hugh Dignon: Yes.

The Convener: I quite like that example. That is

all we wanted to ask about section 1. We have a

number of questions on sections 2 and 3, on risk

of sexual harm orders.

Margaret Mitchell: My question is on the

burden of proof, which will—because such orders

will be a civil matter—be much less than would

be required if a criminal offence were to be

prosecuted. Can you give me an example of the

type of behaviour that you think would be covered

by a risk of sexual harm order?

Hugh Dignon: The sorts of behaviour that are

covered are set out in section 2(3). There are four

categories, one of which, in subsection (d), is

"communicating with a child, where any part of

the communication is sexual."

Such communication could have taken place on

more than one occasion between the adult and the

child. It could also have taken place in circumstances in which only the two of them were

present; therefore, corroboration may be difficult to

achieve. In such circumstances, one might

contemplate using an RSHO.

Of course, imposition of an RSHO will require

not just the behaviours that are set out in section

2(3); a chief constable will also need to be

convinced of the seriousness of the situation

before making an application for the order and a

sheriff must believe that the order is necessary

because the person concerned is a risk to a

specific child or to children in general.

Nevertheless, the sort of activities that we have in

mind are those that are set out in section 2(3).

Margaret Mitchell: Let me take you back. If a

chief constable were convinced that the circumstances were such that he wanted to apply

for an order, why not go a little bit further? It

seems to me that the chief constable will be taking

into account not just the word of the child, but

some other factor, so would not corroboration and

a higher standard of proof be necessary for

prosecution?

Hugh Dignon: The activities that are set out in

section 2(3) do not necessarily constitute a

criminal offence. They may constitute a criminal

offence and, in practice, the chief constable or the

police force may discuss with the prosecution

service the options that are available to them in

light of the evidence that they have to hand.

However, it may be decided that a prosecution

would be unlikely to succeed or that it would not

be in the public interest at that point, in which case

an RSHO might be appropriate.

Margaret Mitchell: If something is not a criminal

offence, what are we talking about?
Hugh Dignon: We are talking about behaviour such as is set out in section 2(3), which would in most circumstances be likely to cause serious concern about the intentions of person who was behaving in such a way to a child. We are talking about clearly inappropriate behaviour that has sexual overtones.

Margaret Mitchell: So if a child accused an adult, what would a chief constable consider in deciding whether there were sufficient grounds for going ahead with an RSHO? It is not clear to me how a lesser burden of proof could lead to an RSHO. Surely the proof that led to a chief constable’s wanting to impose an RSHO would also be sufficient proof for bringing a criminal charge. We must bear it in mind that, as soon as a court granted an RSHO, the adult involved would undoubtedly be targeted.

Paul Johnston: I do not know whether I can add much to what has been said, except to emphasise that there may be situations in which there is activity that falls short of being an offence. Section 2 will increase the package of measures that are available to the courts and to the Crown Office and Procurator Fiscal Service to protect children. Communications might take place between an adult and a child that would not, in and of themselves, be sufficient to give rise to prosecution for an offence. However, investigation of the communications might cause concern that the adult’s intention was to commit an offence in the future. Therefore, early imposition of an RSHO may serve to prevent an offence from being committed further down the line.

Margaret Mitchell: Can you give an example? If there are no obvious examples, I will have serious concerns about RSHOs.

Hugh Dignon: An example of?

Margaret Mitchell: I would like an example of where an RSHO would apply.

Hugh Dignon: As my colleague Paul Johnston said, RSHOs are intended as an extra tool when we consider how to deal with a situation that is causing concern. It is a matter of deciding whether behaviour amounts to a criminal offence or whether that behaviour, although not an offence in itself, is cause for concern that it might lead to inappropriate sexual behaviour between an adult and a child. The problem is in deciding whether an adult’s behaviour is such that they should either be prosecuted or made subject to an order that could prevent a serious and substantive sexual assault taking place in the future.

I cannot give a concrete example, because the RSHO does not yet apply in Scotland, so there have been no instances for which such an order has actively been considered. However, in our discussions with the Crown Office and the police service prior to the bill’s introduction, no one said at any point that they did not feel that the RSHO would be a useful addition.

The Convener: At this stage, without evidence from the Executive as to why it has concluded that behaviour that causes concern in respect of an adult communicating with a child will lead invariably to criminal behaviour, I have concerns about RSHOs. Unless the two behaviours were linked, there would be no point in an RSHO. I think that such a link is what the provision is trying to achieve.

My concern is that we are starting down a road on which we will criminalise behaviour that causes concern. A civil order could lead to a criminal offence simply by the order being breached. Where would that leave us generally in Scots law? A similar civil procedure could be applied to other situations in which it was felt that behaviour was cause for concern but there was not enough evidence to suggest that it was a criminal offence. You will not be surprised to hear that many people would be concerned about such a possibility. We cannot start from the point of view that a person is guilty; we start from the point of view that evidence of an offence must be demonstrated. I believe that the balance of probability test is too thin for what I regard as an onerous order. Is the principle that underlies the need for the order the fact that the Executive believes that concerning behaviour invariably leads to a physical act of criminality? What is the evidence for that?

12:00

Hugh Dignon: I do not think that the Executive would say that such behaviour invariably leads to a criminal act. The position is that the harm or damage that can arise from sexual offences that are committed against children is such that early intervention is justified in seeking to prevent such damage. That is the principle behind the order.

The Convener: That means that if it can be demonstrated that someone has been, in the words of section 2(3), “communicating with a child, where any part of the communication is sexual”, that would be enough to bring the case before a sheriff.

Hugh Dignon: Clearly, that is a necessary part of imposing the order, but it will not be sufficient in itself to have an order imposed. The sheriff will also need to be convinced that the order is necessary to prevent sexual harm to a child or children in general.

The Convener: Does that mean that it will have to be demonstrated in court that, if there had been two separate instances of sexual
communication—we could debate the definition of sexual communication but, for the sake of argument, we will pretend that we have settled that—those two instances will lead to the child being harmed? If so, what sort of evidence will have to be brought to the court about the individual against whom the order is being sought?

**Hugh Dignon:** As I said, the sheriff will have to agree that the order is necessary to protect the child from sexual harm. That is the orders’ purpose. As part of that, there will need to be evidence that the sort of behaviour that is set out in section 2(3) has taken place on at least two occasions.

**The Convener:** Will that be enough? If that behaviour has taken place, will the sheriff be entitled to infer that the child might be harmed?

**Paul Johnston:** It must be proved on the balance of probabilities that that behaviour has taken place. There are two aspects. First, the sheriff must exercise his judgment in weighing up the evidence and considering whether the chief constable has brought evidence that establishes, on the balance of probability, that the behaviour has taken place. Quite separately, the sheriff must then consider whether it is necessary to impose an RSHO. I suggest that, when he is considering—

**The Convener:** I must stop you there—that is what I am driving at. I understand that an RSHO will not be imposed unless it can be demonstrated that there have been two communications as defined in section 2(3)(d). However, from what you said, that seems to be all that will be required. You said that an order will be imposed where the sheriff deems it to be necessary, but what will be the criteria for that?

I draw your attention to previous discussions about the question of the risk that is posed by an offender. In dealing with previous legislation, this committee has strongly stated its view that assessment of the risk of someone’s potential to commit an offence has to be robust. For example, to ensure that a lifelong restriction order be granted, the court must see evidence of likelihood that the person will commit an offence. When the sheriff is deciding whether an order is necessary, the sheriff must be convinced that the order will prevent harm. Surely, therefore, something other than two separate incidents of communication must be placed before the court.

**Paul Johnston:** The sheriff would have to decide whether it was necessary to impose an order based on the evidence that was presented. The balance of probabilities test comes in at the point at which the sheriff decides whether two such incidents have taken place. When the sheriff moves on to consider the necessity of an order, he or she must then consider all the evidence. At that point, it will be less a matter of what standard of proof applies than of the sheriff exercising the classic function of considering whether the imposition of a particular order is necessary.

**The Convener:** I will leave it there, but I am looking for more information on the criteria that the court will use in deciding whether an interdict is necessary. If I picked you up correctly, applying for an interdict will depend on the balance of probabilities—the civil test—that the two communications took place.

**Paul Johnston:** Yes.

**The Convener:** Could there be a further test, when the sheriff decides whether it is necessary to grant an interdict to prevent risk to a child?

**Paul Johnston:** Yes.

**The Convener:** So there could be two tests.

**Paul Johnston:** There are certainly two stages. In considering whether an order is necessary, the sheriff will need to consider the evidence that has been put before him or her. In addition, section 2(6) states:

“The only prohibitions that may be imposed … are those necessary for the purpose of protecting children generally or any child from harm from the person against whom the order has effect.”

Further provision is made there for what constitutes a necessary provision.

**Mrs Mulligan:** Margaret Mitchell asked for specific examples. I will posit a couple of cases and you can say whether the measures would apply. First, where a person against whom an order was being sought had a previous conviction for a similar offence, would that influence the sheriff? Secondly, would you employ the measures where you might otherwise seek a criminal prosecution but, because it is one person’s word against that of another, you feel that you have insufficient evidence?

**Hugh Dignon:** On the first example, the fact that someone had a previous conviction would not necessarily be determinative of whether an RSHO should be made. On the second example, such considerations might be taken into account in deciding whether a prosecution was appropriate or whether an application for an RSHO would be more appropriate. However, it will remain to be proven on the balance of probabilities that the actions took place; it is not as though there is no burden of proof or no requirement because there is the balance-of-probabilities requirement. That might be a more appropriate course of action where, for example, corroboration—which is required for a criminal prosecution—is not available.

**Lindsey Anderson:** Using your example, if a child were to make an allegation of criminal conduct by an adult, the police would instigate
their child protection measures. There would be a joint investigative interview with the social work department and the family protection unit police officers, the purpose of which would be to establish the child’s version of events and to see whether further protective measures were required. At that stage, the investigation might proceed with a view to criminal proceedings.

It may be that at the end of the investigation there would be insufficient evidence. The police might report the case to the procurator fiscal, or have informal discussions with the fiscal without a formal report being made. At that stage, the fiscal might advise that there was insufficient evidence and lack of corroboration. There might be two acts, as covered in section 2(3), relating to the same victim, but no corroboration and it would be the victim’s word against the adult’s. In such circumstances, if the fiscal advised the police of the situation, I envisage that an order would be appropriate.

Mrs Mulligan: How frequently will orders be used? Do you have any idea?

Hugh Dignon: In advance of the act coming into force, it is difficult to say, but my guess is that they will be used fairly infrequently. The band of behaviour, from that which is criminal and justifies prosecution to that which will be subject to an RSHO, is fairly narrow.

Mrs Mulligan: Given that granting an RSHO against someone could be quite serious, will an RSHO be disclosed if a search is carried out on someone who has one?

Hugh Dignon: As a civil order, an RSHO will not automatically be part of the disclosure regime. However, a chief constable would disclose it under the enhanced disclosure arrangements if it was considered relevant to the inquiry being made.

Margaret Smith: I am talking about people coming forward to say, “I believe that behaviour towards my child has been inappropriate, although it might not constitute a sexual offence.” The existence of the RSHO with a lesser evidential requirement might encourage more people to come forward than do at present, when they know that a successful prosecution in court is unlikely.

Hugh Dignon: The number of people who will come forward if the measure is implemented remains to be seen. It will be necessary for a chief constable to make the application and for evidence to be provided of the behaviour that is described in section 2(3). A sheriff will also be required to be convinced that an RSHO is necessary to protect a child. A similar order has been in place in England and Wales since May. I am not aware that many—if any—orders have been made there.

Marlyn Glen: The bill is to protect children from physical and psychological harm. How wide is section 2(3)(b)? What does “a moving or still image that is sexual” cover? For instance, does it cover ordinary late-night terrestrial television programming? How stringent is the provision?

Paul Johnston: I am afraid that the answer is again that much depends on the precise circumstances of the case. At one end of the spectrum, if an adult sat down with a six-year-old child and caused or incited them to watch a pornographic film, that would clearly be conduct described in section 2(3)(b). That adult would be “causing or inciting a child to watch … a moving … image that is sexual”.

At the other end of the spectrum, if a film had a sexual element, intent on the adult’s part to engage in the behaviour that the provision describes might not be proven on the balance of probabilities. Much would depend on the precise circumstances, on the nature of the activity and on whether it was established in court that that activity had been undertaken.

Marlyn Glen: So, there would have to be intent as well.

12:15

Paul Johnston: I am not sure whether Lindsey Anderson wants to add anything. It is unlikely that a situation in which an adult and a child were watching a film in which there were suddenly images of a sexual nature would be covered. The chief constable will look at all the facts and circumstances of a case and decide, on the basis of those facts, whether it is appropriate to apply for a risk of sexual harm order. It seems to me unlikely that such circumstances would ever come
to the attention of the court. If they did, the sheriff would have to consider whether it was necessary for an order to be made, and it seems doubtful that the sheriff could be so satisfied in the circumstances that I have described.

**Hugh Dignon:** It comes back to the point that we talked about in relation to communications for the grooming offence, for which two communications are required. Similarly, a single event would not be sufficient for an offence under section 2(3). The bill allows for accidents, unwitting errors and mistakes. We are trying to identify emerging patterns.

**Marilyn Glen:** So, a regular babysitter watching adult movies would be covered.

**Hugh Dignon:** Yes, if the babysitter was allowing the child to watch images that fell within the definition.

**Marilyn Glen:** I am surprised how wide the provision is.

**Hugh Dignon:** Of course, as we have made clear, the sheriff would have to be convinced that an order was necessary to protect the child. The fact that the babysitter had allowed the child to watch pornographic films on more than one occasion would not be sufficient, in itself, for an order to be made.

**Marilyn Glen:** It would also have to be shown that psychological harm had been caused.

**Hugh Dignon:** It would have to be shown that the order was necessary to protect the child from the risk of sexual harm.

**Marilyn Glen:** Is such a provision in the legislation that covers England and Wales at the moment?

**Hugh Dignon:** Yes.

**Stewart Stevenson:** In providing policy guidance, has the Executive concluded that two 17-year-olds indulging in sexual activity in front of a 12-year-old child is acceptable, whereas two 18-year-olds undertaking the same activity could face risk of sexual harm orders?

**Hugh Dignon:** I do not think that we would go so far as to draw that conclusion. The order is about adults who present a risk of sexual harm to children. Two 17-year-olds carrying out sexual activity in front of a child may be behaving unwisely and inappropriately, but it does not immediately follow that they pose a risk of sexual harm to children.

**Stewart Stevenson:** Was there any evidential basis for concluding that 18 should be the age at which risk of sexual harm orders should apply?

**Hugh Dignon:** The purpose of the provision, and of the bill generally, is to protect children from the risk of sexual harm from adults. That is the sort of behaviour at which the bill seeks to strike. It is possible that the age limit could be drawn at a different age; however, 18 was chosen because the bill is about protecting children from the risk of sexual harm from adults.

**Stewart Stevenson:** I take it that section 2(4)(b) would lead the sheriff to consider that a risk of sexual harm order would not be required where a child in a cot, who is not sentient of activity in the room, is present while his or her parents resume normal sexual relations in another part of the room.

**Hugh Dignon:** Clearly, the activities that are described in section 2(3) are not sufficient in themselves. In addition to those activities having taken place, the person against whom the order is sought must represent a risk to children. It is difficult to see how a sheriff could come to that conclusion in the example that you describe.

**Margaret Mitchell:** The breach of RSHOs carries heavy penalties: on summary prosecution the penalty is imprisonment for six months and/or a fine up to a statutory maximum of £5,000, and on prosecution on indictment the penalty is imprisonment for up to five years and/or an unlimited fine. A breach is very much a criminal act. Are you confident that there would not be a challenge under article 6 of the European convention on human rights, given the burden of proof and the fact that most of the conduct contemplated in the granting of the order is criminal?

**Paul Johnston:** The Executive has considered the provisions and it is satisfied that they are compatible with the European convention on human rights. We are considering a civil process at the stage at which an order is imposed; the process will normally be made by summary application and the normal summary rules will apply. The person will have the right to be heard and to make representations in relation to the imposition of the order. As such, they will be entitled to a fair and public hearing within the meaning of article 6 of the convention. If an order is made, the person will be made aware of what types of conduct they may not engage in. If they subsequently engage in such conduct, proceedings could be brought on the ground that a criminal offence has been committed. You will note from section 7, on the offence of breach of an RSHO or interim RSHO, that there will be a trial at which the person will be entitled to be heard and to put forward their case. In particular, in relation to section 7(1), they will be entitled to argue whether there was any "reasonable excuse", which covers situations in which the person against whom the order was made had no intention of doing anything prohibited by the order.
Margaret Mitchell: Why is there a difference in what is required to grant an interim RSHO? For example, with an interim RSHO there is no necessity to prove that there is a general risk to children or a risk to an individual child. Anything that is described in the order as prohibited is sufficient.

Paul Johnston: The process for imposing an interim RSHO will require the person against whom the order is sought to be made aware of the application and they will be entitled to be heard and to make representations. The sheriff must consider whether it is just to impose an interim RSHO. It is not the case that the order can be imposed without there being any court process in which the person against whom the order is sought has a right to make representations.

Margaret Mitchell: However, an interim RSHO can be imposed without there being a general risk to children or a risk to an individual child.

Paul Johnston: In section 5(3), the test for making an interim RSHO is that it is “just to do so”. It may be that the sheriff will need to go back to the tests for the main order in section 2.

Margaret Mitchell: That is not stated in section 5.

Hugh Dignon: An interim order could be applied for only as part of an application for the main RSHO, so the facts of the case would be set out in the application for the main order. Where an interim order is sought, the sheriff will need to be aware of the facts of the case so they may need to hear argument and evidence on those facts. An interim order might be required in situations in which urgent action needs to be taken. For those reasons, we believe that the interim order is a justifiable procedure for the purposes of protecting children from potentially serious sexual harm.

Margaret Mitchell: It seems strange that the bill does not require the application for such an order to state that the person poses a general risk to children or a risk to an individual child.

Hugh Dignon: The application for an interim order would need to be considered together with the application for the main order. Also, section 5(3) permits the sheriff to make an interim risk of sexual harm order only if they consider it “just to do so”.

Margaret Mitchell: Why would the sheriff not just consider the main order if the person posed a general threat to children or a threat to an individual child?

Hugh Dignon: As you described, the main RSHO will be a serious order that will last for a minimum of two years and will carry some consequences for the individual who is the subject of it. Before making an order for that period of time, any sheriff would want the opportunity to hear the arguments for and against doing so and to consider the evidence on the behaviours that have taken place and the risk that is involved. For those reasons, the sheriff might want a period in which those issues can be considered before making the main order.

However, we believe that it remains conceivable that there might be instances in which rather quicker action was required, such that the sheriff recognised that, given the potential risk that the person posed to a child or to children in general, it would in the circumstances be just to make an interim order in advance of hearing all the arguments and evidence on the main order.

Margaret Mitchell: All kinds of questions might remain unanswered when the interim order is imposed, but a breach of that order would automatically be a criminal offence with no questions asked. Is there not a problem with that?

Paul Johnston: A breach of an order is not automatically a criminal offence and, in this case, would have to be proven beyond reasonable doubt. The process of the criminal law would need to establish that a breach had taken place.

Lindsey Anderson: From a criminal law point of view, we would need to prove that the accused was aware of the terms of the interim order, which, obviously, would have been spelled out in court, and that the accused had, without reasonable excuse, breached those terms. Consideration of a breach of an interim order would be a slightly different matter from the considerations behind its imposition. For there to have been a criminal offence, we would need to show that the accused was aware of the terms of the order and that he or she breached them without reasonable excuse. The criminal law standard of beyond reasonable doubt would apply.

The Convener: The interim order is what concerns me most because it seems that not very much would need to be proved before it was imposed. The interim order could be prejudicial to the full hearing at which the evidence for the main order was considered. If the interim order was breached prior to the full hearing, the person who was the subject of the interim order would already be at the point of committing a criminal offence. Would it not be fairer to set out in section 5 the things that a sheriff must consider before granting an interim order?

Paul Johnston: At present, section 5 states that the sheriff must consider it just to impose the interim order. Also, the normal rules of court require certain standards to be met before interim orders are imposed. In terms of our general law, there must be a prima facie case for the interim order and the sheriff must be satisfied that, on the
balance of convenience, it is appropriate for the order to be made.

Whenever an interim order is sought in a civil process, the standard that I have set out is the standard that will apply. There is no need therefore to specify it expressly on the face of the bill. The sheriff will need to look at the evidence and consider whether, prima facie, it suggests that an order requires to be imposed. The sheriff must then go on to consider whether, on the balance of convenience, it is appropriate for an interim order to be made.

12:30

**The Convener:** How far does the sheriff go in testing the information that is before them before they grant the interim order?

**Paul Johnston:** Certainly, the test is lower than the test for imposing a full order. However, it is clear that the whole idea of an interim order is that it can be imposed quickly. As I said, what must be considered is the question of whether there is a prima facie case and whether the balance of convenience favours the making of an order. After that stage in the process, the provisions of section 5(3) effectively impose the additional condition that the making of the order must be just.

**The Convener:** Given what you have said this morning, I imagine that the power would be used fairly infrequently and only in serious circumstances. Given that the chief constable is the only person who can apply for an order, it seems clear that the measure is a serious one. If the offence is so important, would it not be better to dispense with the idea of an interim order, get the case into court and test the evidence?

I am uncomfortable with the idea of a civil interdict being made when we do not know what the test will be, given that a sheriff can have a pretty open-ended go at deciding what is necessary to prevent harm to a child. A breach of the interim order can lead to a criminal offence. If our criminal justice system places such importance on the protection of children, would it not be better to ensure that an application for a full order is heard quickly?

**Paul Johnston:** It is important that, when a full order that could remain in force for a minimum of two years is imposed, the opportunity is given for a full and fair public hearing. The situations that are envisaged are those in which the risk is such that interim orders need to be imposed speedily. The convener will note from section 5(4) that the interim order

"ceases to have effect ... on the determination of the main application."

The interim order is simply an order that will—

**The Convener:** You have no doubt and no concerns whatsoever about prejudice to the accused.

**Paul Johnston:** As I have tried to point out, certain tests must still be met. They are common to the tests that must be met whenever an interim application is sought, namely the prima facie case and the balance of convenience.

**The Convener:** The interim order does not cover a fixed period. Would it not be fairer to set a maximum period, as has been done with the maximum period of two years for the full order? At the moment, the interim order is completely open ended—a sheriff can grant one for as long as they like.

**Paul Johnston:** The main application must proceed: an interim order cannot be sought without the seeking of a full order. When the full order is sought, the normal summary procedure will be used under which the time limits for consideration of applications are set out. In the normal course of events, a relatively short period of time would elapse between the granting of the interim order and the consideration of the full order.

**The Convener:** If I may, I will skip back a bit to section 2(3)(d). Where the Crown shows that two incidents have taken place, does the order have to relate to those incidents? For example, I assume that the circumstances described by Marlyn Glen of a babysitter or parent allowing a child to watch obscene or pornographic material would be covered by the offence outlined in section 2(3)(d). If an order were granted against a person who allowed that to happen, would it have to be proportionate to the behaviour? In other words, if the harm to the child was that they were allowed to watch pornographic movies, would the order have to prevent that from happening again, or could a further assumption be made that that behaviour could lead to something else? Does there have to be a relationship between the behaviour and the order?

**Hugh Dignon:** Section 2(6) specifies that the prohibitions that can be set out in the order are those necessary for the purposes of protecting the child.

**The Convener:** Does that mean that there is a relationship?

**Hugh Dignon:** Clearly, if the behaviour in question is considered to pose a risk to the child, the order will require that it be desisted from.

**The Convener:** So you would expect there to be a relationship between the behaviour and the order.

**Hugh Dignon:** Yes.
The Convener: For example, if the behaviour that the court was considering was that of “communicating with a child, where any part of the communication is sexual”, could the court jump to the conclusion that it had to protect the child by preventing any contact with the adult? Does there have to be a relationship between the behaviour and the order?

Paul Johnston: I think there has to be a relationship between the nature of the conduct and the conditions that are imposed. Your use of the word “proportionate” is absolutely right. The court will need to act in accordance with the European convention on human rights when it is considering which conditions to impose. It is possible that, under article 8 of the convention, the conditions could have an impact on the person’s private and family life. Any restrictions that are imposed that have such an impact must be imposed in accordance with the law and must be necessary and proportionate.

The Convener: Does the bill have to say that?

Paul Johnston: The courts are obliged to act in accordance with the convention. The court will decide which conditions are necessary, and any condition that is unnecessary or disproportionate could be challenged on that basis.

Mrs Mulligan: We asked earlier how many RSHOs you envisage being imposed. Do you propose to monitor their use?

Hugh Dignon: In the normal course of events, the police would apply for RSHOs and monitor compliance with them. We in the Executive would wish to monitor how many orders were applied for and how many were in place at any one time, but monitoring day-to-day compliance will be a job for the police.

Mrs Mulligan: Are you confident that the police will be able to do that if and when we pass the bill and that other criminal justice services will be able to support the introduction of RSHOs?

Hugh Dignon: Yes. As we have said, we do not imagine that RSHOs will impose a significant extra burden on the police. We imagine that in many cases the people concerned will have come to the attention of the police or criminal justice social work departments already. The RSHO will be an extra tool for those bodies in managing offenders or potential offenders, rather than a significant addition to their workload.

Mrs Mulligan: We understand that in granting an order we would be seeking to protect the child or children so it is important that the orders have the desired effect. We would need a guarantee of that.

Hugh Dignon: Clearly there would be no point in a police force applying for an order if it had no intention of ensuring that it was complied with.

Mrs Mulligan: It would be the police’s responsibility to do that.

Hugh Dignon: Yes.

Margaret Mitchell: Sexual offences prevention orders can be imposed on conviction. Can they also be imposed at the end of a prison sentence?

Hugh Dignon: At present, under the Sexual Offences Act 2003 they can be imposed at the end of a prison sentence on application by a chief constable.

Mrs Mulligan: Has that happened?

Hugh Dignon: There are sexual offences prevention orders in place in Scotland, but I am not able to say whether any were imposed after someone finished a custodial sentence.

The Convener: You will be glad to know that we have reached the end of our questions. Thank you for giving us such full and frank responses to our questions. The information has been very useful indeed. I am sure there will be more questions after today, but that is all for now.

That concludes our business. I remind members that our next meeting will be on Wednesday 15 December when we will take further evidence for our inquiry into the effectiveness of rehabilitation programmes in prisons, because we have to draw up a report quite soon.

Meeting closed at 12:41.
Introduction

Barnardo’s Scotland provides over 60 services for some of the most vulnerable, disadvantaged and excluded children, young people and their families in communities across Scotland. This includes 4 services that are dedicated to working with children and young people with sexually problematic behaviour. In addition, many of our other services also deal with young people who have experienced sexual exploitation.

General Points

Barnardo’s Scotland welcomes the proposed new legislation as a means of extending further protection to young people. The Sexual Offences Act 2003 is already in place in England and Wales and we recognise the importance of UK consistency on this subject through the creation of similar legislation in Scotland.

Barnardo’s Scotland understands that the policy intention of the Act is:

- to enable arrest and prosecution to be made of an adult on their way to meet a child who has been ‘groomed’ by the adult
- to enable police to operate covert operations whereby officers could pose as children and entice sufficient information from the suspected abuser in order to bring about a successful conviction

Barnardo’s Scotland considers this to be a balanced piece of legislation in relation to the protection of children versus the infringement of civil liberties. However, there are some general points which Barnardo’s Scotland would wish to bring to the fore:

- The definition of grooming does not cover those in the same household and we are aware that many instances of sexual exploitation of children occur within the family. Grooming within families, for example - by an uncle, for exploitation by either the relative or an external person will not necessarily be assisted under the proposed new offences. It would have been useful to have considered how this type of behaviour could have been tackled as this limits the potential impact of the legislation.
- There is a need to continue to raise general public and professional awareness and use high profile educative and preventative campaigns in order to protect children from the process of grooming.
- It is essential that statutory and voluntary organisations charged with safeguarding children work in cooperation with internet service and mobile phone providers to protect children from the detrimental effects of grooming and sexual exploitation.
- We welcome the extension of police powers to protect children from sexual harm but would have some concerns about the operation of the legislation where sufficient resources were not available.
- Barnardo’s Scotland welcomes the legislation in terms of the restriction of perpetrators behaviour. However, we would wish to see equal priority given to treatment interventions with perpetrators. If the intention is to affect change in perpetrators behaviour to ensure the long term safety of children, restriction and intervention are both required.
Specific Points

Q1. Does the new offence set out in Section 1 of the attached draft Bill achieve the objective of ensuring that potential sex offenders meeting or travelling to meet a child following grooming behaviour can be prosecuted?

Barnardo’s Scotland generally agrees that the new offence will help move towards the objective of ensuring that sexual offenders meeting or travelling to meet a child following grooming behaviour can be prosecuted.

Barnardo’s Scotland has concerns that if the police are not adequately resourced, implementing the legislation may be problematic. The legislation only comes into effect at the point where an adult travels to meet or meets with a child – this is a considerable way down the grooming process. In circumstances where the police were following up concerns raised by children or parents, the proposed legislation would require that the police wait until the adult meets or travels to meet with the young person before they will have sufficient reason for arresting them. It is in these cases that the proposed Risk of Sexual Harm Orders (RSHOs) may become a valuable tool.

From Section 1 of the Protection of Children and Prevention of Sexual Offences (Scotland) Bill, it seems that there may be evidential considerations to show that there was intent on behalf of the adult to commit a ‘relevant offence’. While we recognise the inevitable limitations in creating legislation for this new offence, we also take note of the fact that there may be challenges in the presentation of evidence.

Q2. Does the new offence strike the right balance in criminalising activity which involves grooming and then meeting or travelling to meet a child? Or should other activities comprise the criminal offence?

Barnardo’s Scotland does not have suggestions to include any further activities within this criminal offence.

Q3. Is the proposed penalty set at the right level?

Barnardo’s Scotland considers the penalty sufficient but would again highlight the need for intervention with perpetrators. There is a requirement to consider most effective form of intervention with adult perpetrators. It would be useful if the prohibitive aspects of the legislation were complemented with a requirement for offenders to participate in treatment programmes.

Q4. Is 18 the right minimum age for the offender or should it be, for example, 16?

Barnardo’s Scotland has given very careful consideration to this issue and recognises that it poses a dilemma. The age of sexual consent in Scotland is 16 years, yet the proposed legislation is effective from 18 years. This leaves an anomalous position for those aged 16 and 17 years who would not be covered by the legislation as it stands.

Barnardo’s Scotland are aware of young people who present sexually problematic behaviour – most of these young people are under the age of 18 years. In our experience, interventions which occur at the earliest stage possible are more effective in helping to prevent future offending in this type of behaviour. The legislation would create a gap in potentially identifying perpetrators aged 16 and 17 years. Care would need to be exercised in separating out threatening behaviour and normal adolescent romantic exchanges – particularly where the age differences are small. Guidance is required on this so that the legislation remains targeted on those who pose a threat through grooming activity.

Barnardo’s Scotland recommends that the age for the offender be set at 16 with the following conditions:

- guidance is created which helps draw distinctions between grooming behaviour and normal adolescent ‘romantic exchanges’
• consideration is given to the role of the children’s hearing system in cases for those aged 16 and 17 years

• treatment programmes for young offenders are appropriately resourced

Q5. Would Risk of Sexual Harm Orders be a useful measure in preventing sex offences against children?

Barnardo’s Scotland welcomes the potential role of the RSHOs in providing opportunities for the police to intervene and prosecute at an earlier stage in the process of grooming. In conjunction with the offence to meet a child following grooming, the proposed new orders could provide the police with powers to act during the process of grooming. RSHOs would help to increase the limited scope of the proposed new offence in relation to the overall process of grooming.

RSHO’s may be effective in a restrictive sense, but it is essential that any work to refrain the behaviour of perpetrators is reinforced with intervention and support to ensure the maximum success.

Q6. Does the proposed list of trigger behaviour cover all relevant activities that might prompt application for a RHSO?

Barnardo’s Scotland believes that the list of trigger behaviours is wide enough to cover all relevant activities that might prompt application for a RHSO.

Q7. Should the use of Sexual Offences Prevention Orders be extended to allow them to be imposed at time of sentencing?

Barnardo’s Scotland would welcome the extension of Sexual Offences Prevention Orders (SOPOs). It is clear that there will be occasions when it would be useful for a court to impose a SOPO when disposing of an offender, rather than requiring a Chief Constable to make an application for an order.

Q8. Are there any other issues in relation to grooming a child for sexual exploitation that we should take into consideration in the proposed bill?

Barnardo’s Scotland generally welcome the introduction of the Bill. The legislation has the potential to be a valuable tool, but it is not the only way of addressing concerns about internet grooming. The following suggestions are proposed:

• Barnardo’s Scotland is particularly concerned regarding the support to be given to victims of this type of offence and that these are appropriately funded.

• Barnardo’s Scotland suggests that attention must be given to the treatment of perpetrators. Punitive deterrents must be reinforced with rehabilitative interventions. It is essential that those who commit or become victim of grooming offences receive suitable treatment if we are to reduce the likelihood of further offences.

• Barnardo’s Scotland recognises the preventative and education work of Scottish Executive in highlighting the issue e.g. the publication of ClickThinking. Children and young people are rightly encouraged to utilise the internet. As a consequence they require to be alert to some of the threats. However, more could be done in this area – particularly linking education programmes aimed at young people and parents with child protection processes.

• Barnardo’s Scotland experience is that young people with learning difficulties have represented a high proportion of those referred to our services as both perpetrators and victims of sexual exploitation. Consideration should be given to the types of measures which will be required to support legislation in this area.
• Barnardo’s Scotland believes there is a continuing need to raise public awareness of the dangers which can arise from children and young people’s unmonitored use of new technologies - press reports have recently kept the issue on the public agenda.

Tam Baillie
Assistant Director (Policy)
Barnardo’s Scotland
15 December 2004

SUBMISSION FROM JAMES CHALMERS, UNIVERSITY OF ABERDEEN

Thank you for your letter of the 29th October inviting me to submit written evidence to the Justice 1 Committee on the general principles of the above Bill. My comments are below.

The offence of meeting a child following certain preliminary contact

I note that the Explanatory Notes state that the Bill “introduces an offence of sexual grooming of a person under 16 by an adult aged 18 or over”. I agree that this is something which should be clearly brought within the scope of the criminal law. At present, such activity may be criminal, but the circumstances in which this is the case are not entirely clear, which may result in the police and prosecution authorities being uncertain at what stage they may intervene. The proposed offence would have the merit of drawing clear lines in an area that is currently rather vague.

Any concerns I might have about the proposed offence relate to the manner in which it is framed, as follows:

It should be understood that clause 1 as drafted goes somewhat further than introducing an “offence of sexual grooming”. All that is required is that the adult has “met or communicated” with the child… on at least two earlier occasions”. There is no requirement that these meetings or communications have involved acts of “grooming” in any sense. There is, perhaps, no good reason why the offence should be so limited – to do so would present rather awkward questions of definition – but the Committee may wish to consider the point. Although clause 1 may be aimed at the problem of “sexual grooming”, it is not an “offence of sexual grooming”, but is in fact rather broader.

It also seems to me that it is unclear why the proposed offence should not also cover persons under the age of 18 who engage in grooming activity, and why there is a requirement of at least two earlier meetings or communications. One prolonged meeting or communication might well be of more significance than two brief instances: equally, it is difficult to see why the question of criminal liability where there has been only one single act of “grooming” should turn on the question of whether there has been a prior – perhaps entirely innocent – meeting or communication.

Risk of sexual harm orders

I would be broadly supportive of these proposals and have only two minor comments to make.

I am not clear why the proposed test for the making of an interim RHSO is whether the sheriff considers it “just to do so”. The test is similar to that which has been adopted for interim anti-social behaviour orders (ASBOs) in England and Wales (Crime and Disorder Act 1998 (as amended), s1D(2)), but it seems this test was not considered appropriate for ABSOs in Scots law: see the Antisocial Behaviour etc. (Scotland) Act 2004, s7. For interim ASBOs in Scotland, the court must apply the same test as for a full ASBO, with the modification that the requirement that the specified person has engaged in antisocial behaviour must only have been satisfied prima facie. Adopting a similar test for present purposes would have the benefit of consistency at least, although it is doubtful whether it would lead to any significant difference in the application of the legislation.

It is not clear to me why the court is prevented from making a probation order when a person is convicted of an offence under clause 7 (clause 7(4)). It may be that probation orders would normally be inappropriate in cases where an accused has failed to comply with an RHSO, but it
seems rather odd to fetter the court’s discretion entirely given that all other sentencing options would remain available (including admonishment or absolute discharge).

I hope that the above is all clear, but please do not hesitate to contact me if anything requires clarification.

James Chalmers
School of Law
University of Aberdeen
21 December 2004
Protection of Children and Prevention of Sexual Offences (Scotland) Bill: Stage 1

10:35

The Convener: Agenda item 3 is the Protection of Children and Prevention of Sexual Offences (Scotland) Bill. I welcome to the committee Tam Baillie, who is the assistant director of policy at Barnardo’s Scotland. Good morning, and thank you for the helpful paper that you supplied, which made useful reading. We will go straight to questions. Why do you think the bill is important?

Tam Baillie (Barnardo’s Scotland): The instruments that are available to protect children from sexual harm are rather blunt. The three main provisions in the bill—the offence of grooming, the risk of sexual harm order and the sexual offences prevention order—will add to the range of measures that can be taken to ensure that youngsters are properly protected. Although we generally welcome the bill, we have reservations that I hope will come out in questioning and be taken on board in shaping the future stages.

The Convener: We have questions on your issues, so do not worry about it. If anything is not covered during questions, I will ensure that it is covered at the end.

Your position is that the current law needs to be strengthened.

Tam Baillie: Yes. I expect that somebody will ask me about prevalence and the increase in the behaviour that the bill covers, but that is not easy to quantify. We know that there has been an explosion of sexually abusive images of youngsters on the internet, and we know that increasing numbers of people are accessing those images. For example, operation ore threw up 7,200 names within the United Kingdom.

Barnardo’s Scotland recently held a conference on the topic, and one interesting statistic that emerged was that Strathclyde police reported that of 295 referrals for computer-related offences, only five related to grooming. The focus of the bill, while it is helpful, targets a small area of activity. Most sexual abuse of children takes place in familiar and family surroundings, rather than through the internet. It is useful that attention is being paid to grooming, although it has to be put in context. The figures on the internet are frightening, but the number of grooming offences is relatively small.

The Convener: It is helpful to have that on the record. Does Barnardo’s have any experience of working directly on any such cases?

Tam Baillie: Yes. We have four services around Scotland that work with young people who exhibit sexually problematic behaviour. In fact, many of the positions that we have adopted on the bill have come directly from the experience of those services. We support the measures generally, but that support is tempered by the professional experience of working with youngsters who exhibit worrying behaviour.

Stewart Stevenson: You have anticipated some of the questions that we wanted to ask. Your paper refers to the need “to protect children from the detrimental effects of grooming and sexual exploitation” through technologies. The second page of your paper refers to working “in cooperation with internet service and mobile phone providers”.

However, it is possible for someone to use an ISP that has no legal existence in the United Kingdom. Could any practical steps be taken to monitor that, or do we have to rely on other means of detecting aberrant behaviour and protecting our children?

Tam Baillie: There are several elements to the detection or discovery of the fact that a child is subject to sexual abuse. The police need to have enough intelligence to know what part of the internet or what communications to target, which requires additional resources. The policy memorandum does not refer to any additional resources being allocated to the police on the basis that they are already carrying out investigations. However, we know that the police cannot keep up with the current amount of internet traffic and that their task is like looking for a needle in a haystack. The police need good intelligence and the ability to follow up that intelligence. We also need to consider the time periods for which internet service providers hold information, which would allow the police to interrogate their systems. Compared with the amount of money that is ploughed into the licensing of third-generation mobile phone technology and the companies that hold the licences, we spend only a pittance on the detection side.

Those are the issues on the policing side. We must also change our general approach to the issue of child sexual abuse. Most of the information will come from the children, not necessarily through the interrogation of internet systems. Having said that, the bill is a helpful additional weapon in the armoury to protect children from sexual abuse.

Stewart Stevenson: You make reference to the importance of internet service providers maintaining records for a period of time to assist police investigations. Do you think that legislation might be needed—although I do not think that the
Scottish Parliament would be competent to pass it—that would require people to access the internet via internet service provider data stores that are within the legal reach of the United Kingdom?

Tam Baillie: Yes. That has already been considered, but the Westminster Parliament decided not to press a requirement on internet service providers to hold information for a minimum period. There are considerations at a national level, and it is beyond the Scottish Parliament to pass legislation on that. However, if a spin-off of the bill was the creation of pressure at national level, that would be helpful.

The Convener: By its nature, grooming takes place when children are using the internet, and different parents will have different rules about the use of computers in their homes. Is Barnardo’s picking up any issues with regard to parents? For example, should there be rules or charters about the use of computer technology in the home?

Tam Baillie: The Scottish Executive has published useful educational information for parents and children on the use of the internet. However, in our experience, young people are much more internet-savvy than ourselves and their parents. There is a job for us to do, as parents, in catching up with how the systems operate and in educating ourselves because, to be honest, children are outstripping us in the use of the internet.

The ownership of mobile phones is another issue. It is expected that 50 per cent of youngsters who are aged 14 and above own mobile phones—although I expect that more than 50 per cent of us here own mobile phones. Young people have a hunger to use the technology, and the internet can be a power for good; we just have to ensure that people are aware of the dangers of introducing strangers into their homes through the internet.

The Convener: Do you mean that many parents do not understand the full extent of what the internet is capable of and therefore cannot monitor their children?

Tam Baillie: That is one aspect. We as adults must try harder than youngsters, who have a natural affinity with new technology.

The Convener: That is not what I meant. Access to the internet for children of different ages must vary widely. Some children use their computer in a room on their own without the presence of parents. Is grooming more likely if children live in households in which they have complete and unrestricted access to the internet in their bedroom?

Tam Baillie: Parents have to exercise good judgment over what their children are up to.

The Convener: You said that you had some experience. I am trying to get a handle on whether having unrestricted access makes a difference. If you do not know, that is fine.

Tam Baillie: The issue is not so much unrestricted access. It is important to have sensible conversations with children and to know what they are doing with the internet or in any activity.

10:45

Mrs Mulligan: You are right to say that such conversations are needed, but they are probably the hardest thing that we do as parents. Unfortunately, we cannot legislate for that, but I am sure that we will return to the matter.

Your written evidence emphasised the need for sufficient resources to be made available, particularly to the police, to ensure that the bill is effective and offers the protection that we seek. Can you give us examples of where resources will be needed?

Tam Baillie: Two other aspects need resources, one of which is child victims. A review of child protection arrangements in Scotland is under way. We need to ensure that child protection is properly resourced. We know that the children’s hearings system is overburdened by care and protection cases and we must have a reasonable balance to what that system is expected to do. It must also be properly resourced when we are aware of children who are victims of abuse or sexual abuse.

The second aspect—it is actually the third, as the police were the first—is the treatment of perpetrators, which must be considered if we are genuine about protecting our children from future harm. The orders for which the bill provides will be restrictive, but we must do more than that to ensure that the perpetrators of sexual abuse change their behaviour. That depends on the stage that their criminal career is at, on how ingrained the behaviour is and on whether they are at a more contemplative stage. We need to consider having resources to try to change perpetrators’ behaviour; if we do not, we will issue restrictive orders with the same risk of repeated behaviour.

The bill contains no measures for treatment interventions for the people whom the bill identifies as offenders. That was one element that we called for in our submission. We may well think about stage 2 amendments in relation to that. Having restrictive orders will help, but they will not in themselves make our children safer in the longer term.

Mrs Mulligan: We will discuss work with perpetrators later. Your first point was about the
resources that are available for the police. I will play devil’s advocate for a minute. If we gave the police more money to do the work now, could we not bother with the bill? Is that the problem?

Tam Baillie: The police need intelligence on which to base police work. Additional resources to the police are not the only measure that is needed. The way in which to give the police intelligence is to have good child protection procedures, so that when children are subject to sexual abuse or may be in danger, we have the right systems, networks and support to assist youngsters and to provide some of that intelligence, so that the police know who presents a danger to our children. We have to operate on a number of fronts. Additional resources for the police only would be of no help.

Mr Bruce McFee (West of Scotland) (SNP): Section 1, which creates the offence of meeting a child following certain preliminary contact, refers to the age of the offender. Under the bill, the minimum age of the offender would be 18, but in your submission, you recommend that it should be reduced to 16, although there are some conditions on that recommendation. Will you explain more fully why you feel that the age should be reduced from 18 to 16? What evidence do you have that 16 or 17-year-olds groom younger children?

Tam Baillie: We thought a lot about that point, as we made clear in our written submission. The main evidence that encouraged us to opt for an age of 16 was our services’ experience of working with young people who are exhibiting sexually problematic behaviour. The information that we got back from our services was that they were working with young people aged 16 and 17 who were capable of using, and at times had used, the internet. On that basis, we felt that it was reasonable to advocate that the offence should apply from the age of 16.

However, there are two main caveats to that. One is that the bill should specify that, for 16 and 17-year-olds, the offence should be dealt with through the children’s hearings system. The second is that there must be clear guidance about the interactions between a 16 or 17-year-old and youngsters to whom they are close in age—for instance, 15-year-olds—because youngsters engage in sexually explicit communications and we do not want the bill to be misused to capture all such communications between youngsters.

The bill needs to contain something about how the offence will be dealt with after it is committed and about the circumstances that would trigger the making of a charge.

Mr McFee: You have raised a few issues that I will explore a little further. Would grooming by a 16 or 17-year-old of, for example, a 15-year-old necessarily be appropriate for criminal law intervention? Your submission suggests that we should aim to intervene in such behaviour rather than to criminalise the individual.

Tam Baillie: We were asked for our view on what the age threshold should be and we pitched it at 16. If it was decided that the threshold would remain at 18, that would still leave the committee and the rest of the legislature with the issue of what would happen with 16 and 17-year-olds. We are working with youngsters who would pose a threat to other young people, so that leaves us with the question of how we should deal with those youngsters. If there was a way of making referrals through the children’s hearings system, which is our care and protection system, we would be satisfied with that, but we cannot just leave 16 or 17-year-olds in some kind of void. Under the bill as it is drafted, that is exactly the position that we would be in.

Mr McFee: Do you have any indication what percentage of your case load those 16 and 17-year-olds would make up? How would you determine which cases were suitable for referral to the children’s hearings system, or are you suggesting that all cases should go to that system?

Tam Baillie: There were two issues there. Could you repeat the first question?

Mr McFee: Can you quantify the problem among 16 and 17-year-olds?

Tam Baillie: As I said, it is difficult to quantify that group. We are talking about a small number, but we deal with a number of youngsters who exhibit sexually problematic behaviour. It would not be right to extrapolate from that group of youngsters.

What was the second point?

Mr McFee: How would you determine which cases were appropriate for referral to the children’s hearings system, or should all cases go through that system?

Tam Baillie: That raises the general issue of how sexual offences by young people are dealt with. Although we have the Lord Advocate’s guidance to procurators fiscal and reporters, there is some inconsistency in deciding which offences go to the reporters and which offences go to the sheriff courts. More than likely, we will back up some of the evidence that we have given previously with a call to review the advice that comes from the Lord Advocate on that. My direct answer to your question is that all cases should go through the children’s hearings system.

Mr McFee: Last but not least, you recommend "that the age for the offender be set at 16 with the following conditions … guidance is created which helps draw
distinctions between grooming behaviour and normal adolescent 'romantic exchanges'.

Tam Baillie: Yes. That wording is clumsy. We had only so long to respond to the call for evidence.

Mr McFee: Given the fact that it has probably been a while since most of us engaged in "normal adolescent 'romantic exchanges'", can you expand on how that guidance might be constructed?

Tam Baillie: I think that I touched on it earlier. Sexually explicit communications are made frequently between youngsters, but some of those communications are about grooming behaviour, in which the youngsters are not communicating on an equal basis. I will not try to establish the wording of the guidance just now, but it would try to separate out those exchanges and would not be a catch-all rule if the age was set at 16. To be honest, even if the age was set at 18 there would be the same need to separate out the different exchanges between an 18-year-old and a 15-year-old, for example, although the difference in age would be slightly more significant in such exchanges.

Mr McFee: If the exchanges were between a 15-year-old and a 16-year-old, it would be a grey area.

Tam Baillie: Yes. We acknowledged that in pitching the target age at 16.

Mr McFee: I wonder whether we would introduce the potential to discredit the bill if we ended up, early on, in a quagmire of trying to differentiate between the two forms of behaviour. Are you suggesting that there has to be a position of inequality between the two parties? Is that the essential element in distinguishing between the two forms of behaviour?

Tam Baillie: I was interested to read the briefing that was produced by the Scottish Parliament information centre. It cited an example from Maine, where an age differential was set as one of the criteria that had to be met before charges could be brought. I regarded that as one of the justifications for having a bar at 18, which would automatically create a two-year gap. The example that is given in the SPICe briefing—of which I was not aware before I read about it—is of an age gap being necessary to trigger the offence.

Mr McFee: In other words, 16 and 17-year-olds could be offenders if there was an age gap of two years or whatever?

Tam Baillie: Yes. That might be even more messy for the legislation; however, I thought that an interesting approach had been taken in Maine.

The Convener: The age difference is an interesting point for debate, in terms of what the legislation should be driving at. What would happen if there was sexually explicit communication between two 16 or 17-year-olds? What would constitute grooming in a case in which there was no age difference?

Tam Baillie: The communication would have to be with someone who was under the age of 16. The closer that the young person's age gets to that bar, the more difficult it may be to interpret the communication as either grooming or just sexually explicit exchanges.

The Convener: You have given a thoughtful analysis of why you feel that the age bar should change. However, you feel that more cases should go to the children's hearings system. How well equipped would that system be to deal with such offences? It does not do so currently and its members are not trained in dealing with that type of offence.

Tam Baillie: We are in the middle of a review of the children's hearings system. One of the considerations will be how well equipped the system is to deal with all cases but especially those involving the older age group. We have the facility to deal with youngsters up to the age of 18, but we have not considered how the system is resourced for that or how it responds to that.

Part of the reason for focusing on the children's hearings system relates to my earlier point that the issue is not simply about applying restrictions when this type of behaviour appears but about finding ways of dealing with it. How do we get a young person or perpetrator of such an offence to look at and change their behaviour?

11:00

The Convener: That is a fair position and, as you said, the whole system is under review. However, do you accept that the current system is not equipped to deal with people from 16 to 18 who have committed such an offence?

Tam Baillie: It has the capacity to do so under the proposed legislation. There might be a question of resources when it comes to how we respond to referrals through the hearings system. We are about to commence the second phase of the review—

The Convener: You have said several times that we need to treat the offending behaviour. Your point is well made, but is the current children's hearings system really equipped to deal with that matter? I do not think that it is.

Tam Baillie: If we had sufficient resources to provide more of the services that we currently provide to deal with sexually problematic behaviour, the answer to your question would be yes.
The Convener: But if those resources were not available, the answer would be no.

Tam Baillie: That is not an issue for the bill.

The Convener: But the bill would have to be amended to allow young people from the ages of 16 to 18 to be dealt with by the children’s hearings system.

Tam Baillie: If the guidance was such—

The Convener: No, the bill would have to be amended in that way. The committee discussed this matter when it considered the Criminal Justice (Scotland) Bill a couple of years ago.

Margaret Mitchell (Central Scotland) (Con): I want to explore some of the issues surrounding the risk of sexual harm orders. On page 4 of your submission, you say that

"it is essential that any work to"

restrain

"the behaviour of perpetrators is reinforced with intervention and support to ensure the maximum success".

What do you mean by that?

Tam Baillie: I will probably repeat myself but, as I said earlier, restricting the behaviour of perpetrators of sexual abuse is necessary and the bill’s provisions will assist in that respect. However, such an approach will have limited impact unless there is some kind of intervention or treatment that requires the perpetrator to look at and change their behaviour.

People who perpetrate sexual abuse against children range from those who contemplate it to those who regularly exhibit hard-driven and determined behaviour. There are many stages in between those two points and we have to examine how society responds to such behaviour. Restriction is one means of addressing the problem, but we need also to consider ways of changing the perpetrator’s behaviour. If that does not happen, the level of risk for our children will be no less great than it is at the moment.

Margaret Mitchell: What form would such intervention or support take?

Tam Baillie: I can speak only from our experience. We have established projects in which a number of youngsters who exhibit sexually problematic behaviour and their families are given assistance; assessments of their risk to the community are carried out and long-term packages of support are provided. We must remember that these people are young and are at a stage in their development at which we can impact positively on their behaviour and the support that the family can provide.

Margaret Mitchell: Who would be responsible for providing those support packages?

Tam Baillie: I had better not say “What an invitation”. We and other organisations would be more than capable of expanding the range of support for those young people.

Margaret Mitchell: Given that the targets of RSHOs have not been convicted of any offence, how would such interventions operate?

Tam Baillie: The RSHO is a civil order, so there is a lesser burden of proof—the balance of probability, rather than beyond all reasonable doubt—which can give cause for concern. However, there are some situations in which an RSHO could be of use. I am thinking of a situation in which young people have been exposed to pornographic videos or pornographic material, there has been a police investigation, and it has been decided not to proceed to prosecution. In such circumstances workers have said to me, “We are certain that something is happening, but there just isn’t the evidence to prove it.” RSHOs could be used when enough evidence is coming forward in terms of what young people say, but there is not enough evidence to go to court and prove the case beyond reasonable doubt.

The problem is that we have numerous examples of civil orders not being used because of misgivings. I note that the policy memorandum contemplates a small number of RSHOs—between 10 and 20 a year. However, because we have so few constructive tools with which we can intervene, in the longer term it is better to have RSHOs than not, even with all the doubts that have to be weighed up because of the lesser burden of proof. We gave that great thought in deciding which position to adopt.

I was asked for specific examples. We have an example of a young person who is staying with an older sibling and there have been complaints. The older sibling was investigated by the police and no charges were brought. We are now working with the younger brother, who is telling us worrying things, but there has already been an investigation. We are left with a youngster for whom we will have to consider whether the circumstances are the best for him. It might be useful to have access to an RSHO for the older sibling in such circumstances.

Margaret Mitchell: That brings me to my next point. If the older sibling was the subject of an RSHO, how would it be enforced?

Tam Baillie: As I have said, one of the key issues is treatment intervention. That should be a condition of an RSHO. Are you asking how that would be policed?
Margaret Mitchell: Yes. What would actually happen if an RSHO was granted?

Tam Baillie: There would be restrictions on the behaviour that he would be able to exhibit. Importantly, he would be required to examine the behaviour that is causing concern. That is where the supportive treatment-oriented element of the RSHO would come in, which does not exist just now. As it stands, the RSHO would say only, “You’re not allowed to conduct yourself in this manner.” It would not add, “And here is something that you need to do about it.”

Margaret Mitchell: Is there a timescale?

Tam Baillie: As it stands, I think the timescale is two years. We have not commented on the length of time, and we have not considered whether RSHOs should always apply for two years, or the point at which someone is deemed to have satisfied the terms of such an order.

Margaret Mitchell: And whether the orders would be extended?

Tam Baillie: We need more time to consider that. The main point is that there are examples that have been identified by our services. In addition, constructive input is required. Orders should not just be restrictive.

Margaret Mitchell: If an order were breached, should the case then become a criminal matter?

Tam Baillie: Yes. That is the case with most civil orders.

Margaret Mitchell: Do you have any problems with that? Could problems arise under the European convention on human rights, given that no offence has been committed and an order has been applied for because it is thought that the risk is sufficient?

Tam Baillie: The case still has to be made by presenting evidence to a sheriff. Evidence must satisfy people that making an order is appropriate. Concern is always felt about orders—including antisocial behaviour orders and parenting orders—that start as civil matters but whose breach is a criminal matter. However, recent legislation contains examples of such powers.

Margaret Mitchell: Do you accept that because the offence in relation to RSHOs is of a sexual nature, the connotations and the stigma that are attached to the orders are likely to be much more of a problem than they are with other civil orders that are granted on the balance of probabilities?

Tam Baillie: That could be the case. However, if we want to protect children and we think that it is better to have than not to have RSHOs, we must weigh up whether the objective is worth running the risk of some of the negative effects of having a civil order.

The alternative is to have a criminal threshold. However, we know that about three quarters of youngsters do not report sexual abuse at the time of its commission or even into early adulthood. Only one in three reports sexual abuse. We must overcome some big hurdles to ensure that youngsters know that their word will be believed.

I recognise that further debate is needed. The outcome depends on which priority we put first.

Margaret Mitchell: Does it have to be a question of priority? Do we not balance the rights of the child, which the bill is of course all about, against the rights of the adult? For example, it is not entirely unknown for an adult to be labelled by a malicious accusation.

Tam Baillie: Those are not insignificant points. People will have to decide where the balance lies. We adopt in our submission the position that the balance lies in trying to increase the protection of children.

Margaret Mitchell: So that would involve examining the circumstances.

Tam Baillie: The bill is in its early stages, so what is missing is guidance to back it and to contextualise the decisions that are being made. Some of those decisions might be fine—particularly those about civil orders and the acceptable threshold of probability. At times, I and many others who work with young people who are subject to sexual abuse know that something is happening but we cannot put our fingers on the evidence.

Marilyn Glen (North East Scotland) (Lab): I will return in a way to the age differential.

Tam Baillie: I thought that I had got away from that.

Marilyn Glen: I will also introduce the idea of vulnerability—a power difference, rather than just an age difference. Your submission says that young people with learning difficulties represent “a high proportion of those referred to our services as both perpetrators and victims of sexual exploitation.” Will you quantify that?

Tam Baillie: I do not have more definition, other than saying that the number is significant. The figure is significant enough for us to include the matter in our written evidence. That raises the issue of vulnerable adults—it is not just under-16s who are subject to the offences that we are discussing.

We talked about judgment over civil orders versus criminal orders. Similarly, careful consideration is needed of how to define a vulnerable adult, particularly because youngsters have different levels of learning difficulty. Some
may have mild learning difficulties, which still make them vulnerable. At what point does the label apply? That is an issue for the committee to consider further. A clear definition would be needed of when somebody is and is not a vulnerable adult, and if there was a way of incorporating that into legislation, it would be helpful to do so, although perhaps it is a matter for guidance. Our experience would make us sympathetic to the committee considering that matter, but defining vulnerability raises some thorny issues.

11:15

**Marilyn Glen:** Would the bill make any difference to vulnerable adults?

**Tam Baillie:** We were not alone in raising vulnerable adults. The bill would not make any difference to them, because the proposed thresholds are based on age, not vulnerability. We take issue with some of those ages. If the committee were to consider a vulnerability threshold, it would need a way of defining vulnerability. Age is easy to define—somebody is 16 or they are not—but there may be different interpretations of vulnerability. We know from experience that a number of young people have mild learning difficulties that have not been picked up at all. Those people do not carry any label, but they are vulnerable.

At an early stage, we considered the position of looked-after children and whether they constituted a particularly vulnerable group. However, that raises issues, because the age of sexual consent is 16, so how do we define the vulnerability of the particularly vulnerable youngsters whom we want the bill, which is well intentioned, to protect? That might be an issue for the committee to consider later. We make no stronger submission than to flag it up.

**Marilyn Glen:** The issue is very important. You mentioned the criticism that the bill appears not to address grooming within the family or household. Will you comment further on that?

**Tam Baillie:** The examples that I gave of situations in which an RSHO could assist were family settings. I return to my opening comment that the vast majority of abuse of children takes place in family or familiar settings, not with people who are not familiar to the children. The bill might not cover family settings, but we know that grooming also happens within such settings. It is all the more difficult to define, because family relations naturally involve familiar contact with young people. We should not forget that most abusive situations occur in family settings.

**Mr McFee:** I accept entirely what you say, but I will press you further on it. Is there a danger of the bill conjuring up an image that modern technology—to be specific, the internet—is the greatest threat? Is there a danger that lessons along the lines of “Don’t speak to strange men” will draw attention away from the main source of abuse, which is the domestic setting?

**Tam Baillie:** As I said, the internet is basically a force for good for all of us—that is probably a controversial statement—and we should not lose sight of that. We need a heightened awareness of the internet’s dangers, but paying undue attention to those dangers and to the danger of abuse happening or abusive situations developing through the internet must not make us lose track of the main danger areas for youngsters, which are in family settings. A review of child protection is taking place, which is also good. The bill is a useful addition to the range of interventions that we have, but I would definitely put the emphasis on what happens to children in family settings and with people whom they know.

**Margaret Mitchell:** Do we have an accurate assessment of how much internet grooming is going on?

**Tam Baillie:** The example that I gave was from a recent conference that we held. Strathclyde’s 2003 figure was 295 referrals for computer-based crime, five of which were related to grooming.

**Margaret Mitchell:** Those are the figures that have been picked up. Are they an accurate reflection of what is going on out there?

**Tam Baillie:** Personally, I do not think so. The figures represent an under-reporting, but I would be cautious about the extent of that under-reporting. Operation ore threw up 7,200 names and operation falcon has followed that up successfully. There is definitely increased activity through the internet, but it might be quite difficult to quantify that.

**Margaret Mitchell:** Have you looked at any studies abroad, such as in the United States?

**Tam Baillie:** Combating paedophile information networks in Europe—COPINE—is a very useful European study group. I can certainly get additional information to the committee if you think that it would be helpful.

**Margaret Mitchell:** I think that one in four children between certain ages had been approached, which seems a horrendous figure. I wondered whether you felt that the figure of 295 accurately reflected the potential scale.

**Tam Baillie:** The figure of 295 is for referrals for computer-based crime, not just grooming. Of that 295, only a small percentage concerned grooming. The information is difficult to get, but if the committee wants more information, we can try to provide it with further briefing.
Margaret Smith (Edinburgh West) (LD): It is slightly unfortunate, but I think that I might be going to ask you questions about things that you do not know anything about.

Tam Baillie: They will be very easy to answer in that case.

Margaret Smith: I will try to explain before I ask my question.

We have been told that the Executive proposes to make further amendments to the bill to bring Scots law into line with the UN Convention on the Rights of the Child and a European Union framework on the sexual exploitation of children and child pornography. At the moment, it is an offence to create, possess or distribute indecent photographs of children under the age of 16. If we bring Scots law into line with the convention and the framework, the age limit would be raised to 18 as has been done in England and Wales. What are your views on that?

Tam Baillie: Funnily enough, I have some thoughts on that.

Barbardo's is a national organisation, so I have colleagues down south who have been campaigning for this. We welcome in principle the proposals that I believe the Deputy Minister for Justice will present. As always, there are some caveats to that welcome, one of which is that it throws up some anomalies—that has been highlighted in some of the briefing that the committee has been given. My understanding is that those anomalies have been dealt with through guidance in the legislation down south, but I am not absolutely au fait with it.

Margaret Smith: By anomalies, do you mean cases such as those in which one of the people aged between 16 and 18 was married?

Tam Baillie: Yes. We return to that 16 to 17 years age bracket. In essence, the age of sexual consent is 16, but some protection would be built into the legislation for 16 and 17 year olds under certain circumstances when offences could be done to them, if you like. In principle, we agree with that because the intention is to try to take youngsters who are subject to sexual exploitation out of the criminal justice system.

The other caveat is that those young people are still youngsters who are at risk. They are still in need of care and protection and that brings in our care and protection system, which is the children's hearings system. In considering what would happen to the 16 to 17-year-olds who would not then be subject to criminal prosecution, we must realise that they are still vulnerable young people. We do not know the detail of the proposed amendment, but it is important that those youngsters are not just set adrift by us saying that there is no offence so no intervention is needed. Those youngsters need support. The issue depends on the detail of the proposed amendment, but we have not seen that yet.

Margaret Smith: Your first caveat was about the anomaly that, in England and Wales, appears to have been covered by guidance and a phrase suggesting that the law does not apply to people who are in an enduring family relationship, which covers not only marriage, but co-habitation or same-sex relationships—I presume that such relationships could be covered by mention of the Civil Partnership Bill. That caveat can be dealt with.

Tam Baillie: There is also the issue of consent. The offence of soliciting is about a financial transaction that takes away consent. If we are considering the implications for 16 and 17-year-olds, it is worth worrying about how consensual the acts are in which people engage. Consideration of that will help to sort out the issues that we want to cover in guidance. We need to ensure that the provisions are not just a catch-all and that we do not get into situations that we really do not want to be in.

Margaret Smith: At present, Scots law has no specific offence of prostitution and it is not an offence to pay a person for sexual services. You have mentioned the issue already, but can you see other difficulties in making it an offence to pay or reward a person who is under 18 for sex or to offer to do so? Do you welcome the proposed amendment on child prostitution?

Tam Baillie: We welcome it, but with the rider that we must consider the care and protection issue and think about how we offer support to young people. We need to consider the interventions and resources that are at our disposal to assist young people. I am not saying that simply because I am expected to ask for more resources; I genuinely believe that if the proposed amendment is well intentioned, it must be followed up with consideration of how to support the young people. We want to remove them from the criminal justice system, but we must also ensure that we offer the right care and protection and the support that they require.

The Convener: Barnardo's does a lot of work with 16 and 17-year-olds. We may not have any choice about the proposed amendments, because some of them will enforce our obligations under European law. Margaret Smith has raised some of the issues. I am certain that, in a well-known red-light area in my constituency, high numbers of younger women are involved. I may be wrong, but I suspect that women who are between 16 and 18 are prevalent there. Although we have not seen the details of the proposed amendment, it seems...
that it would make women in that age group guilty of an offence.

Tam Baillie: My understanding is that it would remove such women from the criminal justice system. My point is that, however well intentioned it is, it will leave the question of how we provide appropriate support. Having identified that age group as vulnerable, what will we do about it? We must consider how to provide adequate support for that group of women.

Marilyn Glen: Are you confident about the positive effects of your treatment programmes? I know that it is difficult to measure that, but what are the success rates? If we are going to push that issue, we need information.

Tam Baillie: I am happy to provide additional information to the committee and I invite members to visit some of our services.

Marilyn Glen: The information is important.

The Convener: There are no further questions. Tam, do you want to add anything?

Tam Baillie: I have said just about everything that I need to—I have taken up enough time. I am satisfied that I have made the points that we feel we need to make.

The Convener: On behalf of the committee, I thank you for your valuable evidence. You have put your points across well and we are grateful for your oral and written evidence.

11:30
Meeting suspended.

11:35
On resuming—

The Convener: I welcome to the committee James Chalmers, who is a lecturer in criminal law in the University of Aberdeen’s school of law and is a member of the Scottish Law Commission’s advisory group on reform of the law of rape and other sexual offences.

Mrs Mulligan: Good morning, Mr Chalmers. I know that you listened to the first evidence-taking session, so it might seem a bit late to be asking you this question. However, do you think that there is a need to create the offence under section 1 of the bill? I ask that because I am aware that, at the moment, cases are reported to the police and are investigated and that the judicial process takes its course. If you believe that it is necessary to create the new offence, could you say what is unsatisfactory about the current situation that makes that the case?

James Chalmers (University of Aberdeen): The creation of the offence is necessary. Some of the activities that the offence strikes at would already be criminal in one of two ways. It might be that online grooming, for example, would amount to the offence of lewd and libidinous practices, which the High Court has previously suggested is the case. There are two problems with that, however. First, although that offence applies to girls under the age of 16, it does not apply to boys who are 14 and over. Secondly, online grooming might not be sexual in itself and the offence of lewd and libidinous practices applies only to conduct that is liable to deprave and corrupt the child. If the conduct is objectively innocent at that stage, that offence is not committed.

The other possibility is that preparatory grooming followed by travelling to meet the child might amount to an attempt to commit a sexual offence. However, an attempt occurs only when someone moves beyond the stage of preparing for an offence to the stage of perpetrating it. It is not quite clear when preparation ends and perpetration begins.

Another factor is that the new offence applies to the intention to commit a sexual offence anywhere, not only in Scotland. Although some statutory provisions cover sexual offences abroad, they do not apply to the same range of sexual offences as the bill does. Furthermore, they apply only outwith the United Kingdom, not to other parts of the UK.

The bill will fill in some gaps, but the main issue is that the legislation will draw some clear lines in areas in which police and prosecution authorities might not otherwise be quite sure at what stage intervention is possible.

Mrs Mulligan: You will have heard Tam Baillie say that Barnardo’s found it difficult to find information about the prevalence of grooming. Do you know of any research that has been done into the extent to which grooming takes place?

James Chalmers: Some research has been done. I am not aware of any being done specifically in Scotland or the UK, although Barnardo’s has been able to report the number of people with whom it has come into contact who have either engaged in grooming or have been the recipients of online solicitations and similar activity.

Earlier, Margaret Mitchell referred to the figure of one in four children. The University of New Hampshire in the United States conducted a telephone survey of 1,501 children between the ages of 10 and 17. It showed that one in five of those children claimed to have received some sort of online sexual solicitation over the previous year. Some caveats should be added to that. Those
solicitations might have been coming from children their own age, only around one in 50 children had received a request to meet and only one in 500 had received such a request from someone who admitted to be over the age of 25. Obviously, we do not know what the actual ages of those people were and the number of actual requests to meet, particularly from people who are not in the child’s age group, might be small.

Mrs Mulligan: You say that there is currently no research in Scotland or in the UK. Are you aware of anybody proposing any research?

James Chalmers: I am aware that Barnardo’s at one point called for a national audit to assess the scale of the problem. If research is on-going, I am not aware of it, I am afraid.

Stewart Stevenson: There was discussion in the previous evidence session of the apparent legal limbo that 16 and 17-year-olds would be in under the bill as it is currently cast. Do you have any views about the legal implications of the fact that the offence can be committed only by a person aged 18 and over rather than by a person aged 16 and over?

James Chalmers: As Tam Baillie said, there is certainly evidence to suggest that sexual offences are committed by children under the age of 18. A Home Office study that was published in 1998 suggested that adolescents might be responsible for as many as a third of all sexual offences. I tend towards the view that the age that the bill currently specifies, which is 18, may need to be reduced. I agree that prosecution might not be the normal response, but at least the matter would clearly be covered by the criminal law.

Stewart Stevenson: Would there be any legal difficulties if the age were to come down to 16?

James Chalmers: There is a general problem with regard to the extent to which the current law should cover consensual sexual activity between children and young adults of around the same age. I do not think that that is a problem in the bill as such; it is a problem that relates to the underlying law on sexual offences. I think that the Scottish Law Commission will examine the issue in its current review of sexual offences, although that is a matter for the commission. The bill applies only where the person concerned is acting with the intention of committing a sexual offence.

Unfortunately, there are no easy solutions to the problem. The law on sexual offences has fairly recently been reviewed and changed in England. The Home Office found the matter to which I have referred rather difficult and eventually gave up trying to make specific provisions to exempt such activities from the scope of criminal law. I am not sure that the problem can be addressed in the bill; it is a problem with the law on sexual offences generally.

Stewart Stevenson: My next question is on the cross-jurisdictional issues that are associated with age, in particular when somebody is legitimately married to someone who is under the age of 16. What legal issues would be associated with, for example, a marriage exemption?

James Chalmers: Some of the underlying offences already contain marriage exemptions. Most obviously, the offence of sexual intercourse with a girl under the age of 16 applies only to unlawful—that means extramarital—sexual intercourse. However, with other offences, there is either no explicit exemption or the issue is unclear. There would be no great difficulty with such an exemption.

Stewart Stevenson: In practice, would the situation be that the fiscal would decide that it would not be in the public interest to prosecute?

James Chalmers: In practice, the issue could be—I am sure that it would be—dealt with as a matter of prosecutorial discretion. However, it could be also be explicitly dealt with in legislation if that were thought to be desirable.

Stewart Stevenson: A House of Commons research paper that was produced in 2000 suggests that the legal age of sexual consent in Spain is 12—a footnote makes the point that in Spain

“there is no statutory age of consent”,

although in practice it seems to be 12. In that example and in others, such as Northern Ireland where the age of consent is 17, are there cross-jurisdictional issues about which the committee should take particular care?

James Chalmers: If someone is travelling to commit an offence abroad, the bill does not require that what they propose to do be criminal under the law of that country, so there is an issue about whether it would be appropriate to prosecute somebody for intending to travel to commit an offence in, for example, Spain that would not be an offence in the UK or Scotland. Given the huge range of provisions in different jurisdictions, the matter might easily be dealt with only by way of prosecutorial discretion. The alternative would be to adopt a rule that the bill does not apply to actions that are not criminal in the country where they are to be carried out, but that would defeat some of the objectives of the bill.

Stewart Stevenson: The footnote that relates to Spain in the House of Commons library research paper states:

“there is no statutory age of consent. In general, consensual sexual relations are not penalised from the age of 12, although a person aged over 16 who has sex with a
person aged between 12 and 16 may be liable to prosecution?".

It appears difficult to rely on legal provisions in other jurisdictions, and that is only in relation to the European Union; I suspect that the issue becomes much more complex outwith the EU. Do you agree that it would be unwise to rely on legal provisions elsewhere?

11:45

**James Chalmers:** Yes. Because legal provisions in different countries are not consistent, a neat general rule cannot be adopted, other than one that would remove actions that are not criminal in overseas jurisdictions from the scope of the bill entirely, which would be undesirable.

**Mr McFee:** The offence in the bill will apply if a person has had at least two prior communications or meetings with the child. Is that necessary? Could the offence be constituted with only one prior meeting or communication? Could an offence be committed if an adult simply arranged to meet a child without prior communication? Which communication is made with a child through an intermediary?

**James Chalmers:** On your last point, I am not sure in what circumstances a person could arrange to meet a child without prior communication with them. Do you mean cases in which communication is made with a child through an intermediary?

**Mr McFee:** That is a good point. I was thinking about that as I asked the question. How would a person arrange to meet somebody if they had not communicated with them? Perhaps modern technology has gone further than I know. I suppose that we are talking about opportunists.

**James Chalmers:** One of the practical issues is proving exactly what the adult intends to do, which may be difficult in the absence of prior communication. However, I have doubts about the requirement for two previous meetings or communications. The bill does not require that those communications must have a grooming nature—they could be entirely innocent or inadvertent, but that would suffice to bring the further actions under the scope of the bill. I assume that the reason is that it is difficult to find a definition so that the provision would apply only to communications that have a grooming nature.

One lengthy internet conversation could last hours or the best part of a day and could be much more significant than two short conversations. That is why I have my doubts about the limitation of requiring two previous meetings or communications. I am not sure that that provision serves any useful purpose.

**Mr McFee:** It has been whispered in my ear that a third party could be involved in the communication. Is that covered in the bill, particularly if the third party is furth of our shores?

**James Chalmers:** That could be covered by treating the situation as a conspiracy of two people acting together to commit a criminal act. However, the bill is not absolutely clear on how that would be dealt with. An explicit provision might be needed if the issue was thought to be a problem.

**Mr McFee:** You raise a couple of points that we should consider.

Is it your understanding that the bill is directed only at cases in which the adult initiates the contact or is the bill neutral on that issue so that it does not matter whether it is the adult or the child who initiates the contact, for whatever reason?

**James Chalmers:** The bill is absolutely neutral on that. There may be good reasons for that. Although the bill is not limited to cases of internet grooming, I will use that as an example. A child might initiate contact with an adult but believe that the adult is another child because they portray themselves online in a certain way. An attempt to limit the offence to cases in which the adult initiates communication would give rise to serious problems, such as problems with proof. However, the wording of section 1 makes the issue irrelevant. Of course, the matter may be taken into account in the exercise of prosecutorial discretion.

**Mr McFee:** We need to follow up the point about how third parties come under the bill and the point that one long communication might be more effective for grooming than a couple of shorter ones.

**The Convener:** You raised the issue of whether it matters who initiates. The Executive’s evidence is not clear on that point. It did not suggest that there was a particular reason or subtext for not including a specification in the bill, so we need to pursue the matter.

I want to press you on how the offence should be drawn up. We are trying to show that the adult has taken some action to arrange to meet the child. Do you think that there is a simpler way of creating an offence—for example, from the communication? If there are two communications, should that not be enough to make it clear that someone is arranging to meet a child and has committed an offence? Do we need something in the middle?

**James Chalmers:** In that situation, there is still scope for intervention through a risk of sexual harm order. There is something to be said for the view that, where matters are only at a very preparatory stage, a criminal prosecution may not be the best way of dealing with the actions. An
intervention such as a risk of sexual harm order would probably stand more chance of being effective.

The Convener: In your view, would it be possible to make it an offence for someone to arrange by internet communication to meet a child who thinks that that person is their age? Is it necessary also to show that there has been more than an internet exchange and that the adult has acted on a communication by arranging to buy a ticket to travel to meet the child?

James Chalmers: Under the bill as drafted, it would be necessary to show that the adult had met the child or travelled with the intention of meeting them. An offence could be drafted that covered simply the communication, but that might pose evidential difficulties. It might not be possible to be certain from the communication that the adult seriously intended to meet the child. We may be confident that an adult is not just contemplating a sexual offence, but has the intention to commit it, only when they take action to travel to meet a child. That may be one reason for limiting the offence in that way.

The Convener: Are there any evidential issues relating to the communication? Could someone argue that the fact that a message has come from their computer does not mean that they typed it? Are there difficulties in proving that the communication came from the alleged offender?

James Chalmers: There is always a general problem with evidence that is obtained from computers in such a way. That problem is not peculiar to the bill. I am not sure that much can be done in the bill to deal with it. To a certain extent, it is a technological rather than a legal problem. At issue is the information that the police are able to derive from computer and other records.

The Convener: Perhaps that is why the bill includes the provision that the accused must have made arrangements, which shows that they are acting on a communication and provides confirmation that the communication came from them. Without that confirmation, one would have to prove that the communication came from the accused.

James Chalmers: I agree.

Margaret Mitchell: In your view, are risk of sexual harm orders compatible with the European convention on human rights?

James Chalmers: In my view, they are compatible with the convention. They are very similar to antisocial behaviour orders in the way in which they are drafted. In the case of McCann v Manchester Crown Court in 2002, the House of Lords held that ASBOs were compatible with the convention, at least under English law. The same issues arise in relation to risk of sexual harm orders. The basis for any ECHR challenge would be the argument that the orders are criminal penalties and that it is inappropriate to apply the safeguards that apply in civil proceedings to criminal cases. However, the case law of the European Court of Human Rights makes it clear that court proceedings that cannot result in a penalty are not criminal proceedings for the purposes of the European convention on human rights. The proceedings that we are discussing can result only in an order being made. A penalty might be imposed later on if the order is breached, but that will require the criminal standard of proof to be met in criminal proceedings. The ECHR safeguards would be properly met in such proceedings.

Margaret Mitchell: That has taken us quite far down the proof slide, as it were, but perhaps we could go step by step. Are you confident that, in the event of such a challenge, no distinction could be made between the stigma that is attached to breaching, or even to being served with, a risk of sexual harm order and that which is associated with other kinds of orders for behaviour such as vandalism, which one would in no way condone but which nevertheless tends not to provoke the same kind of reaction that the behaviour that we are talking about does?

James Chalmers: Civil proceedings may also involve significant stigma. For example, in an action for defamation that is based on an allegation that someone committed a sexual offence, the relevant standard of proof would be on the basis of the balance of probabilities. In such an action, the safeguards that are applicable in criminal proceedings would not apply.

The House of Lords judgment on the McCann case was quite clear that court proceedings that could not in themselves result in a criminal penalty were not criminal proceedings for the purposes of the ECHR. In an application for an antisocial behaviour order, allegations might be made that could attract almost as much stigma as those that might be made in an application for a risk of sexual harm order. However, despite the stigma attached to those allegations, the proceedings would not be criminal proceedings and it would not be a violation of the ECHR to deal with the issue as a civil matter.

Margaret Mitchell: Did the judgment consider only the proof, evidence and consequences of the issue? Did it take into consideration the balance between the obvious necessity to protect the rights of the child and the desire to protect the rights of the adult?

James Chalmers: In the McCann case, which concerned an antisocial behaviour order, the House of Lords laid a great deal of stress on the
rights of communities to be free from antisocial behaviour. The same sort of argument could apply to the rights of the child to be free from unwanted and illegal sexual activity. That would also be an important consideration.

**Margaret Mitchell:** In other high-profile cases in the past, evidence has been called into question and found in retrospect to have been unsubstantiated. Is there any danger of that kind of thing happening if a risk of sexual harm order was imposed on an adult after a malicious accusation, given that the standard of proof—a matter on which the bill is silent—is likely to be, as you have confirmed, on the balance of probabilities?

**James Chalmers:** With stigma, there is always an issue that wrongful accusations might be made. A potential way of dealing with that problem is to consider whether it would be necessary for an application for a risk of sexual harm order to attract publicity and for the person against whom the order is sought to be publicly named. Depending on how the bill operates in practice, it might be felt that publicly naming the individual would be inappropriate and unnecessary, just as the names of those who are on the sex offenders registers are not released. That might be one way of dealing with the stigma issue.

**Margaret Mitchell:** We have covered most aspects apart from the sanction for a breach of an RSHO, which is a civil order. We may have gone over that issue, but I want to be absolutely sure that we have the matter on record.

**James Chalmers:** Under section 7, the bill explicitly provides that the sanction for a breach of a risk of sexual harm order or interim RSHO would be a criminal prosecution. In that situation, the criminal standard of proof and all the safeguards that apply in criminal proceedings would apply.

**Margaret Mitchell:** Is that the usual sanction for a breach of a civil order?

**James Chalmers:** No. The measure that is most analogous to a risk of sexual harm order is, I suppose, an interdict. The appropriate sanction that follows on from proceedings for breach of interdict is dealt with in the civil courts but the criminal standard of proof applies because of the nature of the allegations involved.

**Margaret Mitchell:** However, the proceedings under the bill would go a bit further in that they would be for a prosecution rather than for an interdict.

**James Chalmers:** That is correct, but an action for breach of interdict can result in criminal penalties. Although the action takes place in the civil courts, the proceedings are, in effect, criminal in nature.

**Marilyn Glen:** The types of conduct that section 2(3) identifies include

*“giving a child anything that relates to sexual activity or contains a reference to such activity”*

and

*“communicating with a child, where any part of the communication is sexual.”*

Is there any risk that, for example, a doctor who prescribed the contraceptive pill for a 15-year-old girl or a schoolteacher who provided sex education would be subject to an order?

**James Chalmers:** No. A doctor or someone else in that situation would commit an act that fell within the scope of the section, but that would be insufficient for a chief constable to bring an action before a court to make an order, because it is also necessary to show that an order is required to protect

*“children generally or any child from harm from that person.”*

That condition would not be satisfied.

**Marilyn Glen:** That covers the doctor. What about the teacher?

**James Chalmers:** The same applies to the teacher. It would not be necessary to make an order to protect any child from harm from the teacher. If that is a concern, a model is available in the English Sexual Offences Act 2003, which contains the offence of facilitating commission of a child sex offence and an exception for teachers who provide sexual health advice and doctors who provide contraception—for anything that is done for a child’s welfare. Those provisions would provide an appropriate model if it were felt necessary for the bill to say that such actions do not fall within the scope of section 2. Even if they did fall within the list of acts in the section, the necessity test would not be met.

**Marilyn Glen:** The bill defines a child as a person who is under 16. What is the situation when the target of an application for an RSHO reasonably believes that the younger person is over 16?

**James Chalmers:** That person would still have committed one of the acts that is referred to. It is not necessary to show a relevant criminal state of mind; it must simply be shown that they committed the act. If the trigger condition was satisfied, an order could be made. However, if the person concerned reasonably believed that the child was over 16, it is difficult to see how the test that an order must be necessary to protect children from harm could be passed.
The Convener: I will return to Margaret Mitchell’s questions on risk of sexual harm orders, which you said are compatible with the ECHR. I am a bit uneasy about how wide the scope is. The bill gives no clues to the evidence that must be led, other than what is necessary to protect a child. Does the bill need more detail about what the court will look for? In the absence of that detail, I presume that, as a chief constable can request an order, they must lead evidence that a child has perhaps been sexually abused or has had sexually explicit material put in front of them. In some cases, a chief constable may lead evidence that would be insufficient to be led in a court of law. In leading evidence, will such issues have to be raised to obtain a sheriff’s agreement to a risk of sexual harm order?

James Chalmers: Evidence might be led that would be inadmissible in a criminal court, but it would still have to be admissible in a civil court, because civil proceedings will be used. The standard of proof that will apply in such cases may raise an issue. I understand that the Executive’s view is that, because the bill is silent on the subject, the civil standard of proof applies and only proof on the balance of probabilities is required. I am not as confident about that, because it has been said of antisocial behaviour orders in England, which are made on a similar basis, that the criminal standard of proof must apply and that proof must be beyond reasonable doubt.

It is impossible to say whether Scottish courts would take the same view on the provisions in the bill, which are different in nature. I am not sure whether a conclusion can be reached, because in some circumstances Scottish courts have ruled that the higher standard of proof applies in civil proceedings. However, even if it did, the other rules of criminal evidence would not apply. For example, there would be no prohibition to the same extent as in criminal law on the use of hearsay evidence. Corroboration—evidence from two independent sources—would not be required. There would also be no requirement to show that a person against whom an order was sought had acted with a criminal state of mind. It would be necessary to show only that they had committed the act in question. Therefore, the standard of proof required would clearly be much lower.

The Convener: Do you agree that evidence could be presented to a civil court that might refer to a crime that cannot be proved in a criminal court?

James Chalmers: Yes.

The Convener: Would that be compatible with the European convention on human rights?

James Chalmers: Yes, because the only situation in which the matter could be resolved by a criminal penalty’s being imposed would be if, in a subsequent prosecution, a breach of the order were proved beyond reasonable doubt.

The Convener: Is not it a fundamental human right that if someone has committed a crime for which there is evidence they should be tried in front of their peers in a criminal court?

I come next to the interim order, which seems to me to be bizarre, because there is no test whatever for it. I realise that a risk of sexual harm order might be used when a person’s behaviour is not necessarily criminal, but is such that we want to prevent it from continuing. Are you comfortable with trying people under the rules of a civil court when the evidence against them is insufficient for them to be tried in a criminal court?

James Chalmers: On the basis of the law as it stands, I am comfortable that what is proposed appears to be compliant with the ECHR. That may not mean that it would, as a matter of policy, always be advisable to seek RSHOs. A decision’s simply being compatible with the ECHR does not mean that it is a wise decision. Orders such as the RSHO—for which we could certainly go beyond what is required for the ECHR—are designed to deal with situations in which it is not possible to bring a criminal prosecution but there is thought to be risk. Therefore, in a sense, the RSHO represents a deliberate policy decision to relax the standard of proof to allow preventive measures to be taken. The Executive might give you the answer that the order would not in itself require that the person in question was guilty of a crime. To obtain an RSHO would certainly require proof that a person had committed an act. If it could be proved that such an act also involved an appropriate criminal state of mind, that would amount to a crime. However, there is no need to prove such a state of mind in order to obtain an RSHO.

The Convener: That is my point.

My next question is about the fact that the RSHO provision has no detail about what needs to be proved in court. Do you think that there should be detail about what must necessarily be shown?

James Chalmers: I am not entirely sure how it would be possible to frame a provision along such lines. The provision is designed to allow an order to be made if it is shown that a child is, or children are, at risk. I am not sure why, provided that that were shown, it would be desirable to limit how it might be shown. I have great difficulty in envisioning what any such restriction would look like, or how it could be usefully drafted.

The Convener: Section 5 makes provision for an interim RSHO but, unlike the full order, there is no test for the making of such an order other than
a sheriff thinking that it is just to do so. Should we have a clearer test for the interim RSHO?

James Chalmers: I think that that provision is rather surprising, which I touched on in my written submission. I think that the test for the interim RSHO is modelled on the English legislation on antisocial behaviour orders in the Crime and Disorder Act 1998, in which an interim ASBO may be made if a court considers that it is just to do so. It seems that that test was not considered appropriate for the Scottish antisocial behaviour legislation—the Antisocial Behaviour etc (Scotland) Act 2004—in which all the conditions that are required for a full ASBO must also be met for an interim ASBO. However, it is necessary only to show prima facie evidence that the acts that would justify making an order had been committed. In a sense, the test for a full order is relaxed to the extent that only prima facie proof of the act is required. However, it must still be shown that the order is necessary to protect a person from antisocial behaviour. As I said, that is a clear and somewhat stricter test than that which is proposed in the bill. The Antisocial Behaviour etc (Scotland) Act 2004 provides a clear model that could be followed.

I should explain that the written evidence that I submitted, which does not relate to my oral evidence, was submitted only yesterday afternoon, so I suspect that few people have seen it yet.

The Convener: I have some difficulty with this issue and have asked the Executive about it. If we are treating the protection of children as the priority for the system and we get to the point at which it is necessary to apply for an order to protect the child, the system should give priority to that, rather than be modelled on antisocial behaviour orders, the nature of which is completely different.

I am not in any way trying to downgrade the serious issue of antisocial behaviour, but given that child protection is regarded as being a priority, we should design the legislation so that we can reach the point at which we get a case to court. An interim order would seem to defeat any attempt to deal urgently with a matter. Is it necessary to have an interim order?

James Chalmers: An interim order is designed to be used pending a hearing on a full sexual harm order. If there is a problem, it is a problem with orders in general rather than specifically with the interim order provisions.

It might simply be that it is, in some cases, difficult to lead evidence that would satisfy a criminal court that an offence has been committed. The situation with regard to antisocial behaviour orders is analogous to the extent that it was found that the victims of antisocial behaviour were unwilling to give evidence for fear of reprisals. Children who have been the target of behaviour that would be covered by an RSHO might be unwilling or unable to give evidence. Because proceedings are civil, hearsay evidence could be used.

There are, of course, provisions to address those problems that would allow for children’s evidence to be taken in special ways in criminal proceedings, but the matter might be more easily met by the relaxed standards of evidence that are required in civil matters. I take the point that that would reduce the protections available to the person who was the subject of the order.

If the problem is considered to be to do with the stigma that attaches to an order’s being made, I think that there is something to be said for the view that the proceedings should attract anonymity and that the person against whom an order was sought should not be publicly named.

The Convener: Would you take the view that, if there were to be an offence in the future, after an order had been applied, the criminal court that was dealing with the case should have that information before it? In other words, should the order be treated the same as previous convictions?

James Chalmers: If the offence for which the person was being prosecuted was a breach of the order, the court would necessarily have the details of the order in front of it. If the person was being prosecuted for a full criminal offence, I expect that they would, as a matter of practice, be prosecuted at the same time for a breach of the order. Again, in that case, the court would have before it the fact that the order had been imposed when it was imposing the sentence.

The Convener: The court would not have that information before the sentence was imposed.

James Chalmers: That is correct.

The Convener: So, in your view, a breach would be treated like a previous conviction.

James Chalmers: No—it would not be treated like a previous conviction. If an accused were being prosecuted for breach of an RSHO, the fact that they were being prosecuted for that offence would demonstrate that they had been subject to an order in the same way that somebody who was prosecuted for—

The Convener: If an unrelated offence—that is, one other than a breach of the order—were committed, would the order be treated in the same way as a previous conviction would be?

James Chalmers: If the offence were unrelated, my view is that the order would not be treated as a previous conviction. Such evidence would not normally be relevant evidence in such a case,
which would mean that it might not be possible to lead it. I do not want to state categorically that such evidence could never be led, but it would not normally be evidence that would be relevant in relation to proving a charge against the accused in a case such as the one that you outlined.

Stewart Stevenson: Will you confirm that, for an interim antisocial behaviour order, there has to be a demonstrated urgency and—this is my recollection, which you might confirm or otherwise—it is not necessary that the person on whom the order might be served has been found?

12:15

James Chalmers: I will consult my copy of the relevant legislation, which I have with me.

Under the Scottish legislation on ASBOs there must be, for an interim ASBO to be made, an application for a full ASBO, which must have been intimated to the person against whom it is sought. The conditions for making an interim ASBO are the same as those for the full ASBO, with the exception that, rather than satisfy the court that the accused has engaged in antisocial behaviour—roughly speaking—it is necessary only to satisfy the court prima facie that that condition has been met. That is the one difference.

Stewart Stevenson: I must confess that although I remember the discussion on that subject, I do not remember the outcome. One of the arguments that was made on interim ASBOs was that the supposed perpetrator of antisocial behaviour should not be able to escape having an order placed on them by removing themselves and not turning up. Are you suggesting that we did not win that argument?

James Chalmers: I will just check the statute. It states that the application must be intimated.

Stewart Stevenson: Is that on a best-effort basis?

James Chalmers: Yes—the intimation need not necessarily be successful.

Stewart Stevenson: Therefore, under the Scottish legislation on antisocial behaviour, it is possible that a person on whom an interim antisocial behaviour order—not a full order—has been served could be unaware of that.

James Chalmers: Yes.

Stewart Stevenson: Is that mirrored in the bill’s provisions for interim RSHOs?

James Chalmers: The bill requires only that the application must be intimated.

Stewart Stevenson: Again, such an application might or might not have been successfully communicated. Therefore, there are some distinct differences in the proposals for the interim RSHO that would cover particular circumstances that might apply in a small percentage of cases.

James Chalmers: Yes.

Stewart Stevenson: So the existence of an interim RSHO could have a value in preventing the person on whom it might be served from thwarting the protection of the child in question simply by removing themselves for a period.

James Chalmers: Yes, although it would still be necessary to make that person aware in some way of the order’s existence for it to have any value. The matter is not clear from section 7, which would create the offence of breach of an RSHO or interim RSHO, but it is probable—if not certain—that the courts would require that the accused was aware of the order’s existence before they could be found guilty of a breach.

Stewart Stevenson: Are you suggesting that, if a person against whom an interim order has been sought and granted has commenced a journey and left the jurisdiction of the UK, they could not necessarily commit a breach of the interim RSHO if they were unaware of the granting of that interim order?

James Chalmers: Yes. The offence of breach of an RSHO, which is the same whether the order is a full or interim RSHO, requires that the offender has breached the terms of the order “without reasonable excuse”. Not being aware of the order would generally be a reasonable excuse. However, if the person knew that an RSHO was about to be made and deliberately absented himself or herself from the jurisdiction in order to avoid finding out about the order, that might not be treated as a reasonable excuse. That would have to be determined case by case. The courts would probably require knowledge of the order or the risk of the order. It is difficult to see how, if an order of which the accused was entirely unaware had been made, the accused could not be said to have a reasonable excuse for not knowing that they were prohibited from doing certain things.

Stewart Stevenson: So, after all that, under what circumstances will interim orders be of value?

James Chalmers: Interim orders will be of value simply because it will take time, in many cases, to schedule a full court hearing at which all the evidence can be led. Under the terms of the bill, interim orders are designed to cover the gap between proceedings being initiated and a full hearing before the sheriff.

Mrs Mulligan: On the point that Stewart Stevenson was making, would the RSHO always be about preventing an act that was, in itself, an offence?
James Chalmers: No. The terms of the RSHO are not limited in that way. All that it has to do is prohibit the person against whom the order is taken out from doing anything that is described in the order. The fact that breach of an order is an offence demonstrates that the order is not designed to be limited to preventing things that would constitute offences. If that were the case, there would be no need for breach of an order to be an offence. There is a necessary implication that the order may go much further than simply prohibiting criminal offences.

Margaret Smith: You may have heard me ask this question of Barnardo’s earlier. The Executive has proposed a series of amendments for which we do not yet have the text, so we are slightly in the dark, although we know that it is trying to bring Scots law into line with the UN Convention on the Rights of the Child and the EU framework regarding the sexual exploitation of children and child pornography. The present law makes it an offence to create, possess or distribute indecent photographs of children under 16. The bill proposes to raise that age limit to 18, as has been done in England and Wales. We would be interested to hear your views on that and on the need for exceptions and exemptions to that to cover circumstances in which the person involved is married or, as in England and Wales, is in an enduring family relationship; that is, cohabiting or in a same-sex relationship.

James Chalmers: I was aware of the Executive’s proposals, and I am grateful to the clerks for making me aware that that issue was going to be raised today.

My views are similar to those expressed earlier by the witness from Barnardo’s. It seems that it would be a sensible change to make, but there would need to be caveats, possibly including a marital or cohabiting-type exemption. The same considerations seem to apply that apply generally to criminalisation of sexual activity between young people. Just as criminal liability and prosecution may not be the appropriate response to sexual intercourse between a 16-year-old and a 15-year-old, it may not be the appropriate response to two 17-year-olds taking indecent photos of each other, even if they are not in an enduring family relationship or something similar. That may be best dealt with through procurator fiscal discretion rather than through attempting to frame the matter in legislation. When the parties to such an offence are similar in age, they would not normally be the subject of a criminal prosecution.

Margaret Smith: At present, it is not an offence to pay a person for sexual services, irrespective of the age of the provider of those services, unless the child is under 16, in which case the age of consent is a consideration. Can you foresee any difficulty with making it an offence to pay or reward a person under 18 for sex or to offer to do so? What implications does that have for our view of the law on prostitution, which is currently under review in Scotland?

James Chalmers: The practical implications of such a change would be relatively minor, especially concerning a girl under the age of 16, because the examples that you cite would already be criminal. The implications would obviously be more significant if the girl was aged between 16 and 18. I cannot foresee any specific difficulties in making that change. It might be desirable to make it clear that the child is not guilty of the offence as an accessory. That problem arises generally in the law on sexual offences in Scotland, and has never been resolved by the courts for the simple reason that people in that situation are not prosecuted.

However, for the avoidance of doubt, it might be desirable to make it clear that a child who sells sex is not guilty of aiding and abetting the purchase of sex by an individual. Subject to that caveat, I see no particular problems with the provision. Much might depend on exactly how concepts such as reward are defined in the legislation.

Margaret Smith: Would it be necessary to prove that the person who procured the prostitute was aware of the prostitute’s age? I offer a practical example. Someone who is driving around the middle of Glasgow or Edinburgh might choose—possibly in great haste—a young woman from the street who turns out to be 17 and a half years old, rather than 19 years old. I presume that for that person to be guilty of an offence, it would have to be proved that they knew that the young woman was under 18.

James Chalmers: It is difficult to answer that question because the matter depends in part on how the Executive chooses to draft the amendment. The law could be drafted as you suggest, but it is more likely that the Executive will propose a defence of reasonable belief, instead of placing a positive obligation on the prosecution to show that someone had knowledge of the individual’s age. There might be a defence of reasonable belief that that person was over the age of 18, which might be sufficient to deal with concerns.

Of course, there are general issues beyond the scope of the bill concerning the extent to which the law should criminalise the sale of sex by adults. However, if it is accepted that that should be outwith the scope of the criminal law, it would be desirable to allow a defence of reasonable belief—which tends to be the norm in Scots law—rather than to place a positive obligation on the prosecution to show knowledge of the age of the victim, which is very difficult.
The Convener: As there are no further questions, I thank you for your evidence. You have made some valuable points that we need to consider. Would you like to make some concluding remarks?

James Chalmers: No. All the points that I wanted to make have been covered in questioning.
SUBMISSION FROM ASSOCIATION OF CHIEF POLICE OFFICERS IN SCOTLAND

I refer to your correspondence dated 29 October 2004 in relation to the above subject, which has been considered by members of the Crime Business Area, and can now offer the following by way of comment.

The internet has had a significant impact on society. For children it offers great opportunities to both communicate and learn and has been widely embraced by them. Alongside the legitimate benefits the internet offers there are potential dangers, the most serious being the activities of paedophiles to use the medium of chat rooms and instant messaging with the intention of “grooming” children for sexual abuse. Against that backdrop members welcome the proposals by the Scottish Executive to bring forward the Bill to strengthen the law in what the Scottish police service acknowledge to be a difficult, demanding and sensitive area. Members acknowledge that there is a need to:

- Make the internet a safer place;
- help and safeguard children at risk; and
- hold perpetrators and those who are a potential threat to account.

The Association has had the opportunity to respond to the consultation on the draft bill and took that opportunity to express some reservations on the potential difficulties in effecting the desired outcomes.

The following comments and observations are offered in response to the three key areas of the proposed legislation.

Grooming

In evidencing the offence of grooming, members agree that the offence at Section 1 will be difficult to prove, although it may provide a basis for prevention or disruption of paedophile activity. Due to the difficulty in obtaining evidence, it is likely that the new offence would only be used in a very small number of cases and therefore not address the problem of on-line grooming as effectively as intended. It would be inappropriate to discuss, in this submission, the tactics that the police service would consider using to combat or investigate potential offences/offenders.

Risk of Sexual Harm Orders (RSHOs)

RSHOs will provide some means of affecting the behaviour of those sexual offenders whose conduct has not resulted in any convictions. As they are to be applied for by Chief Constables, there will be an impact on forces in terms of identifying offenders and preparing civil cases for the consideration of courts. Forces will then be duty-bound to proactively monitor RSHO subjects for compliance with the conditions of their orders. The demand for resources, particularly for covert methods, may be significant in terms of both people and finance.

Sexual Offence Prevention Orders (SOPOs)

The proposal to extend the use of SOPOs to judges may be expected to generate significantly more orders than currently exist. As with RSHOs, forces would be duty bound to monitor the subjects of orders for compliance, albeit many would already be the subject of general police monitoring as registered sex offenders. However, some increase in resources must be anticipated.

In response to the consultation on the draft bill, members raised concerns regarding the age factors that were being proposed. The minimum age requirement of 18 years for the “adult” perpetrator is inconsistent with Scots Criminal Law. In relation to RSHOs, members agree that the provision of this section could apply to persons who are aged 16 or 17 years; indeed there are occasions when
persons under 16 years have been assessed as likely to pose a risk of significant harm. The Association has previously proposed adjustment to the draft bill to take account of these concerns.

The Association welcomes the opportunity to provide evidence to Justice 1 Committee and where required provide exploration and information on the issues commented in this submission.

William Rae
Chief Constable (Hon. Secretary)
Association of Chief Police Officers in Scotland
21 December 2004

SUBMISSION FROM LAW SOCIETY OF SCOTLAND

The Criminal Law Committee of the Law Society of Scotland (“the Committee”) welcomes the opportunity of commenting on the Protection of Children and Prevention of Sexual Offences (Scotland) Bill.

The Committee supports the principle of the bill and agrees with the creation of a new statutory offence to tackle sexual grooming. Although there are a range of common law and statutory offences, which may currently be used to prosecute this type of behaviour, there may be some cases which will not clearly fall within any existing category of offence. It is important that those adults who seek to groom children and meet or travel to meet them with the clear intention of committing a sexual offence can be prosecuted, before any sexual offence takes place.

Section 1 – Meeting a child following certain preliminary contact

Section 1 of the Bill makes it an offence for an adult aged 18 or over to meet intentionally or to travel with the intention of meeting a child under 16 in any part of the world if the adult has met or communicated with the child on at least two earlier occasions and intends to commit one of the relevant offences against that child, either at the meeting or on a subsequent occasion. The offence will not be completed if the adult reasonably believes the child is 16 or over. Whilst the new offence will ensure that potential sex offenders meeting or travelling to meet a child following grooming behaviour can be prosecuted, the Committee would raise a number of matters in relation to the drafting of this provision.

The requirement to meet or have communicated with the child on at least two earlier occasions. The Committee would question why there is a necessity within the legislation for the accused person to have met or communicated with a child on at least two earlier occasions.

It may be that the grooming could occur during one session and, indeed, that particularly vulnerable children would only require one such session before agreeing to meet the adult concerned. In these circumstances the Committee would recommend that the reference to two earlier occasions should be deleted from the offence provision.

Completion of the offence

The offence is not completed until the adult either intentionally meets the child or travels with the intention of meeting the child in any part of the world. The Committee agrees that there needs to be certainty in the definition of the offence and that the criminal act needs to move from preparation to perpetration before proceedings could be instituted. The definitive act in terms of the offence provision is travelling to meet or meeting the child. Confirmation would be welcomed as to what would constitute “travelling” for the purposes of this offence. Would it be sufficient for the adult to have purchased a ticket signifying an intention to travel or would he or she have to have embarked on the journey before a prosecution could competently be taken? Similarly, if the adult had arranged for the child to travel (rather than the adult) would the offence be constituted prior to the meeting taking place?

Reasonable belief

An offence under section 1(1) will not be constituted unless the adult had a reasonable belief that the child was under 16. The test, as currently drafted, is based on “reasonable belief” but the
Committee would question whether this will be determined on the basis of a subjective or objective test. Clarification of this would be welcomed.

Minimum age of the offender

A person will only commit an offence under the bill if aged 18 or over. The Committee can understand why the age of 18 has been chosen and recognises that the prosecution of individuals aged between 16 and 18 who have engaged in sexual activity with those who are, perhaps, slightly under the age of 16 can raise difficult policy considerations. However, the Committee is concerned that the type of conduct which is being criminalised in the Bill could be committed by those in the 16 to 18 age gap without penalty under this measure and that this gap may ultimately be exploited through time. Accordingly, the Committee would prefer to see the minimum age reduced to that of 16.

Section 2 - Risk of Sexual Harm Orders: applications, grounds and effects

The Committee can see the merit in having such an order available as a child protection measure under civil procedure. However, the Committee would question how such orders will interact with the criminal law. Strict protocols would have to be established to ensure that criminal proceedings are given priority and that evidence which would subsequently be used in a criminal prosecution would not be contaminated in any way.

The Committee is concerned that section 2 makes no specific provision in relation to representation of the party against whom the order is sought. It would appear from section 2(4) that the sheriff may make a Risk of Sexual Harm Order on application by the chief constable if he or she is satisfied that the person against whom the order is sought has, on at least two occasions, whether before or after the commencement of the Act engaged in a prohibited activity and that it is necessary to make such an order for the purpose of protecting children generally or any child from harm from that person. No reference is made to the fact that the sheriff should hear parties before making such an order. Given the potential repercussions of making such an order and the fact that such an order may be disclosed subsequently in an enhanced disclosure certificate issued by Disclosure Scotland, the Committee would recommend that provision is made for the party against whom the order is sought to make representations directly to the sheriff before an order or interim order is granted.

The Committee notes that the provisions of section 2(4) of the Bill would appear to have retrospective effect in that conduct which has taken place prior to commencement of the Act can be taken into account when applying for such an order. In these circumstances, would it be open to the court to refuse an application for a risk of sexual harm order in cases where the relevant conduct occurred so long ago that the application may not be regarded as proportionate?

Monitoring

The Committee believes that the effectiveness of the provisions contained in this measure should be monitored in practice to ensure that they continue to meet the purpose of the legislation and protect vulnerable children.

Mrs Anne Keenan
Deputy Director
Law Society of Scotland
7 January 2005

SUBMISSION BY SCOTTISH POLICE FEDERATION

Thank you for the opportunity to submit written comments to the Committee prior to the evidence giving session on 12 January 2005.

The Scottish Police Federation (SPF) agrees with the comments made by the Minister for Justice when announcing the consultation on this subject when she said, “There must be no safe havens for sex offenders in Scotland. If we can add to our existing armoury of measures to protect children, then we must do so.”
Paedophiles are often devious, secretive and manipulative individuals who go to great lengths to cover their tracks and avoid detection. They often know the fine details of relevant laws. We are advised by officers working in this area that ‘internet grooming’ is increasing; it often only becomes apparent after an actual sexual offence has occurred or when an adult has become aware of inappropriate communications and, it often involves resource intensive enquiries where technical assistance is required. While the SPF supports the aims of the Bill it has reservations about some of the details and reservations about the ability of the police to deal effectively with the new proposals with the resources currently available.

Section 1 - Meeting a child following certain preliminary contact

Some of the requirements to constitute the offence might often be too difficult to prove. We believe that individual communications might be clearly inappropriate and serious enough to justify an offence in themselves and that a course of conduct such as that proposed in the Bill might be virtually impossible to prove in all but a few cases. As stated above, we see value in the Bill as currently written but we are in effect advocating that ‘sexual grooming’ in itself should become a criminal offence where inappropriate communications between an adult and a child should be a sufficient measure without the requirement to travel or meet being necessary.

Definition of an “adult”
In S.1 (1) SPF would prefer the definition of “adult” to be “A person aged 16 or over” as opposed to “18”. This would be more consistent with other aspects of the criminal law. If the age of the “adult” were to be reduced from 18 to 16, it may be appropriate to also consider the age of the “child” relative to the age of the “adult”.

Communication
In S.1 (1) (a) SPF would prefer the definition, “having met or communicated with a person aged under 16 (the “child”) on at least one earlier occasion” as opposed to “two”. Depending on the nature and content of a single communication it may be perfectly apparent that it is inappropriate and that the adult is intent on committing an offence.

Meeting and travelling
In S. 1 (1) (a) (i) and (ii) as stated above, SPF questions whether the offence should include the requirements of “meeting” or “travelling to meet”. In our view the offence should be complete when the “adult” has made an attempt to arrange a meeting.

Section 2 – Risk of sexual harm orders: applications, grounds and effect

SPF agrees that RSHOs would assist in preventing sex offences against children. In S.2 (1) we would prefer if they could apply to a person aged 16 or over as opposed to 18. There have been cases where RSHOs could in fact have been useful for persons under the age of 16 and we believe this should be further considered.

In relation to S.2 (1) (a) we do not believe the provisions should be restricted to a person who has committed a relevant act on two occasions. One such act should be sufficient.

Section 9 – Prevention of sexual offences: further provision

SPF supports the provision to allow a Sheriff to impose a SOPO at the time of sentencing.

Resources

SPF believes that all new laws increase costs for the police. Training, guidance, increased police activity in recording and investigating complaints, increased reports to the Procurator Fiscal, increased time spent in court and increased monitoring of offenders all increase costs.

Douglas Keil
General Secretary
Scottish Police Federation
5 January 2005
Protection of Children and Prevention of Sexual Offences (Scotland) Bill: Stage 1

10:22

The Convener: Item 4 is stage 1 consideration of the Protection of Children and Prevention of Sexual Offences (Scotland) Bill. I refer committee members to the summary of the responses that we have received to the consultation and invite them to comment on the written submissions that we have received in response to our call for evidence. Some common themes run through the responses. There seems to be a variety of views on whether the age of the offender should be set at 16 or 18. The Law Society of Scotland has made some useful comments about the process, particularly about whether there is a need to write into the bill a specific provision allowing the accused to be heard in relation to a risk of sexual harm order.

Margaret Mitchell: There are some worthwhile submissions, which make points that move us on in our consideration of the bill and examine aspects of the bill in more depth. Perhaps there are issues that can be discussed more fully at the seminar. The response has been excellent and respondents have made some testing comments.

The Convener: The evidence from Childnet International is interesting. That organisation has given us examples of legislation in other countries and different ways of constructing the legislation.

This discussion is just an opportunity for the committee to put on the record its points about the written evidence. Sometimes in the oral sessions we forget that we have a whole pile of written submissions from a range of people and organisations, so I wanted to draw the committee’s attention to that evidence.

Margaret Mitchell: Some of the submissions highlight the fact that addressing the issue could have a positive effect on other services, whether in relation to health, drugs or people who have been abused. We should try to nip the problem in the bud, as that could have an impact on services that are being used by people who have psychological problems or who are suffering from other effects of abuse. I do not think that we should underestimate the good that the legislation could do.

The Convener: If there are no other comments, we shall move on.

I welcome our witnesses to the committee. We shall hear evidence from Deputy Chief Constable Robert Ovens of the Association of Chief Police Officers in Scotland, Chief Superintendent Tom Buchan of the Association of Scottish Police...
Superintendents and Douglas Keil MBE, general secretary of the Scottish Police Federation. Unfortunately, David Feldman is unable to be here due to adverse weather conditions.

Margaret Smith: Will we be able to put to David Feldman in writing the questions that we wanted to ask him?

The Convener: In the first instance, we shall try to reschedule evidence from him. Failing that, it is a good suggestion that we should put our questions in writing. I am sure that that would be fine.

I invite Bruce McFee to ask the first question.

Mr McFee: Good morning, gentlemen. I refer you to the submission by ACPOS. Under the heading of “Grooming”, it says:

“Due to the difficulty in obtaining evidence, it is likely that the new offence would only be used in a very small number of cases and therefore not address the problem of on-line grooming as effectively as intended.”

Could you go into a little more detail about why that should be the case? Could you quantify the number of cases, even in general terms? Are you suggesting that the existing law is sufficient to counter that type of activity or just that the bill is not the right instrument?

Deputy Chief Constable Robert Ovens (Association of Chief Police Officers in Scotland): Given that those comments were made by ACPOS, it is probably proper for me to answer that question first. In one of the notes that I submitted, I said specifically that it would not be appropriate for us to get into details about tactics and so on in a public forum, for very obvious reasons. Nonetheless, I shall try to be as helpful as I can in responding.

First of all, I should say that we think that the move towards the proposed legislation is a helpful and useful step. We are not saying something opposite to that. We think that the current law is not as robust as we would want it to be, particularly given the advent of internet grooming. That is why we support the proposals.

10:30

We say that we think that the bill may not bring about large numbers of cases because it includes a factor that may be difficult to have in place in every instance. I will put that into simple terms. We would have to establish that there were a minimum of two contacts. We would have to establish that what we would call an accused person, or a person who is under suspicion, has made an attempt to travel to meet an individual. That introduces another element that we have to demonstrate and be able to evidence. We also have to try to prove that there is an intention to engage in inappropriate sexual behaviour. That last element may be very difficult in the light of the two-contacts factor. That factor, coupled with the fact that the internet offers enhanced opportunities for people to retain anonymity and not reveal who they are or where they are located, introduces added complexities as to how we identify them and get information that would allow us successfully to conclude an investigation and report the case to the procurator fiscal for consideration of a prosecution.

We are not saying that we do not welcome the legislation. We are pointing out that a number of issues will add to the complexities. It is not straightforward to deal with these matters.

It is very difficult to assess the number of cases that there will be. Currently, the number of cases that are brought to our attention is not large. We have to accept that a change in the law will not necessarily lead to more reports being made to us. If individuals—parents in particular—are concerned, they have the opportunity now to raise their concerns with us and we can respond to them. Our view is based on the fact that currently we do not get a large number of such cases reported to us. Of course, that does not necessarily reflect what may be happening. It would be foolish of me to suggest that the level of activity on the internet may not be considerably higher than we are aware of.

Mr McFee: I do not want you to go into the technicalities of how you would intend to trap someone who is engaging in such activities, because it is clear that you would not want to publicise that. The submissions by ACPOS and by the Scottish Police Federation state that the offence might be difficult to detect, far less prove. I will leave aside the question of the age of criminality, because I know that one of my colleagues wants to raise that as a separate issue. You say that one of the factors that may make it difficult to prove is the minimum of two contacts. I am slightly confused, in particular in relation to the Scottish Police Federation evidence. Perhaps you can clear the matter up for me. The evidence from the Scottish Police Federation suggests that a way round the problem is that, instead of stipulating that there must have been two contacts, the wording could be “having met or communicated with a person under the age of 16 … on at least one earlier occasion”.

That suggests to me that two contacts would be involved. What is the thrust behind that suggestion? Are you saying that the provision that there must be two contacts is too blunt an instrument? Can you give me the thrust of the argument as to how your suggestion would make the offence easier to prove?
Deputy Chief Constable Ovens: I will comment and perhaps my colleague Mr Keil, from the Scottish Police Federation, will also comment.

The thrust of what we are suggesting is that we accept that in order for a grooming offence to be committed there must be contact, but it is not necessarily helpful to attach a number to that. More than one contact may often be made in the grooming. That has often happened, for example, when children are groomed for sexual abuse in a non-internet situation. In some cases that we deal with, a family member or friend of the family strikes up a relationship with a child and grooms them over time with the intention of abusing them.

If contact had been made on a single occasion and the circumstances and other information that was available to us suggested that the contact was illegitimate, it would not be helpful if we were required to wait until another contact had been made or the person had travelled with the intention of meeting the child and for more evidence that the meeting was likely to lead to sexual abuse, before we could intervene. We seek a more wide-ranging ability to deal with situations on the basis of the circumstances that are presented, which would allow us to intervene at an earlier stage. Obviously there is the potential for us to intervene by seeking an order to impose a restriction on an individual, but that might not be the most appropriate approach. If someone is intent on committing a crime, we must consider whether we should report them to the procurator fiscal for possible prosecution rather than seek an order. That is the thrust of our thoughts on the matter. The conditions in the bill are very prescriptive and a number of elements would have to be satisfied to make the offence complete.

Douglas Keil (Scottish Police Federation): I did not recognise the words that Mr McFee quoted; they might come from a paper from ACPO or another paper that I have not read. Our concern is that the bill proposes that the offence would involve a course of conduct: two meetings or communications, followed by a meeting or travel with the intention of meeting the child. That is too restrictive. A single communication could be of sufficient concern to constitute an offence of sexual grooming.

We would go as far as to say that the bill focuses too much on internet communication and should focus more on sexual grooming by any means. On Mr McFee’s specific point, however, the provisions about the course of conduct are too restrictive. It would be very difficult to prove that there had been two previous contacts, which had been followed by a meeting or travel with the intention of meeting.

Mr McFee: I am not sure whether I was quoting from your submission or from the summary of written submissions that was prepared for the committee, so I might not have been quoting your submission accurately. It seemed strange that given that one contact plus one contact makes two contacts, you seemed to arrive at the same conclusion. I want to probe the matter a little further, because I think that we are getting to the nub of your argument. I accept that the bill is quite prescriptive. You are saying—correct me if I am wrong—first, that you want the provisions that say that the individual must meet or travel with the intention of meeting the child to be removed from the bill. We can return to the age of the child later. Secondly, you would prefer the bill to focus more on something along the lines of inappropriate contact, which might include contact on a single occasion.

Douglas Keil: I will be more specific. The person who drafted the bill followed section 15 of the Sexual Offences Act 2003, which applies in England and Wales. However, the anecdotal information that we receive from forces in England and Wales is that section 15 is not used to any extent, but that section 14 of the 2003 act is used. That moves the focus away from the course-of-conduct approach that is proposed in the bill and away from internet communication, to an approach that is based on inappropriate contact. I understand that that is almost equivalent to saying that the bill has to be entirely rewritten. If we were looking for an extremely useful new law, it would be along the lines of section 14 of the Sexual Offences Act 2003, rather than section 15, on which this part of the bill seems to be based.

Mr McFee: That is relatively clear. I agree that although much of the focus has been on the internet, the greater danger probably lies nearer home. It would be useful if we could have some form of appraisal of sections 14 and 15 of the 2003 act, as they are referred to in some of the submissions; I do not know whether that would be a job for the committee’s staff or for the witnesses.

Margaret Smith: I turn to the ever-present issue of resources. As any of us who have been watching “The Commander” over the past few nights will know, the detection of such offences requires good intelligence. Is that work especially resource intensive? Are the resources that are available to the police adequate to address the problem of child grooming over the internet? What would be the resource implications of the passing of the bill?

Deputy Chief Constable Ovens: Mr Buchan will comment first; Mr Keil and I might add to what he says.

Chief Superintendent Tom Buchan (Association of Scottish Police Superintendents): Such work is resource intensive. I understand that a meeting is proposed
for next week, at which the committee will have the opportunity to engage with some of the practitioners. The three of us are not really practitioners. The people who are at the sharp end will tell you that dealing with the issue can be an immense drain on resources. That was shown by operation ore, even though that was not quite the same thing. I know that there were cases in my division that involved detective officers spending three weeks examining one individual’s images.

From the ASPS’s point of view, the bill seems to be geared more towards the reactive than the proactive. As Mr Keil said, that means that we must wait for something to happen and then must do research. A person tells us that they are aware that something has happened and that they would like us to investigate. That takes us into fairly difficult and lengthy discussions with the internet service providers, for example. Some of the people at whom the bill is aimed are very clever indeed and will have a significant number of contact addresses. In particular cases, such investigations could be extremely demanding on resources. That is the reactive side.

We share the Scottish Police Federation’s view that monitoring must include online activity. As Mr Ovens said, the fact that children or young adults use chat rooms unsupervised for four or five hours means that a substantial amount of information can be exchanged. If we had access to that, it might cause us great concern. If we were in a position to be able to monitor what was going on in chat rooms, the experience in America shows that that would be massively demanding on resources. If we were engaged in such proactive action instead of waiting for something to be brought to our attention, as is the norm at the moment, we might be a step ahead of the posse.

Margaret Smith: Can you give us a bit more information about the experience in America?

Chief Superintendent Buchan: The other day, we had a meeting with one of our colleagues who is involved in this line of work. He tells me that, in America, there are up to 800 people who do nothing more than monitor online activity—of course, they need not be police officers.

Margaret Smith: Would the service providers do that, too?

Chief Superintendent Buchan: That is where we run into difficulties. Recently, there have been some well-publicised problems with ISPs. The committee might be aware of the case of the father who sought nothing more than to have access to the e-mail account of his son, who had recently died in Iraq. The ISP said no, on the ground that the account had died with his son. That is an example of the difficulties that can be encountered in trying to extract information from an ISP.

Margaret Smith: Both ACPOS and the Scottish Police Federation have suggested that the minimum age requirement for the adult perpetrator of an offence should be 16 and not 18. You are not alone in that belief; it is a view that is held by a number of people who have given us written evidence. Will you explain the reasons for your recommendation? How would you deal with the example of a 16-year-old who has a relationship with a 15-year-old? We have heard such a relationship described as “romantic note passing” via the internet.

10:45

Deputy Chief Constable Ovens: I will answer first, but I know that Mr Keil will want to comment. We have to separate clearly the intentions of a legitimate contact, whether romantic or otherwise, from one that is illegitimate. If a contact is made by an individual with an illegitimate purpose—sexual activity in particular—age is less of an issue. Whether that individual is over 18 or over 16 seems unimportant to us. If the individual is 16 or 17 and they are making contact with another young person who is under 16 with the clear intention of having a sexual relationship with them, the law needs to take account of that to protect the young person who is under 16. That is our responsibility. There is a danger in that age group and although it is not a large group, we all have experience of it in the service. I am sure that members know from other experience that there are predatory young people out there who are under 18. If they were to follow that course of behaviour, it would be unreasonable to exclude them from the impact of the legislation until they became 18.

We want the legislation to focus more on the intention and less on the age of perpetrators. We also want to ensure that the protection of young people is properly effected by the legislation. That explains our rationale, which is based on our experience of dealing with that small but nonetheless dangerous number of individuals.

Douglas Keil: I will add only one or two comments. The Scottish Police Federation thought that it would be more consistent with other aspects of Scots law to set the minimum age of an offender at 16 as opposed to 18. As Mr Ovens said, we are aware of people who are under 18 being involved in this kind of activity, so there should not be an age gap.

There is an element of choice in setting the age requirement. I know that other factors influence the age of a child and that we have to resolve the dilemma in the bill, but our preference is to keep
Dougie Keil: The police would not get involved in a relationship between boyfriends and girlfriends of 15 and 16. However, the ultimate arbiter in such a situation would be the procurator fiscal who would decide whether a case could be made in the public interest. I am sure that the relationship between two such individuals would be at the forefront of his thinking.

Margaret Smith: I understand that at the moment, the Crown just has to prove that a victim was under a relevant age. The proposal here is that the accused would be able to say that they reasonably believed that the person was a different age. Is that another restriction that we should consider changing?

Douglas Keil: Many years ago, it used to be a defence for a male under the age of 24, in relation to the sexual offence known as statutory rape—of a female under the age of 16—if he reasonably believed that the female was over the age of 16. That is historical, going back to when I was a practising police officer; I am sure that it has now changed with the introduction of the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002. Nevertheless, it was recognised that the question arose of the relationship between the accused and the victim. I think that you would be looking for a modern equivalent of that.

Chief Superintendent Buchan: One of the vagaries of Scots law is that the definition of a child varies depending on the legislation. As far as I am aware, that has never been problematic in the past—although people outwith this nation might take exception to that. However, that is not a matter for us.

On certain occasions, whatever the offence, a reasonable defence might be that a person has reasonable cause to believe that another person was over a certain age. That defence has been accepted in the past in Scots law.

Mr Tam Baillie of Barnardo’s gave evidence to the committee and pointed out that the bill would create a void for 16 and 17-year-olds. That void is not helpful. The definition of a paedophile can depend on the dictionary that you consult. The definition may suggest that adults have to be involved, or it may not mention adults at all. It may refer simply to sexual love towards children. Talking about ages can therefore be very difficult.

For example, grooming can be upwards: a younger person can groom an older person if that older person is vulnerable. I think that the committee can appreciate that point. A 15-year-old—and there are some very proactive predatory young people—could be able to manoeuvre a potential victim.

The Convener: You have just suggested that we are presuming that it is older people who groom younger people, but that it could be the other way round. Are you arguing that the bill should not mention any age? That is the logical conclusion of your argument.

Chief Superintendent Buchan: I want a full appreciation of the difficulties in drafting legislation of this nature. You want to protect vulnerable people and, in my view, it would be unwise to do anything that did not recognise that a 14-year-old could target a vulnerable 16-year-old for grooming purposes. That can happen and the possibility should not be ignored.

I appreciate that there are difficulties in drafting, but we have to consider what is really happening. We have to consider intention and purpose; I think that that is more important than age. If a predatory 15-year-old sees an opportunity with a 16-year-old, I do not know that that is any less of an offence than a 19-year-old targeting that 16-year-old. The 15-year-old might be younger, but he might be much more of a sexual predator.

The legislation suggests that grooming can only be downwards—an older person grooming a younger person. However, I have experience that that is not always the case. It can be the other way about; the younger person can be the predator.

The Convener: I do not disagree with what you say—it has the ring of logic to it. However, the law often determines whom it considers to be vulnerable. Children are a group in society for whom we say that consent does not come into it. If a 14-year-old is raped, the law determines that that person was too young to give consent. The law makes such judgments for young people.

I want to ask about the scenario of a 15 and a 16-year-old. In your view, in what circumstances would the 16-year-old be a predator over the 15-year-old?

Chief Superintendent Buchan: Dougie Keil pointed out that we are focusing on this particular bill, which deals with meeting, contact and so on. It may be a helpful piece of legislation to deal with people in a particular category, but it would be more helpful to go further. That would be challenging. Why will it not be an offence for a 15-year-old to groom a 16-year-old over the internet? Obviously, the procurator fiscal would have a say in it and the circumstances would be considered. However, there may well be clear evidence in the
correspondence that that person did not need to meet that other person, that it was clearly their intention to meet them, and that the nature of the communication was such that there were good grounds for believing that that other person was at risk because of the grooming that was taking place by what could—possibly—be a younger person.

The Convener: I have some difficulty getting my head round that theory. I accept your point about vulnerable adults—it is a point that the committee will have to consider—but grooming carries the connotation of an adult using their power over a child and it would be quite easy to see that such communication is inappropriate. However, when the ages are closer, how will you judge whether the communication is inappropriate? You will be responsible for charging the person for that offence, and you will have to judge whether that communication is inappropriate and whether it constitutes grooming. What would you be looking for?

Deputy Chief Constable Ovens: A common feature for us, although it is not necessarily evidence that can be used in court, is the previous pattern of an individual’s behaviour. That applies across all crimes. For example, the individuals who we will consider in relation to an offence are those whose modus operandi has been a certain course of activity that may have led to their conviction and subsequent imprisonment. If, on their release, the same offence happens, with the same modus operandi, that gives the police a starter on who is responsible for the offence.

The Convener: They have a course of conduct.

Deputy Chief Constable Ovens: I do not want to get sidetracked by the age issue—it is exceptional for a young person to be guilty of grooming. However, a young person could previously have followed a course of conduct that has led to an offence in which the police have been involved. If, at an early stage subsequent to that, the same course of action starts happening again, society would reasonably expect the police to intervene.

The function of the police service in society is not just to work with the Procurator Fiscal Service on the prosecution of offenders. What takes primacy is the protection of all people in society, but vulnerable people in particular, especially children. There has been a lot of focus on that. We are considering the new legislation from the point of view of the protection that it affords potential victims, as opposed to the ability of the new legislation to be used as a tool to prosecute those who may follow that course of action. Protection as opposed to just prosecution is an important issue. The police service has a strong view that we will never leave a victim in a situation of potential danger in order to get sufficient evidence to prosecute someone.

The Convener: I appreciate that protection is very much the role of the police, but I am trying to understand your position in relation to how the offence is constructed. You have mentioned a course of conduct in relation to 15-year-olds and 16-year-olds, but earlier you were not happy with the bill’s requirement for a course of conduct—or, in other words, previous communication.

Deputy Chief Constable Ovens: What I am saying is that if a person’s history showed a course of conduct that had started to manifest itself again—

The Convener: What is the difference between that scenario and a scenario involving an adult? Under the terms of the bill, two previous communications would be required, but I think that you argued that you would prefer for there not to be such a requirement.

Deputy Chief Constable Ovens: That is in dealing with the current offence. The course of conduct concerns previous conduct not relating to the current offence. The courses of conduct are quite separate. You asked what might cause someone to be concerned about a 16-year-old and I am trying to say that previous conduct is an influencing factor and that someone’s action would suggest certain things to you. If you know that someone has previously broken into jewellers’ premises and you see them loitering outside another jeweller’s premises, you can take that as an indication that they might be about to commit a crime.

11:00

The Convener: How do you get that into court, if it is a previous conviction? For example, if a 16-year-old, who would not be not covered at the moment, is writing to a 15-year-old and the communication seems innocent because they are quite close in age, but you know that that 16-year-old has a history and perhaps even a previous conviction, what evidence will you present in court to demonstrate that that communication is inappropriate if you cannot bring to court the fact that there has been a previous conviction or a history? You have already said that you think that there are predatory young people.

Chief Superintendent Buchan: What Mr Ovens is saying is that, in the majority of cases, we will know little or nothing of the background of the individual. If it is brought to our attention that a parent believes inappropriate communication to be taking place, you would expect us to take cognisance of the fact that the individual had previously exhibited such behaviour, if that were the case. However, if the e-mails that formed the
communication were of an innocent nature, I do not know that we would be in a position to do anything. In terms of the legislation, it would have to be clear that there was an intention to groom the child. Obviously, if it was brought to our attention that someone who was potentially dangerous was involved in such communication, we would want to monitor the situation. However, that is perhaps muddying the age issue.

The Convener: I will leave the issue at that point.

Douglas Keil: Can I just go back, convener—

The Convener: No, we do not need to pursue the matter any further. However, I would like you to know what my problem with all of this is. I am listening carefully to what you are saying and I was initially persuaded that we need to re-examine the age issue. However, I am worried that what we are talking about would mean that we would have to be looking for communication of a sexual nature, which could be innocent. Both 16-year-olds and 15-year-olds will communicate in that way. The question is what makes the communication a grooming offence. If the legislation were to cover 16-year-olds, their innocent communication would not be so considered. In a case involving a 15-year-old and a 16-year-old, you would be able to bring to the court only such communication of a sexual nature, unless you had other evidence relating to the person’s history. Would you accept that?

Chief Superintendent Buchan: Yes. What is suggested during the communication is the key matter, but clearly, a person’s history could add weight to the case.

Mr McFee: This has been a useful discussion. You appear to be saying that you want the bill’s emphasis to change. I gather that you do not want to sit around waiting for a certain number of communications before doing something. We are talking not about getting to a prosecution, but about intervening before the offence takes place. Is that a reasonable summary of what you are saying?

Chief Superintendent Buchan: Yes.

Mr McFee: There is a problem, however. Any line that you draw will be arbitrary, whether it is 18, 16 or two-and-a-half. I understand the argument about the benefits of harmonising the ages in various pieces of legislation but I have a concern about downward grooming, which is that a 15-year-old could be grooming a 12 or 13-year-old in extremely inappropriate circumstances. However, your suggestion would appear to be that it is okay to groom someone if you are 15, but you have had it if you are 16 or 18. There is a question about where that line should be drawn or, indeed, whether a line should be drawn at all. Do you believe that we should be setting an age for the perpetrator? I am sure that you know of young men of 14 or 15 who are active sexual predators.

Douglas Keil: That is what I said in our written submission. We believe that the age should be set at 16 for harmonisation purposes, but we are also aware that people under the age of 16 can be a problem. All that I can suggest is that the issue should be given further consideration.

The convener’s proposal that the bill should perhaps make no reference to the age of the person committing the offence—if that was her proposal—has some merit. I do not know how the parliamentary draftsmen would achieve that, but that proposal might get round the problems that we have at the moment. We should also remember that the final decision on whether to prosecute lies with the Crown Office and Procurator Fiscal Service. The convener’s proposal is worth further consideration.

Chief Superintendent Buchan: That would not rule out what the bill seeks to achieve. The downwards grooming of a child by an adult would still be an offence, but it would be broadened to include the possibility that such grooming—or inappropriate activity that could lead to circumstances that one would not want to be fulfilled—could be committed by a person of a younger age than is currently proposed in the bill.

The Convener: In answer to the question about the parameters of what we can do, let me say that it is clear that we could amend the age from 18 to 16. Given that the bill is about the protection of children, it is pretty clear that we could not make some of the other amendments that have been suggested. However, we will consider the legitimate point that has been raised.

Mr McFee: The protection of children does not necessarily imply that younger children could not be protected from older children.

The Convener: We can debate that at a future stage.

Margaret Mitchell: I accept that grooming can occur between people of any age and that it is possible for a minor to groom an adult. However, the bill’s purpose is to protect children. If children—that is, people under the age of 16—were to be included as being able to engage in the offence of grooming, surely that would undermine your argument that it can be possible to be sure about someone’s intentions from their first contact. If, whether on the internet or in some other manner, an adult tries to pass themselves off as someone younger in order to gain the confidence of a minor, it may be possible to determine that from one incident. In that instance, one might not need the two earlier communications that the bill currently requires for the communication to be an
offence. However, if the person doing the grooming was a child, one would need to give them the benefit of the doubt, unless a course of conduct could be established. That is where the proposal starts to muddy things and make things difficult.

I appreciate what you are saying, but it would not be helpful to incorporate that into the legislation. I only hope that the fact that we are raising awareness of what grooming is will address your reservations about the possibility of an adult being groomed by a minor. Is that a fair comment?

Chief Superintendent Buchan: Often, the child who is being groomed will not know until well into the affair that they are dealing with an adult because the adult does not purport to be such. From the outset, the child may have no idea because the adult may be very clever and may purport to be a child. Indeed, if the person who is doing the grooming is a younger person, they may purport to be someone older. Those difficulties exist. However, it is difficult to argue with the concept that it is right for society to see it as a serious issue for a 32-year-old to kid on that he is purporting to be a child. Indeed, if the person who is doing the grooming is a younger person, they may purport to be someone older. Those difficulties exist. However, it is difficult to argue with the concept that it is right for society to see it as a serious issue for a 32-year-old to kid on that he is younger in order to try to meet with a 14-year-old. One would be very wary of that and it is right that we worry about it.

Margaret Mitchell: Let us move on. Given that the bill focuses very much on internet grooming, other witnesses have suggested that it does not pay sufficient attention to the grooming of children within the family. It would be useful to have on record whether you consider that to be a problem.

Deputy Chief Constable Ovens: Because I have responsibility for the management of sex offenders on behalf of the Scottish police service, and for deciding on disclosure checks within my own police force area, I have had to read all the files of registered sex offenders. From my reading, it is quite clear that, in the majority of cases, the individual has engaged in grooming a child and that has led to the primary offence. Usually, that happens through a relationship within the household, although there may not necessarily be a direct family relationship. The person may have been befriended by the family or may be someone who has stayed in the house temporarily, such as when they have been asked in to watch young children. They are then put in a position of trust and, over a certain period of time, a relationship is built up. We would describe that process, which leads to the primary offence, as grooming. That is by far the most common background of the offenders on the sex offenders register in Scotland. You have raised a major issue, and we must consider whether we should broaden things out and make it an offence to take such action in advance of the actual sexual offence.

Margaret Mitchell: It is very helpful to have those comments on record.

Do you think that criminal law can deal with this problem?

Deputy Chief Constable Ovens: I am sure that you appreciate that these issues are not black and white. Indeed, earlier discussions have shown that they are very complex and that each case has to be judged on its merits.

As I have said, our responsibility first and foremost must be to protect individuals, not to deal with the consequences of serious offending. As a result, it is reasonable for us to find out whether we can legitimately intervene before an actual offence takes place, either through making certain actions a criminal offence or through a more extensive use of orders.

Education is a major element in this respect, and parents must be made aware of their responsibility for looking after and safeguarding children and the questions that they must ask themselves when they leave their children with other individuals. That said, we think that we know family members and other people who are close to us and visit our homes and we are more trusting in such situations. I do not know how we address that matter, but education must be at the forefront. In that respect, the Executive has introduced a programme to support and improve parenting, to highlight parents’ responsibilities and to assist families, particularly those in the vulnerable category.

My answer to your question cannot be an unequivocal, “We must criminalise these matters.” Instead, I feel that we need to consider a range of issues. I should again point out that there is clear evidence of the commonality of grooming behaviour, particularly in the family situation.

Margaret Mitchell: It is useful to have that comment thrown in the pot. Obviously, the proposed legislation is supposed to act as a deterrent and to curtail such behaviour. However, as you have pointed out, there are other ways of dealing with this matter, and education is a primary one.

Some witnesses have suggested that it would be helpful to curtail potential offenders’ activity through good liaison between criminal justice social workers and the police. How does that relationship work at the moment?

Deputy Chief Constable Ovens: There are strong requirements on us to work in partnership with colleagues in criminal justice social work, particularly with regard to known and registered sex offenders. We manage the matter jointly and meet to consider individual cases, carry out risk assessments and so on. For example, when I
consider any disclosure, that file contains comments not only from the police service, but from criminal justice social work. As a result, we have a very close working relationship.

We are also about to introduce in Scotland a new multi-agency software tool called VISOR—or the violent and sexual offenders register. Although that application is being rolled out to the police service, the intention is to roll it out to criminal justice social work and the Scottish Prison Service as well, to ensure that we are all using a common system. Such an approach will allow us to exchange information electronically, to look at the files and keep them up to date and to move quickly. After all, we know that offenders move around. If an offender moves from Edinburgh and Glasgow, the system will let us know that and we will be able to flag it up immediately to colleagues in the police service and criminal justice social work at the new location.

That is forcing us to work more closely than we have done in the past. Although I might paint a positive picture, we acknowledge that there has to be significant improvement. The underlying messages from the Bichard inquiry, our reviews of child protection, the announcements by the Minister for Justice on the arrangements in the police service for the management of sex offenders and the appointment of Professor Irvine to consider that will influence continued improvement and closer working in the future.

11:15

Margaret Mitchell: Is it fair to say although there is best practice, it is not necessarily replicated throughout Scotland? Are you hopeful that there will be more co-operation with the introduction of the VISOR system and what are the resource implications of that?

Deputy Chief Constable Ovens: There are resource implications of bringing the system into play. I hope that when it is in place it will save resources as opposed to requiring more, because we will be keying in information only once, rather than having people throughout the agencies involved key it into their own systems. Our having a system that runs across agencies means that the information will get built on, but not duplicated and replicated many times. The intention is that it will free up resources. There will be a resource implication for introducing the system and staffing it, but the Executive has supported us financially in that respect.

The system was developed in England and Wales and is being rolled out to the police service and the new agency that is replacing the former probation and prison service. It is therefore a UK system and will probably be the first step towards something that will, ultimately, be pan-European and might apply further afield as we recognise the issues involved.

Margaret Mitchell: So there are no artificial boundaries to it being implemented throughout the country?

Deputy Chief Constable Ovens: No, not at all.

Margaret Mitchell: That is encouraging. Thank you.

Mrs Mary Mulligan (Linlithgow) (Lab): Good morning. I want to move us on to considering risk of sexual harm orders. At least one of you has commented on them in writing, but, for the record, will you comment on the role of the chief constable in applying for RSHOs and whether you think that will be resource intensive?

Douglas Keil: We welcome the proposal for RSHOs and think that they will be applied for. The nature of the offences that we are talking about is that there is often no corroborative evidence of their having taken place and there are no independent witnesses. The evidence often falls short of the requirements that the fiscal would make of us before he could bring a case to court. With that in mind, there could be circumstances in which an RSHO would be considered appropriate. It is difficult to give a more detailed example, but we believe that there is definitely a role for the orders. As with everything else in police work, one would assume that the more offences that are created the more people will be picked up for them. There will be more investigating time, more reporting time, more police time in court and, in relation to the offences that we are talking about, there will be monitoring time. All that will impact on police resources.

Deputy Chief Constable Ovens: I will respond to that on behalf of ACPOS. We welcome the potential introduction of the orders. We are happy to introduce a new set of skills into the police service, which we had not highlighted before, in relation to risk assessment and the alternative ways of dealing with situations in our communities that are not necessarily the traditional ones of considering prosecution or some other activity. We are considering that and we are re-evaluating how we train our officers and what skills we need. Risk assessment is a term that we are now using freely—it rolls off the tongue—but there is significant science behind it. Part of the work that we are engaged in with our colleagues in the Executive and in criminal justice social work is consideration of more detailed training for specialist staff on risk assessment and, particularly, on the role of the risk assessment authority that might be created.

We believe that there is a place for RSHOs and that they will make a difference. We think that their
use will increase gradually. Although it is the chief constables who will apply for them, we will need to work in close partnership with other agencies in relation to the information that we will consider. I return to the point that I made earlier: if there are actions that we can take to prevent something escalating, that is the course that we should reasonably take.

Mrs Mulligan: You have pre-empted my next question, which was about the work that will be carried out with other agencies to take RSHOs forward. Given that they will be civil orders, do you think that there is a risk that suspected perpetrators will not be given the opportunity to protect themselves?

Deputy Chief Constable Ovens: It is difficult to be clear about that. One recognises the rights of individuals and we need to be careful about how we use the powers, if they come to be. When orders have been brought in for other purposes, history shows that we have not gone on to use them with a cavalier attitude. One could argue that we have used them more economically than Parliament intended. There is a history of recognising that we need to be cautious. We may have been guilty in that we have not applied for a lot of sexual offences prevention orders, which were formerly sex offender orders. That is partially about our developing skills and a knowledge base; we have sought orders only where there is absolutely no doubt that the sheriff would be minded to grant an order.

I am not suggesting that we will change and become cavalier, but I return to the point about skills and training and the need to work with other organisations and recognise the rights of individuals. Much of what we and criminal justice social workers do involves working with offenders on their behaviour, their lives and issues in respect of their protection because—dare I say it—we have spent a disproportionate amount of time around issues such as vigilante action. We need to address issues carefully because of the consequences that flow from them.

Mrs Mulligan: ACPOS suggested in its evidence that police forces will monitor the use of RSHOs. How can we make sure that they will be effectively policed? You started to go into that, but will you say a little more about it? Perhaps some of your colleagues would like to comment on how we will know that it is worth while to have RSHOs, that they will be used effectively and that they will produce the results that we hope to see.

Deputy Chief Constable Ovens: We all accept that in any course of activity there is a need for robust inspection and audit arrangements to ensure that the powers, duties and responsibilities that have been given to us are monitored so that we are satisfied that they are being used effectively. That was highlighted in the Home Office response to the Bichard inquiry, which was published yesterday and to which I keep referring. We recognise that we have to enhance such arrangements.

That is not just about the role of HM inspectorate of constabulary for Scotland; it is about the role of the service itself. Under the current structures, people such as me carry specific responsibilities for areas of activity that cut across the whole service. Within the service, I am held accountable in relation to those areas and must report internally to the service and externally to the Executive on our activities and performance, and on how we are using the resources that are at our disposal. The regime that we are moving towards is much more accountable and responsible.

You are right to suggest that resources are not in themselves sufficient: it is about how we use them and how we evidence our use of them. There is a cycle: we always learn from experience, which may influence adjustments or amendments in our approach, in our training, in our skills and ultimately in legislation.

The Convener: You said that although you think that RSHOs would be useful, you cannot cite specific examples of situations in which they might be useful. I am a bit uneasy about the orders, for reasons that you probably know. It appears that the bill will allow us to try under a civil process, in which the burden of proof is lower, cases that we cannot try in a criminal court. I find it difficult to sign up to that without any understanding of the kind of cases that would be involved.

You will appreciate that much trust is placed in the police service and in its using the new powers responsibly. However, as a legislator, I am being asked to sign up to something that is far reaching in respect of human rights issues. Nobody has yet given us examples to illustrate how the orders would be used. I am not suggesting that you can do that today—you have said that you have some difficulty with the matter—but I ask you, possibly at our seminar next week, to give us sight of some potential cases or instances in which you feel the orders would be needed.

Douglas Keil: I find it difficult to give examples that detail the type of behaviour that occurred between one person and another person. I have given a general example in which, because of the nature of the offences, we might well report to the procurator fiscal all the facts and circumstances as we know them, and he or she might decide that there is not sufficient evidence for a prosecution. I understand your concern about something that is effectively a civil order being placed on someone against whom, at least in evidential terms, the case falls short of a criminal prosecution. To take that a stage further, if that person is to be
prosecuted for breach of an RSHO, that breach is
to be a criminal issue. I can understand the legal
principles involved in that.

We all know that the bill is about protection of
children. At some point we must accept that to
achieve that effectively we must go the extra mile.
The bill contains a number of measures in respect
of which the chief constable and the court must be
satisfied before the process is gone through.

The Convener: Could I stop you there? I
understand that the bill is about protection of
children, but just because legislation involves
children, that does not mean that we should give
up our cross-examination of it.

Douglas Keil: No—indeed not.

The Convener: That is particularly true when
we are trying to understand in what sort of cases
the police are asking for such wide-ranging
powers to go to a civil court. You are suggesting
that there could be a scenario in which a
procurator fiscal says that he or she does not have
corroboration for something and the case might be
swung back to one involving a risk of sexual harm
order.

Douglas Keil: I think that is—

The Convener: I am quite prepared to concede
the principle that we sometimes have to skew the
balance to protect vulnerable people in society.
However, at no time have I been given any
examples, circumstances or details about cases in
which you would use the orders, which I find
difficult to accept. You are asking us to give you a
blank cheque. Would it be possible to get sight of
some details, even privately? I realise that any
such cases will be very sensitive. It would, quite
honestly, be remiss of us to say to you, “Have
these powers and we will not question you further
about what cases you would use them for.”

11:30

Chief Superintendent Buchan: I was certainly
not aware that the service had asked for a blank
cheque or that it had sought your giving us the
power—that was not my understanding. That said,
we have discussed the matter. Next week, there
will be a meeting of practitioners, which may be a
more appropriate environment in which to discuss
the issues.

I do not know whether this is covered by the
powers, but might it be the case that, because
court cases take forever and a day to come up,
there could be a circumstance in which the fiscal
was considering a case but it was going to take
some time to refer the matter to the Crown Office
or perhaps even to take it to trial, to a children’s
hearing, or wherever, although in the interim there
might be benefit in identifying that there was a
risk? It is not clear to me what the answer to that
would be.

The Convener: That is what I am asking. I do
not expect you to give the committee real
elements on the record; I realise that it is a
sensitive matter. I am asking you to consider
whether there might be one or two cases that we
might have sight of, even if we just get sight of the
circumstances. That could perhaps be done at the
seminar. All that I am asking is whether that would
be possible.

Deputy Chief Constable Ovens: I apologise,
convener, but I cannot give you the definitive
answer that you are asking for; however, it is
perfectly reasonable for you to seek that. I will
arrange for some of the situations in which we
think that the order would be used to be scoped
out and mapped, and I will provide that information
to the committee. You might want to get back to us
after you have considered it.

The Convener: We would be very grateful for
that.

Deputy Chief Constable Ovens: We will get
the staff who are working in that area to answer
the specific question that you asked and we will
provide a written submission. The subject may
also be something that we can pick up next week
in general detail; I will brief the staff who are going
to be at the meeting on that. We will provide you
with a written paper on that specific issue.

The Convener: Stewart Stevenson might be
able to help us out with an example.

Stewart Stevenson: I do not want to be
specific, as I might identify someone. However, let
us imagine that a person has, for child protection
reasons, come to the attention of the children’s
panel and has not necessarily entered the criminal
justice system per se. As the person approaches
the age at which they will no longer be an
appropriate subject for the children’s panel, it
becomes apparent that they would present a risk
of sexual offending. In such circumstances, would
a chief constable be prevailed upon to apply for an
RSHO in the interests of protecting the potential
victims of someone who is already in the system—
probably through social work services, rather than
through the criminal justice system—and who
might present a risk? In such circumstances, there
would in civil terms be an evidential background to
justify application for and granting of an order.
Would that be an example of a circumstance in
which an order might be sought and granted?

Deputy Chief Constable Ovens: I am grateful
to Mr Stevenson for providing that example, but I
am reluctant to comment on it. My preference
would be to ask my specialist staff to spend time
considering what is proposed in the bill in respect
of the specific question that the convener asked,
The Convener: I entirely want more time to think about the example that I have given is not necessarily theoretical.

Stewart Stevenson: I merely comment that the principles of, for example, antisocial behaviour orders. However, in relation to the example that Chief Superintendent Buchan gave of circumstances in which, prior to a case reaching court, there was thought to be risk, the one thing that concerns me about the orders—and the thing that distinguishes them from antisocial behaviour orders—is the stigma that would attach to someone who had an RSHO taken out against them. That is also the convener’s concern. It is a serious matter, and there is a risk in the community for somebody who has such an order taken out against them that would perhaps not exist for someone who was subject to an ASBO. What are your comments on that?

Chief Superintendent Buchan: I entirely endorse that. Of course, the committee would expect me to say that, given the experience to which Mr Ovens referred. The fact is that society in general and people in general will tolerate living next door to just about anyone but a sex offender. The sex offender is the pariah. People will live next door to wife beaters, house breakers and people who assault people—none of whom are nice people—but they are loth to tolerate in their vicinity anyone who may be a sex offender, once they are aware of that.

I understand the difficulty. However, as the committee would expect us to do, we take cognisance of that fact in making our judgments and going before sheriffs. I agree that an RSHO is not like an ASBO—the difference is the stigma that attaches to an RSHO and the potential danger for the named individual.

Stewart Stevenson: The Executive has indicated to the committee that it proposes to amend the bill to conform to the United Nations Convention on the Rights of the Child and the subsequent European Union framework decision to make the creation, possession or distribution of indecent photographs of children under 16 an offence. Given that article 1(a) of the EU framework defines the upper age limit for a child as being 18, should the age limit in Scotland also be raised to 18? Should there be exceptions, for example, where the person who has taken the photographs is married to the younger person or in a relationship with them that has the general attributes of marriage?

Douglas Keil: I received correspondence on the issue a short time ago, but I have not yet had an opportunity to circulate it to my colleagues for comment. I recognise the dilemmas that are raised and I would like more time to think about the issue. I recognise that there are a number of potential knock-on consequences. That answer is not very satisfactory, but it is the only one that I can give the committee today.

Stewart Stevenson: Can I take it that your response might be similar to that which you gave on payment for sexual services to someone who is under 18?

Douglas Keil: If I understand properly the implications, it could mean that the bill would make prostitution—which, as the member knows, is not in and of itself an offence in Scotland—an offence for 16 and 17-year-olds.

Stewart Stevenson: I am not clear whether the Executive’s intention is for prostitution to become the offence. I think that its intention is that the offence would be committed by the person who uses the prostitute. I suspect that that provision would receive wide support, perhaps even in the more general sense of the offender being the user and not the supplier.

Douglas Keil: I want more time to think about this relatively complex issue.

The Convener: That is fair. We were advised only recently that the Executive has obligations under European law to implement the offence. We can provide you with information if you so wish.

Mr McFee: Previously, our discussions have focused on harmonising the age limit at the age of 16. We now face the prospect of a child being defined in two separate ways under the same legislation—as a 16-year-old and an 18-year-old. I fully understand Douglas Keil’s reason for wanting to take away such a difficult issue and come back to us on it.

Chief Superintendent Buchan: Members of the legal profession will be very busy for the foreseeable future.

Stewart Stevenson: What a shame.

The Convener: We will be hearing from them shortly.

I thank the witnesses for their evidence this morning. The exchange of views with the committee has been extremely useful. We will see members of your organisations at the seminar next week. On behalf of the committee, I congratulate Douglas Keil on his appointment as a member of the Order of the British Empire in the new year’s honours list. Well done.
Douglas Keil: Thank you.

The Convener: I propose that we take a brief comfort break.

11:39
Meeting suspended.

11:47
On resuming—

The Convener: I am sorry to have kept people waiting. I welcome our regulars from the Law Society of Scotland—Gerry Brown, Iain Fleming and Anne Keenan. We always look forward to having members of the Law Society here. You usually say interesting things and I am sure that you will not disappoint us this morning. Thank you again for attending the Justice 1 Committee to give evidence on the Protection of Children and Prevention of Sexual Offences (Scotland) Bill.

As usual, we will go straight to questions.

Mr McFee: Good morning—just. Your submission’s second paragraph says that you support the general principles of the bill. Will you give us a quick outline of why?

In relation to section 1 of the bill, in what areas does existing legislation not cover the types of offences that we are talking about?

Anne Keenan (Law Society of Scotland): Thank you for having us here.

I will quickly run over some of the offences that are covered by common law and statutory offences. There is existing provision under offences such as lewd and libidinous conduct, which covers acts of indecency towards children under the age of puberty, and thereafter the statutory extension of those provisions in relation to girls in section 6 of the Criminal Law (Consolidation) (Scotland) Act 1995. Other offences include breach of the peace, fraud and potential offences under the Communications Act 2003 and the Civic Government (Scotland) Act 1982. There are therefore a range of offences that might cover contact where inappropriate sexual approaches have been made by adults towards children.

The Protection of Children and Prevention of Sexual Offences (Scotland) Bill appears to try to strike at situations in which there has been conduct that might not appear to be offensive; objectively, contact might appear to be innocent but may be followed up by travelling to meet the child with the intention to commit a sexual offence. In such a situation, the initial contact would be objectively innocent and therefore could not be covered by the law of lewd and libidinous conduct, breach of the peace or something of that nature. The new bill appears to plug that gap and will, I hope, cover any such offences.

Mr McFee: You probably heard the earlier evidence about the number of contacts that must be made for an offence to be committed. In your evidence, you say:

“In these circumstances the Committee would recommend that the reference to two earlier occasions should be deleted from the offence provision.”

I understand that when you say “Committee”, you mean the Law Society of Scotland’s criminal law committee. Do you mean that the number should be one or zero and not two, or is it just that the contact is inappropriate?

Iain Fleming (Law Society of Scotland): We believe that there need be only one meeting.

Mr McFee: One meeting?

Iain Fleming: Sorry—one communication. We take that view because first, in the case of children who are particularly vulnerable, it might be that that leg of the offence could be completed in one meeting only. Secondly, if there were a desistance after two communications, it would increase the risk of circumventing the legislation.

Mr McFee: So one communication could be the first communication.

Iain Fleming: Yes.

Mr McFee: You give reservations about the relevance of travelling to meet a child in section (b)—entitled “Completion of the offence”—of your submission. You ask what would happen if, instead of travelling, the adult arranged for the child to travel. Would an offence be committed if the child travelled but a meeting did not take place? Will you confuse us a little more about that?

Gerry Brown (Law Society of Scotland): Our concern is the extent to which preparation for commission of the crime becomes the actual crime. We ask in our written evidence whether the purchase of a ticket for either the child or the adult would fall within the ambit of section (1)(b). I am not convinced that it would, nor is our criminal law committee. Perhaps another form of words could be used to try to encapsulate that intention. I understand from some of the previous evidence that a form of words was proposed, for example, “arrangement to meet”. Those words have the potential to cover the planning arrangements to take the offence one leg forward in the four legs that are referred to in section 1 of the bill.

Anne Keenan: In addition to what Gerry Brown said, our concern is about whether the policy intention behind the bill could be subverted in some way if, instead of travelling, the alleged
offender arranged for the child to travel rather than travel themselves. We highlight that point for further debate because it might be worthy of further consideration.

**Mr McFee:** I accept that the wording appears to be unclear and that there is a possibility that it could be challenged; we might want to look at it again.

You suggest that the defence of a reasonable belief on behalf of the alleged perpetrator requires some clarification—you want to it to be clear whether it is objective or subjective. Will you explain that?

**Gerry Brown:** Anne Keenan will deal with that. The issue has caused us a lot of concern, in view of previous bills. It is an important issue.

**Anne Keenan:** We have to consider whether reasonable belief involves a subjective view that the accused reasonably believed that the child was 16 or over or an objective test that a reasonable person would have reached that view on reasonable grounds. The offence might be difficult to prove because, as the bill is framed, we understand that the onus would be on the Crown to show that the accused did not have a reasonable belief that the child was 16 or over, whether that is subjective or objective.

Other legislation is not framed in that way. I appreciate that the analogous offence in England and Wales is framed in that way, but in other Scottish offences, particularly under the Criminal Law (Consolidation) (Scotland) Act 1995, the process is inverted. Instead of placing the onus on the Crown to prove the reasonable belief of the accused in relation to the victim, the provision is framed in the way of a defence—showing that the accused had a reasonable belief that the person was over the age is a defence to a charge. We have given this issue considerable thought and think that it might be easier to prove the offence if we use the formula that is used in the Criminal Law (Consolidation) (Scotland) Act 1995 and other existing Scottish offences.

If the onus for that element of proof is removed from the Crown and placed on accused persons, who have to say that they had a reasonable belief, we are back to the question whether the test for reasonable belief should be subjective or objective. From the 1995 act, existing case law shows that the accused has to have made due inquiry and cannot just rely, for example, on the appearance of the other person. There is a body of case law on which a judgment could be made.

**Gerry Brown:** The bill asks the Crown to prove a negative. We are concerned that proof in relation to section 1 is becoming more difficult because of that. The onus should revert to the accused.

**Mr McFee:** That is interesting, because I framed the question according to the traditional concept of reasonable belief being a defence, when, under the bill, it is not a defence—it is for the prosecution to prove that a person did not have a reasonable belief.

**Gerry Brown:** Yes.

**Mr McFee:** That is useful. Thank you.

**The Convener:** I want to clarify your view on section 1. In your paper, you refer to an adult who “intends to commit one of the relevant offences against that child, either at the meeting or on a subsequent occasion.” How far do things have to go before an offence is committed? Is it inferred from the travelling to meet the child and the communication? Does the Crown have to specify which of the relevant offences the accused was going to commit?

**Anne Keenan:** Our understanding is that the relevant offence could be any of those that are referred to in the schedule. The court would infer that the accused intended to commit one of those offences. A specific offence would not have to be libelled.

**The Convener:** But it is correct to say that the offence is not complete until the Crown shows that the adult who is over 18 travelled to meet the child who is under 16 and communicated on two previous occasions.

**Anne Keenan:** Yes.

**The Convener:** Will that be enough?

**Anne Keenan:** Yes, if the accused had done that and intended to commit one of the offences listed in the schedule.

**The Convener:** The only way in which you could decide that is by inference.

**Gerry Brown:** Yes.

**The Convener:** Do you think that the bill makes it clear that that is the case?

**Gerry Brown:** Yes. The only way in which that could be decided would be by inference from the evidence that was led. That inference would be made from something that was in the communication or in any other correspondence, or something that was in the possession of the accused, that implied that one of the relevant offences was going to be carried out. To give an example off the top of my head, the accused could be in possession of certain clothing or other items that suggested that he or she was going to commit some sexual offence. There are certainly a number of hurdles to overcome. The reason for that is that we are talking about striking at the
preliminary stage of the activity. As Anne Keenan has said, we have a panoply of legislation to deal with more progressive sexual misbehaviour. The hurdles are there both to try to protect the innocent and to prevent the abuse that we are targeting.

The Convener: The principle is that we are trying to prevent that abuse from happening. The offence is based entirely on the preparation that is made to commit such abuse.

Gerry Brown: It is all based on a communication that, on the face of it, is innocent, but that seeks to subvert a child’s will. That apparently innocent communication is linked to other elements that are not innocent—for example, the fact that someone is travelling from outwith Scotland to meet a seven-year-old child whom they have never met before. That might require an explanation, as might the other aspects on which you have already had evidence.

Mr McFee: I want to clarify whether it is your contention that the way in which the bill is written means that if an adult travels to meet the child with the intention of carrying out an unacceptable act, that is an offence, but if the adult gets the child to travel to their home, that is not an offence, even though the adult still has the intention of committing such an act.

Anne Keenan: Yes. That is what we are concerned about.

The Convener: The bill is specific about the fact that it must be the adult who travels.

Iain Fleming: The reason for that is that section 1(1)(a)(ii) says “travels”.

Mr McFee: Yes, and it says who has to travel.

Gerry Brown: Stewart Stevenson raised the issue of when a person is an adult. That is another matter.

Anne Keenan: In relation to previous communications, there is the question of whether they would have had to have been made after the adult had reached the age of 18 or whether they could have taken place before then. Mr Stevenson has already mentioned that.

The Convener: We had a similar exchange about whether it matters who initiates the communication. Although the bill concentrates on the adult’s behaviour, the same principle may apply even when the child has made the initial communication, of which the adult then takes advantage.

Margaret Smith: Before I move on to ask about the age of the offender, I will return briefly to the concept of reasonable belief, on which Bruce McFee sought clarification. You said that what was proposed in the bill was analogous to the situation that applies in England. What was the background to that situation from a case law point of view? Was the change in the way in which such matters are dealt with the same in England as the change that is proposed for us? If so, has the change presented any difficulties in England?

Anne Keenan: I do not have a detailed knowledge of the law and procedure in England; I simply checked the relevant act to ensure that the provision was the same and noted that it was. That is certainly something on which we could consult with our counterparts down south.

Margaret Smith: I am just worried that we may be going down the road of importing English law for no reason other than by mistake.

Anne Keenan: I would certainly be happy to write to the committee to clarify that, if we can get some information from colleagues down south about English law and procedure.

Margaret Smith: That would be helpful.

On the offence as set out in section 1, you recommend that the proposed minimum age of the offender, 18, be reduced to 16, which, as we have already heard, raises a number of questions. Will you explain more fully why you think that that should be done? Are you aware of any people in the 16 and 17 age group who groom younger people for sexual purposes?

Will you also elaborate on your views about what would be appropriate for criminal law intervention in terms of the relationships between 16 and 15-year-olds and so on? I think that it was Barnardo’s Scotland that suggested that it might be more appropriate for the conduct of 16 to 18-year-olds to be referred to a children’s hearing, rather to the courts system. That is something of a can of worms.

Anne Keenan: We looked at the matter purely from the point of view of legal principle in relation to the bill’s consistency with other areas of law. We do not have any research on the number of people who might commit offences in that age group. We suggested that the age could be reduced to 16 on policy grounds. We could envisage a situation in which a 16 to 18-year-old might be grooming younger children of perhaps seven or eight. On purely policy grounds, we did not see why such offenders should evade liability for prosecution, when other areas of the criminal law, particularly the Criminal Law (Consolidation) (Scotland) Act 1995, do not make that age distinction. A 16-year-old could, for example, be charged with having unlawful sexual intercourse with a child aged between 13 and 16 under section 5(3) of that act.

In Scotland, we are familiar with procurators fiscal making the decision and using their prosecutorial discretion as to whether it is
appropriate to initiate a prosecution in such circumstances. In some ways, the considerations that are applicable in other areas of the criminal law could also apply in relation to the offence that we are considering. That would also relate to the decision on whether to refer the offender or the case to the children’s reporter for further consideration.

Margaret Smith: So you do not think that it would be necessary to include an extra provision, as alluded to by the Scottish Police Federation, on the age of the child relative to the age of the adult. Would you leave that in the hands of the prosecutor to assess on a case-by-case basis?

Anne Keenan: I would leave that in the hands of the prosecutor. There are situations all the time where policy considerations are taken into account, particularly in cases where there is a relationship between a 16-year-old and someone who is just under 16. In such cases, prosecutors make a decision about whether it would be appropriate and in the public interest to proceed. The prosecutor has the benefit of taking all the facts and circumstances of the individual case into account at that point.

The other aspect of the bill that concerns us relates to art-and-part guilt. We were concerned about situations in which a 16 or 17-year-old could be used as the instrument of an older person or third party to initiate contact with the child, with the person over 18 making the contact. We are unclear what the exact position would be. It was our understanding—although we are now not clear whether it is the case—that section 293 of the Criminal Procedure (Scotland) Act 1995 would apply. That section states:

“A person may be convicted of, and punished for, a contravention of any enactment, notwithstanding that he was guilty of such contravention as art and part only.”

It is therefore read into every statutory offence that a person can be convicted of that offence on an art-and-part basis.

That provision is in the Criminal Procedure (Scotland) Act 1995, but we were interested to read the evidence that the Scottish Executive and the Crown Office gave about the question. We are not clear what the position would be and we seek clarification about whether or not that provision would apply.

Gerry Brown: I think that, in fact, we—that is to say, those of us in the Law Society—are clear. We are just being polite.

Anne Keenan: I was trying to be polite, at least.

Margaret Smith: You were being very polite.

Gerry Brown: Whereas I am gung-ho.

Throughout the consideration of the bill, the age of the child has been discussed. I heard the evidence about the European framework directive and the protocol relating to child prostitution, pornography and trafficking. We are sympathetic to that view, but we are bound by what has been said about ages in other places. We have to deal with a range of ages. I suggest that the question of age and the child in criminal law might have to be re-examined in general terms so that we can provide some sort of consolidation—perhaps the Scottish Law Commission could examine that. For the law to be effective, individuals have to be clear about where they stand.

Margaret Smith: At the risk of boring you even more, I want to talk about another issue relating to age. As introduced, section 1 of the bill would make it an offence for anyone who was resident in Scotland but validly married to a person under the age of 15 to meet her or him for sexual purposes. Do you think that there should be some sort of marriage exemption, or could that issue best be addressed by appropriate prosecutorial discretion? My understanding is that, in England, there is an exemption relating to marriage or relationships akin to marriage.

Iain Fleming: I would be inclined to the view that such circumstances should be left to prosecutorial discretion.

Stewart Stevenson: Why is an age specified at all in relation to the perpetrator, given that the 22 offences that are listed each have an age at which it is possible to commit those offences? Why does the bill need to specify an age that relates purely to the preparation to commit any one of those 22 offences? In law, what would be the difference if the bill made no reference to the age of the perpetrator?

Anne Keenan: That is a valid point. The Criminal Law (Consolidation) (Scotland) Act 1995 relates to a number of the offences that we have referred to but gives no age for the perpetrator in relation to some of the offences. Certain defences can apply, such as the fact that the perpetrator is under 24 and has not been charged with a previous offence, but no age is specified in relation to a number of the offences. The matter would be left to the discretion of the procurator fiscal, subject to agreed protocols between the Lord Advocate and the Scottish Children’s Reporter Administration in relation to whether the prosecution was taken.

Stewart Stevenson: I am making the point in relation to the perpetrator. I think that there is a clear case for giving an age in relation to the person whom we are seeking to protect; that is an entirely different issue. However, the police told us of their experience of aggressive sexual predators of modest age—they talked of 14-year-olds. It is
interesting to hear you say that the substantive offences provide the necessary discrimination in relation to age.

The Convener: The question of age is interesting. You might be right in making the final decision just a matter for prosecution guidelines, but if we reduce the age to 16, in the case of a 16-year-old and a 15-year-old, what will be the difference between under-age sex and grooming? I admit that a similar scenario could arise whatever the age is, because the age gap between a 19-year-old and an 18-year-old is small. I wonder whether more needs to be done to define grooming.

I understand entirely Anne Keenan’s point. It is clear that a 16-year-old or even a 15-year-old could prey on an eight-year-old or could be used in the commission of such an offence. That makes me think that perhaps the bill should drive at the intention behind behaviour, rather than at the ages of those who are involved. We have received written evidence about a worry of mine, which is the defining line between unlawful or under-age sex and grooming. You think that the prosecutors should ultimately determine that.

12:15

Gerry Brown: The prosecutor has wide discretion—some evidence referred to that—to take into account the nature of the offence, the circumstances, the accused’s background, the victim’s circumstances and the balancing act with the public interest. That is the stopgap and the safeguard that we should have.

Subject to the comments that we have made, I am reasonably comfortable—as is the Law Society’s criminal law committee—that section 1 covers the preliminary step to the more active misbehaviour that is referred to in the relevant offences. I detect that the convener is not as comfortable.

The Convener: You suggest that if we lowered the age to 16 and there was some sexual content to the messaging on msn messenger between a 16-year-old and a 15-year-old, who agreed to meet, the offence would be committed if the 16-year-old travelled to meet the 15-year-old. The prosecutor would have to decide whether to prosecute in the public interest, but the offence would have been committed.

Anne Keenan: That would apply only if the person involved intended to commit one of the scheduled offences—if the 16-year-old intended to meet the 15-year-old to commit rape or engage in lewd and libidinous conduct, for example.

The Convener: You said that the inference must be drawn from going so far as to meet up and from the communication. Nothing else has to be shown.

Anne Keenan: No. Intent must still be proved. I am sorry; perhaps I did not make that clear. The intent to commit one of the offences would still have to be proved, but that could be drawn from the facts and circumstances of the case. Evidence might be led and the inference would be drawn from the facts and circumstances.

The Convener: It might be clear from their communication that they would have under-age sex, which could also involve an offence under the bill. That does not apply in relation to the similar age gap between a 19-year-old and an 18-year-old, because sex between them would be lawful.

Gerry Brown: The point is that, on one view, a sexual predator could equally be 16, 27 or 45. What matters is the facts that support the element of the intention to commit the relevant offence. The inference must be drawn from sufficient credible and reliable evidence and I think that it would have to be corroborated.

The Convener: I will soon leave the point. If we suppose that the evidence exists, the offence will have been committed. If one party was 14, under-age sex could be involved. The e-mail communication could show that that is why the parties were meeting up. However, if the age in the bill were reduced to 16, the prosecutor would have to make a decision about whether unlawful sex could be inferred because the parties were trying to have a relationship or whether the terms of the legislation were met because there was communication and it was clear what would happen. Consent will not come into it.

Gerry Brown: That is right.

Stewart Stevenson: In essence, section 1 of the bill is about creating an offence of preparation. To sustain that, it is necessary to show that the preparation is for one of the 22 offences listed in the schedule, that communication has taken place and that there is a Scottish connection.

Gerry Brown: There is also the travelling element.

Stewart Stevenson: Yes. As shorthand, I was using the word “preparation” to cover that. The parties do not have to meet; the travelling is a specific part of the preparation. I was intervening to ensure that, when you said that section 1 describes the offence, you were not reneging on the point about the lack of symmetry at section 1(1)(a)(ii), which states that the perpetrator is the one who has to travel. You are continuing to say that there ought to be, for the sake of argument, a section 1(1)(a)(iii) that says, “or arranges for the child to travel”, or something like that.

Gerry Brown: Yes.
Stewart Stevenson: That is the substance of my intervention.

Gerry Brown: If we are going to renege, we will tell you.

Stewart Stevenson: It is just that the words that you used carried that risk.

Gerry Brown: Yes. I am sorry.

Mr McFee: So the offence hinges on the inequality between the two parties. It is not the case that she is 15, he is 16 and that is an offence—boom.

The Convener: On what grounds? There is no definition of grooming.

Iain Fleming: On the one hand, there is a situation in which a 15-year-old and a 16-year-old are involved in an on-going consensual relationship. There is no doubt that a number of offences may be being committed in the course of that relationship but, in my experience, the likelihood is that the prosecutor would take the view that it would not be in the public interest to prosecute in such a case. On the other hand, when there is an adult of 45 and a child of 12—a situation in which there is a clear inequality—the view of the prosecutor is more likely to be that it is appropriate to prosecute.

The Convener: My concern is that, although that seems sensible, it is in fact arbitrary—an individual will have to make a decision about whether the age gap means that there is inequality. Would the gap have to be two years, three years or what?

Iain Fleming: I am not a prosecutor, but my understanding is that guidelines are given to each of the various offices of the Procurator Fiscal Service. The guidelines will instruct the prosecutors on what matters should be taken into account when making such decisions.

The Convener: The point that occurs to me is that there has to be some definition of inequality to enable the Lord Advocate to draw up guidelines. Otherwise, he would be drawing up guidelines for legislation about which Parliament’s intention was unclear in relation to the offence of grooming, which is the term that we are attaching to the offence.

Margaret Mitchell: The police are keen for us to consider whether the content of the communication could be such that it could be viewed as the grooming offence, without there being a necessity to prove an intent to meet. If we amended the bill so that the contact or communication happening once showed that grooming was taking place, would there be a need for corroboration? In other words, would we then have to look for two occasions on which those actions had happened, without necessarily having moved on to the second stage, which relates to—as the bill stands—the intent to meet?

Iain Fleming: My understanding is that the whole crime has to be corroborated. There have to be two separate sources pointing to the commission of the crime. If there are two separate sources relating to that one meeting, that would be enough.

The other concern that we had about the requirement for two meetings was the difficulty in defining what constitutes two meetings. I am not terribly familiar with internet chat rooms, but I understand that it is possible for someone to go on for a day in an internet chat room. Is that one meeting or two meetings? The concern is that there is a possibility of circumventing the bill if we insist on a requirement for two meetings. The evidence tends to suggest that there may be only one, terribly prolonged meeting.

Margaret Mitchell: I presume that there would have to be something in the communication about travel, if nothing else, if the police did not have the ticket saying that the parties were going to meet or if the adult party did not turn up at the meeting. I am getting confused about the evidence that would be needed if, as the police want, the requirement for evidence of travel to meet is taken out of the bill. Is the communication itself enough?

Anne Keenan: Do you envisage needing only the communication as evidence of the offence, with no further action having had to take place?

Margaret Mitchell: Yes. The communication would contain inappropriate language or be obviously abusive.

Anne Keenan: I think that what you are getting at is that the communication would not be innocent but would, in itself, be indecent in some way. There has been case law on that point; the High Court ruled on it in the case of Webster v Dominick—2003 SCCR 525. Talking about lewd and libidinous conduct, the Lord Justice Clerk said:

“...and libidinous practices ... It may be constituted, in my opinion, by means of any lewd conversation with the victim,
whether face to face or by a telephone call or through an Internet chat room. In each case, the essence of the offence is the tendency of the conduct to corrupt the innocence of the complainer."

Therefore, a conversation between two parties through the internet, for example, would be all that was needed to prove the offence. That would be lewd and libidinous conduct in any event.

However, in my view and in the view of the criminal law committee, the bill is trying to address a situation in which the communication is not lewd or indecent but appears to be innocent. That is why the further aspects of a meeting or arrangements to travel to meet the person are needed. It is that further action with the intention of committing the sexual offence that consolidates the offence.

Margaret Mitchell: So if the communication said, “I will meet you at such-and-such a place,” would that be enough even if the tickets were not purchased or the person did not turn up? Would it be sufficient for someone to say that they would meet and for there to be only one communication?

Anne Keenan: If we leave the number of communications out of it, the adult would—as the bill is drafted—have to travel. I do not think that we have discussed whether the attempt to commit the offence would be an offence. A provision in the Criminal Procedure (Scotland) Act 1995 allows one to read into any statutory offence the attempt to commit an offence. Whether an attempted commission of this type of offence would be an offence in itself is another matter on which we would need clarification.

Margaret Mitchell: Would that constitute grooming?

Anne Keenan: We would need to go back to the Executive on that and check its intentions and whether it agrees that the provision would apply in such circumstances. As the bill is currently drafted, it appears that there needs to be travel, not just intention.

Margaret Mitchell: I understand that, but if that element is removed and we go back to what the police want, I wonder whether we are really covered.

The Convener: Let us move on to risk of sexual harm orders. It is back to you, Margaret.

Margaret Mitchell: On risk of sexual harm orders, do the witnesses wish to comment on the fact that we are using a civil order to address conduct that is, in effect, a criminal offence?

Anne Keenan: Our written evidence indicates that we can see some merit in having those orders available as a child protection measure under civil procedure. We question how they will interact with the criminal law and our position is that the criminal law should be given primacy so that, if there are suspicions about whether conduct is inappropriate, the first port of call should be to ask whether there is sufficient evidence to go down the route of criminal law. If there is, the matter should be passed to the procurator fiscal for a decision on whether prosecution is in the public interest. Only when there is a clear indication that a criminal prosecution will not go ahead should consideration be given to whether a civil order would be appropriate. There is a pecking order, if you like; the criminal law should be the first port of call and the orders should be a secondary measure.

Our concerns are primarily in relation to contamination of evidence and the fact that evidence that could be used in a criminal trial should not be rehearsed initially during civil proceedings. We want to ensure that any evidence that will be led in a criminal trial is led in that forum first.

12:30

Gerry Brown: The right to a fair trial is paramount. When civil and criminal processes run together, every effort is made to deal with the criminal process first. If that cannot happen, an undertaking should be given by the prosecution or any of the other parties not to use that evidence or any finding of the civil process during the subsequent criminal process.

Mr McFee: As you probably heard, the police said in evidence that there was a suggestion that civil proceedings could be used when there would be an unreasonable delay in bringing a criminal case to court. Your evidence suggests that that could prejudice the outcome of a prosecution when it came to the criminal court. Is that correct?

Gerry Brown: Yes. However, all the explanatory notes and evidence that we have at this stage show that we are not talking about huge numbers. Our general view is that such matters should be dealt with expeditiously. If we are talking about a criminal prosecution and a civil process, both should be dealt with expeditiously and we suggest that there should be a strict time limit, with the criminal prosecution taking the primary role when there is sufficient evidence. When the case goes to the procurator fiscal, the decision might be that there is not enough evidence and then the chief constable would state that he would like to take out a risk of sexual harm order. The issue is important and there might be questions to be asked in connection with safeguards for the individual who is served with the papers.

The orders should go through the Court of Session process so that they are valid throughout Scotland. The practice appears to be that if a risk of sexual harm order were to be dealt with in
Edinburgh sheriff court, for example, that order would be granted within the jurisdiction of the sheriffdom of Edinburgh but would not cover other areas of Scotland. An order that applied to an individual and which involved a child or children might not have effect if the child were to move from Edinburgh to Lochgilphead, for example. Although we have other reservations about the orders, our view is that because they are important, they should apply Scotland-wide. The only way to do that in practice would be through the Court of Session.

Mrs Mulligan: I will show my ignorance by asking whether evidence that has been led in a civil case can be led again in a criminal case. Are you saying that such evidence should be able to be used?

Gerry Brown: A number of different issues are involved. In a civil case there is a different onus of proof, which is the balance of probability. Hearsay evidence is admissible and corroboration is not required, although the individual might have to respond to the evidence. The normal practice is that an individual should not be prejudiced if a criminal process is pending and that because of the implications of the criminal process, he or she should have the right to have that process dealt with first.

Margaret Mitchell: On the standard of proof, do you have concerns that the test would be the balance of probability rather than beyond reasonable doubt?

Iain Fleming: We have a number of concerns, but given that the RSHO would be a civil order, we cannot articulate real concern about the point that you raise. However, we are concerned about the procedures for the leading of evidence and, in particular, about the various safeguards for the person who would be the subject of an order.

Margaret Mitchell: Your submission suggests that one way of safeguarding the rights of the person who would be the subject of the order would be to allow them to have representation. Would that automatically be covered by article 6 of the European convention on human rights?

Iain Fleming: I do not profess to be an expert, but my understanding is that we must first consider the interim order. Interim orders are regularly granted in courts throughout the land without the individual being represented. We are concerned about the granting of interim orders without the benefit of representation and all that might flow from that. Given that we are talking about a civil order, I am not convinced that article 6 would be contravened at the interim stage. In relation to more permanent orders, I think that article 6 would be contravened if the opportunity to obtain representation were not given to the person who was to be the subject of the order. We must make a distinction between the two types of order. The criminal law committee of the Law Society of Scotland has real concerns about interim orders and the use to which they might be put.

Gerry Brown: A reason for our concern is that a number of tests would have to be satisfied before a decision could be made to grant a full-blown order, but the bill makes no such provision in relation to interim orders. I think that the police organisations that gave evidence touched on the fact that the RSHO would not be like an ASBO—I mean no disrespect to anyone who was involved with the ASBO legislation. The RSHO would have implications in relation to imprisonment, disclosure and, potentially, the sex offenders register.

Margaret Mitchell: Will you comment on the retrospective effect of section 2(4), which you mentioned in your submission?

Anne Keenan: We considered the matter with reference to article 7 of the ECHR and we are fairly satisfied that given that the RSHO would be a civil order, article 7 would not apply. We are concerned that the provisions on orders are widely drafted. For example, the “acts referred to” that are listed in section 2(3) are set out in very broad terms. We must consider section 2 in its entirety, to examine the checks and balances that would apply. For example, the court would have to be satisfied that it was “necessary to make such an order for the purpose of protecting children generally or any child from harm from that person”.

There is an overriding view that the court would have to act proportionately to satisfy its obligations under the ECHR. From that aspect, we think that any action that was taken in relation to the order would have to be proportionate. However, we felt that it was important to flag up the need for proportionality, particularly when we are considering a situation in which conduct that occurred prior to the commencement of the bill—or the eventual act—is taken into account. The courts need to be aware of proportionality. If we were talking about conduct that occurred 15 years ago, for example, it may not be proportionate in those circumstances for the order to be given. We just want to flag up that the order, more than anything else, is a real one in which there should be checks and balances. As Iain Fleming has indicated, the right to representation—to put the case before the court before an order is given—is very important, and should be contained in section 2.

Section 4 deals with variations, renewals and discharges, and there is provision in section 4(3) for the sheriff to vary the order or to renew it. However, the section says:
“after hearing the person making the application and (if wishing to be heard) any of the other persons mentioned in subsection (2)“.

If express mention can be made in that context, should not specific reference also be made in section 2?

Another aspect that we were concerned about related to the granting of the orders. I appreciate that there are distinctions between RSHOs and ASBOs, but the procedure in the Antisocial Behaviour etc (Scotland) Act 2004 makes express provision for the sheriff to explain to the person in court the effect of an ASBO, and the consequences if the person breaches the order. There are also provisions about notification, so that there is an onus on the clerk of court to intimate the granting of an order either by serving it on the person in court or by sending out a letter by recorded delivery or the like. None of those provisions appears to be replicated in section 2 of the bill, or indeed in relation to interim RSHOs. As Gerry Brown has indicated, given the stigma that could be attached to RSHOs, is it not all the more important—if we are to achieve a balance—that similar protections should be included in the bill?

Margaret Mitchell: If we take that literally, it could go way back. Where do we put that proportionality? Where do we flag it up? It is common sense, but—

Anne Keenan: It is implicit that there is a duty under the ECHR for a court to act in a proportionate manner. We just felt that it was important to get it on the record that that was how that proportionality should apply.

The Convener: I am slightly uneasy about the provision. You seem to be content that the legislation should indicate simply that the court has to be satisfied that proportionality is necessary. I thought that the provision was not that prescriptive and that, if we did not know the grounds on which a sheriff would consider an order, it was in fact quite wide.

Iain Fleming: I hate to harp on about the interim RSHOs, but I have real concern about them. The test for an interim RSHO is whether it is just that it should be granted. That seems to be a lesser standard than whether it is necessary. If we envisage that, on the one hand, there is that test, and that, on the other hand, there may not be representation, it seems more likely that interim RSHOs will be granted. That is what causes the criminal law committee some concern.

The Convener: I agree. Too many comparisons have been made between RSHOs and ASBOs. That is the line that we got from the Executive officials and now, after hearing the exchange round the table, I think that it is inappropriate to compare the respective models. The discussion that we had on the ASBOs and the interim ASBOs cannot simply be lifted and applied in this case. I agree that we have no indication of what guidance the court would use for the interim orders, which are an even thinner provision. I would be happier if the legislation were to say that the action that the sheriff takes ought to be proportionate. That would nail down that provision a bit more. As it is, we as legislators do not know what grounds sheriffs could use to grant orders, as long as they can justify that they felt that an order was necessary.

12:45

Gerry Brown: Sheriffs are obliged to comply with the Human Rights Act 1998 and to make proportionate decisions. It is not normal practice to specify that in a bill.

The Convener: If it were to be specified in the bill, somebody who wanted to challenge a decision to grant an order could challenge the bill. If it is not specified in the bill, they would have to challenge the decision under the ECHR.

Gerry Brown: First, if someone were to challenge the bill, they would have to say that it was incompatible with the ECHR.

The Convener: If the word “proportionate” was included in the bill—if the bill said that the sheriff had to be satisfied that it was necessary to grant an order and that any decision had to be proportionate—any person who wanted to challenge the proportionality of the sheriff’s decision could rely on the bill. However, if it is not in the bill, they would have to rely on the relevant article of the ECHR, which would be slightly harder.

Gerry Brown: It would be. They might, for example, have to raise a devolution issue or something of that sort.

The Convener: Exactly. However, if proportionality was mentioned in the bill, we could keep the case within our own courts.

Gerry Brown: Yes. If you were unhappy with the test that is provided in the bill, you could use another form of words. You could say, for example, that the granting of the order must be in the interest of justice or that the sheriff must take into account all the facts and circumstances. As usual, I am talking on the hoof.

The Convener: ACPOS suggested that, in cases in which the police could not corroborate the offence and the case got as far as the procurator fiscal but could not get to court, we might go for a civil order. Is it a just course of action, having tried the criminal route, to go for a civil order? I can get my head round the idea that the police might sense a crime but want to protect the child and therefore go for the civil order and justify the
decision, but I am less comfortable with the idea that, if they have a go at a criminal prosecution but do not get any further, they can say, “Hey, we’ve got this order that we can use.”

Gerry Brown: To take an analogous situation, the three of us find that, in practice, if a case does not prove in a criminal court, that is normally because of lack of credibility or reliability on the part of witnesses, lack of corroboration or insufficiency of evidence. In the case of insufficiency of evidence, there is nothing wrong with going ahead with the civil process, because we would be trying to safeguard an important situation, but in the case of lack of credibility, reliability or corroboration, the chief constable might think twice, because the two complainers have been disbelieved.

Stewart Stevenson: During the passage of the Antisocial Behaviour etc (Scotland) Act 2004—I am sorry to return to ASBOs—one of the changes that I wished to make, which the Executive resisted strongly, was to ensure that ASBOs could not be granted for an indefinite period. That act allows ASBOs to be granted for an indefinite period, but section 2(5)(b) of the bill states that risk of sexual harm orders must be granted “for a fixed period”. Is there any particular legal or ECHR reason why RSHOs could not be granted for an indefinite period?

Anne Keenan: We raised the same concerns as you did on the granting of ASBOs for an indefinite period and gave evidence to that effect, so it would be inconsistent for us to say that it would be all right for an RSHO to be granted for an indefinite period. We have concerns from an ECHR point of view about the granting of orders for indefinite periods.

Stewart Stevenson: When I looked at the bill, I wondered whether the Executive had had a rethink.

Iain Fleming: One of my concerns is that nothing in the bill would prevent an interim order from going on for an indefinite period.

Stewart Stevenson: Section 5(4)(a) states that an interim RSHO “has effect only for a fixed period specified in the order”.

The Convener: Yes, but the orders can specify whatever period they like.

Iain Fleming: That is right.

Gerry Brown: The point is that sheriffs might never choose to grant a full order.

The Convener: A full order runs for a minimum of two years, but it could be—

Margaret Smith: But “indefinite” cannot be a fixed period.

Stewart Stevenson: Could the term “indefinite” be defined as a fixed period in law?

Iain Fleming: We might specify that such a period would last, say, for 10 years. However, that move would mean that the interim order would remain in place without the evidence ever being tested. We felt that there should be some provision that stipulated that the interim order should be allowed to exist only for a fixed period until the matter was brought to court. Obviously, that would put pressure on the various agencies involved to air the matter in court. The worry is that once the interim order has been granted—

Stewart Stevenson: The pressure is off.

Iain Fleming: Exactly, but the pressure is not off the subject of the order.

Margaret Smith: You said that the interim order should be for a fixed period. However, that is already stated in the bill. Are you saying that that period should be fairly short?

Iain Fleming: Yes. They will have advantages in urgent situations in which a child is perceived to be at real risk. However, we must ensure that the application of an interim order is accompanied by various rights of representation and the subject of the order’s right to be heard.

I am not saying that this is likely to happen, but a child might make a complaint to a police officer about an individual’s conduct. That child might be perfectly credible, and the police officer might entirely accept their evidence. After that, the interim order might be granted. Once a full investigation has been carried out, it might transpire that the evidence is utterly unreliable and should not be used as the basis for sustaining a court order. However, the individual in question has already been legally and socially stigmatised by the granting of the interim order.

On the validity of such orders, the committee has taken a view that this provision is worthy enough to be set out in proper legislation. As I have said, I see some advantages in having interim orders if they are used in emergency situations and not as a substitute for the full-blown process.

Mrs Mulligan: That comment is useful. I understand your concerns, but I do not want members to think that you believe that the interim orders should be abandoned. You think that they can play a specific role.
Iain Fleming: That is right.

Stewart Stevenson: Given the EU framework decision to define a child as being under the age of 18, do you think that that age limit is appropriate with regard to indecent representations or photographs? Should there be any exemptions for people who are married or are in a relationship with those characteristics?

Anne Keenan: I should preface my comments by saying that they are based on a brief discussion of what has happened. We would welcome sight of any amendments that the Executive might lodge, at which point we would provide the committee with some more detailed comments.

That said, we have had the benefit of reading Chris Gane’s very helpful note on the subject. As Gerry Brown has indicated, we can understand why it might be seen as desirable in such cases to extend the protection that is given to children under 18. However, we also appreciate that there are problems with making that fit with other areas of consent in law and we understand why it might be necessary to provide exemptions in certain situations for those who are lawfully married or in a civil partnership. We think that due cognisance should be taken of the Civil Partnership Act 2004 to ensure that there is no discrimination on that basis.

Stewart Stevenson: Similarly, are there any issues with the age limit in the proposal that it would become illegal to pay someone under the age of 18 for sexual services?

Anne Keenan: We would want to see how the provision is drafted. As the police indicated, we want to find out exactly what is being criminalised by the provisions. Ostensibly, if such protection is to be extended one would extend it to the child in relation not only to sexual intercourse but to the payment for that sexual intercourse. We understand why that protection would be necessary but, again, we do not want to say exactly what—

Stewart Stevenson: I do not think that the Executive proposes to make the sexual act that is concerned illegal.

Anne Keenan: It is the payment that would be illegal.

Stewart Stevenson: The payment to someone under the age of 18 would be the illegal act. That is my understanding of the proposal.

Anne Keenan: That is right. That is our understanding, too.

The Convener: We do not have the amendments yet, but when we get them we will make sure that you see them. That brings us to the end of our questions.

Gerry Brown: May I make one brief point, convener?

The Convener: Yes.

Gerry Brown: I draw the committee’s attention to section 7(4), on the breach of an RSHO or interim RSHO, which states:

“it is not open to the court by which the person is convicted to make a probation order in respect of the offence.”

With respect, it seems to us that that provision ties the hands of the court, and I fail to understand it. One would have thought that when there is a breach of such an order but the court deems the breach not to merit a fine or imprisonment, the provision closes one of the options, namely a three-year probation order. Our experience is that when someone breaches a drug treatment and testing order, for example, there may be a function for probation, especially if the person is off drugs but there are other issues.

The Convener: Thank you for drawing that to our attention. It seems extraordinary.

Stewart Stevenson: Similarly, are there any issues with the age limit in the proposal that it would become illegal to pay someone under the age of 18 for sexual services?

Anne Keenan: It is the payment that would be illegal.

Stewart Stevenson: The payment to someone under the age of 18 would be the illegal act. That is my understanding of the proposal.

The Convener: Thank you very much for your evidence, which has been useful. I am sure that we will have further exchanges on the subject in the future. As members know, unfortunately David Feldman could not be with us because he could not travel today. We will see whether we can reschedule his appearance.

I remind members that unless there is an issue with the land reform provisions that we discussed earlier, the committee will not meet formally next week because we will have a seminar with various organisations to examine the policy and practical implications of the Protection of Children and Prevention of Sexual Offences (Scotland) Bill. Members should check their email for any response that is received from the minister on the land reform provisions.

Meeting closed at 12:58.
1st Meeting, 2005 (Session 2), 12 January 2005, Associated Written Evidence

SUBMISSION FROM ASSOCIATION OF CHIEF POLICE OFFICERS IN SCOTLAND

I note from the Financial Memorandum (into Prohibition of Female Genital Mutilation) that few, if any, investigations and prosecutions are expected. In the case of Protection of Children and Prevention of Sexual Offences, the Financial Memorandum suggests that cases are currently prosecuted under e.g. existing lewd and libidinous behavior legislation and relates the difficulty in predicting the number of additional enquiries expected.

In both Bills the Financial Memorandum accurately reflects the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise.

I trust this is of assistance to you meantime.

Peter Forsyth
Staff Officer to the Chief Constable
Dumfries and Galloway Constabulary
24 December 2004

SUBMISSION FROM ASSOCIATION OF CHIEF POLICE OFFICERS IN SCOTLAND

Thank you for your letter of 17 February regarding the Protection of Children and Prevention of Sexual Offences (Scotland) Bill.

In relation to the information that was reported in the Press it would be helpful if I can clarify the position. I was not, as has been reported, advocating that there should be a mandatory custodial sentence for sex offenders. The point I was making was that to best protect the public there was a need to try to change the offending behaviour of those individuals that perpetrate sexual crimes against children and other vulnerable groups. As such I am a supporter of the use of programmes that can be used to try to change the future behaviour or sex offenders. The point I was trying to make was that the sentencing of individuals needed to take account of availability and duration of such programmes. As I am sure you are aware, not all of these programmes need to be delivered within the Prison. However, where an individual was to receive a custodial sentence there does seem to be some merit in that sentence being of a duration that would allow that individual to complete a programme with the hope that that would change their offending behaviour for the future.

As you will appreciate, and I am sure have experienced, our friends in the Media at times take what you have said and present it in a more sensational way than was intended. That said the story as run in the “Scotland on Sunday” was otherwise broadly reflective of what I had said to the reporter. It was just the emphasis was put in the wrong place and the link to the sex offenders programmes was lost.

To summarise ACPOS is not advocating mandatory custodial sentences for all sex offenders. We acknowledge each case must be judged on its merits, nonetheless sentences should reflect the seriousness of the offence and the impact on the victim. Sex Offenders programmes are important and can significantly improve public safety by addressing offenders future attitude and behaviour.

I apologise for the delay in coming back to yourself and colleagues on Justice 1 Committee in relation to examples where the RSHO may be applied for. I had canvassed my colleagues across the Forces and have recently had to remind them as this was proving more difficult to give you a range of examples. I enclose some examples where staff working in the sex offenders management units believe RSHOs would be applicable.

I trust these are helpful to you.

Bob Ovens
Deputy Chief Constable
Association of Chief Police Officers in Scotland
28 February 2005
Protection of Children and Prevention of Sexual Offences (Scotland) Bill: Stage 1

10:35

The Convener: We move on to item 3, on the Protection of Children and Prevention of Sexual Offences (Scotland) Bill. I welcome the committee’s adviser on the bill, Chris Gane. I also welcome Rachel O’Connell, who is the director of research at the cyberspace research unit of the University of Central Lancashire. I thank her for coming all this way to talk to the Justice 1 Committee and for her research paper, which it has been helpful to have in advance. We have a number of questions on the paper; we will go straight to them.

Margaret Mitchell (Central Scotland) (Con): Rachel O’Connell will be aware that the purpose of the bill is to provide greater protection for children against sexual offences and, in particular, to home in on grooming and to strengthen the law on it. I have read her excellent paper, in which she goes into that in a lot of detail. I ask her to elaborate a little on what grooming is. Having read her paper, I know that that is a huge thing to ask her to do, but it would be useful if she could give some more detail on that.

Rachel O’Connell (University of Central Lancashire): I will be happy to do so, but I will first fill in my background, which is in forensic psychology. I began researching paedophile activity way back in 1996, when I was part of a project that was funded by Europe. We worked with Interpol, the paedophile unit at Scotland Yard and the Garda Síochána in Ireland. At the time, it was not illegal to possess child pornography in Ireland—this was after the Mark Dutroux case—so Professor Max Taylor and I were sanctioned by the Government to look at child abuse images on the internet and to engage in research, during which I integrated myself into paedophile communities in internet relay chatroom environments, some of which were entitled “toddler sex” or “pre-teen sex”.

We were also sanctioned to examine grooming activities. I posed as an eight, 10 or 12-year-old, usually a girl, in children’s or teen chatrooms for the purposes of finding out how easy it is to groom and what the nature, processes and scope of grooming are in teen chatrooms. The biography that I usually gave was that I was eight, 10 or 12, my parents were always fighting and I was lonely in school. Between 6pm and 9pm, it never took more than 10 to 15 minutes to be picked by an individual.
The process is as follows. There is an initial friendship-forming phase of dialogue such as “Hi, how are you doing?” The individual wants to isolate the child from the public environment and get them into a private chatroom, so they move the child from an environment in which communication is one to many into a one-to-one communication environment. They then go through a relationship-forming phase, in which the adult says things such as “I know what that feels like,” and “I want to be there for you.” Most individuals pose as being about two years older than their target child—when somebody is 10, that is a big difference—although, almost from the outset, others tell the child that they are 20 or over. If you can remember being a kid, you will remember that anybody who is over 20 is just old; the person is an adult.

There are usually requests for pictures, and my experience of conducting research in paedophile chatrooms indicates to me that individuals refer to the pictures that children post in their profiles as being similar to portfolios. They search through kids’ profiles until they find the kid that matches their particular predilections. However, paedophiles have a variety of ways to select a child with a degree of premeditation and planning before they make contact with the child. Some will select children on the basis of their pictures, some will appear to spend a lot of time in a chatroom before they decide to target an individual child and some will come in, announce themselves and see what kind of contact they can make.

Once the child is isolated in a private chatroom, there is an exclusivity phase in which the groomer will use very seductive and manipulative language. For example, he might say, “Oh, I feel like I have really bonded with you”, “I feel like you might be my soul mate” or “I love you”. In fact, the language is so seductive that, on occasion, I have found myself saying, “Aw” before I realise what I am responding to. As part of the bonding process, the groomer might also send pictures and rose and smiley face emoticons.

The exclusivity phase, which involves language such as “I love you”, “This is our secret”, and “This is a very special relationship”, leads to what might be described as the risk-assessment phase. The adult might ask questions such as “Who else uses the computer?” and “Where is it located?” and might tell the child not to save copies of their conversations. He can disguise such remarks by pretending to have brothers and sisters themselves and saying that it is sometimes difficult to access the internet. However, I found that to be a trigger point; as soon as the person asked such questions or made such comments, I would think, “Right, we’ve got a live one here.” Perhaps at this point I should make it clear that my comments are not solely reliant on my own research but are also informed by a review of actual police cases.

Once the adult has established that the child is malleable, they move on to the sexual phase. At this point, there is deviation. For some individuals, the intention behind the process of online grooming is to meet the child, which is what the bill is intended to address. As members will know, some spend a year engaged in the process, while others reach the stage of “I can meet you” much quicker.

Other individuals engage in online grooming to find out the child’s daily routine. They want to know who takes them to school, what their after-school activities are, whether they are latchkey kids and are home alone and so on. For example, in a recent case—I cannot remember whether it was the Turner or Monaghan case, but I can find out the details later—the adult discovered that the girl was home alone on a particular afternoon, came to her house, knocked on the door and then forced his way in when she answered. The individuals in question go through a process of finding the optimum way of getting access to the child.

Although the groomer will typically engage in an intimate bonded relationship with the child, he might manipulate the child into believing that he or she is ultimately in control of the situation. For example, he might pretend to be psychologically weakened by the relationship and allow the child the perception that they are guiding what happens.

The ultimate purpose of such activity is to meet the child. Although circumstances differ from case to case, the adult might engage in cybersex, which basically involves describing to the child what they would do if they were with them and explaining such activity. It is noteworthy that it did not seem to make any difference whether I pretended to be a child of eight or 12; they would still explain in depth particular sexual terms such as masturbation, would ask the child to do it and would want to know what it felt like. That sexual element of the grooming process is used to strengthen the promise of a wonderful blooming relationship in which the person and the child will come to know each other fully. In that particular strand, there is a balance between intimacy and psychological coercion which takes the form of the adult trying to push the child’s boundaries by saying, “Do this. Don’t you love me? I’m here for you. I think about you all the time. You are the most important person in my life. Please do this for me—you’ll make me happy.”

Groomers might also request pictures. For example, they might say, “Oh, you have a beautiful face. Can I see more?” which might progress to questions such as “Do you have a webcam? Can you take photographs?”
Increasingly, they are utilising capabilities such as moblogging sites, which allow children to upload photographs that they have taken with their phone. In some cases, they have sent phones to the kids. A groomer might ask for the make and model of a child’s phone and send a mirror phone that he says is to be used only for communicating with him or a phone that he keeps in credit. They are expanding beyond fixed internet access and computers to embrace mobile technologies. Computers come in below parents’ radar—they are not aware of what is going on—but mobile technology is completely lost on them.

10:45

That describes the typical groomer, but there are also individuals who will engage in coercive activity. They will balance the coercion, but their approach is more aggressive. Having secured some piece of information that the child did not want to divulge or that is really important to the child, they will say things such as, “If you don’t do what I tell you to do, I’m gonna post the pictures you sent me on the internet,” or “I’m gonna come round and tell your mother,” or “I’m gonna see your school friends.” Engagement in cyberspace can have quite aggressive elements, such as talk about tying up the kid or using whips. It can go to that level.

Some of those aggressive types seem to want to meet the children in the real world, but there is less indication that they will go that far. There is also a minority—granted, they are few, but they exist—who seem to be driven by sadistic desires. They are more aggressive, but it appears that they are the smaller category of individuals who engage in grooming.

Those are the various processes. At the end of the conversations, the groomers say things such as, “Night, night, sweetheart. I love you. Sending roses”—they will use emoticons of roses—“I can’t wait to see you; I’ll be counting the minutes and hours. I’ll send you presents.” The aggressive types will try to bring the conversation round so that they are ameliorating the situation by being quite kind at the end.

On cyber-rapists, I am not fully convinced that all the guys who are just into the sexual fantasy are preferential paedophiles. They are just trying to achieve sexual gratification for themselves through the process of coercing an individual and getting a kick out of it. At the end of that, they are gone. As soon as they obtain what they want, that is it—they do not even complete the conversation, but instead just log out of the chatroom. My work with the police in tracking those guys has shown that they might come back on again after a very short time. They seem to be quite prolific; they have a high desire to engage in such activities.

Margaret Mitchell: We have been studying grooming for ever, but you and your paper have opened up new insight into what is going on with the result that we wonder whether the bill covers what we want it to cover, in that we are focusing a wee bit more on what happens after grooming as opposed to focusing on grooming itself and cybersex. Is cybersex, taken in conjunction with the grooming process—the winning of confidence, the intent and the content of the communication—enough in itself to make an offence? Perhaps I am wandering into what Bruce McFee will ask.

Rachel O’Connell: That is a very difficult question, although it is a good one. I am sometimes called in as an expert witness on court cases. Most recently, I was a witness in a case that involved procurement, in which an individual was talking to a law-enforcement officer but thought that he was talking to another paedophile about procuring an 11-year-old. He specified exact characteristics such as ethnic origin. His defence was the defence of fantasy—that he never intended to carry the act out. It is incredibly difficult for a court of law to tease out such issues.

I will deviate slightly. In my experience of researching paedophile activity in paedophile chatrooms, such as toddler sex chatrooms, the chat centres on certain activities. People ask, “Are you here to play or trade?” They refer to the exchange of child abuse images as “trade”. “Play” means engaging in cyberspace—exchanging details of their sexual fantasies with one another or role playing. One of them will say, “I’ll be a four-year-old boy in short pants; you can be the abuser.” They generate narratives about what can happen. From a research point of view, the fascinating thing is that other individuals will then engage in the story and embellish it with their experiences. In such environments, narratives are constantly being created about adult sexual contact with children.

Another activity that paedophiles engage in is talk about how they swap kids. Some claim to be fathers or people such as schoolteachers, who have access to kids; that cannot be verified, because they are online. They have nicknames such as “Kidswapper”. How much of that is fantasy is difficult to establish. Although we are obviously talking about the creation of text-based child pornography, there have to date been no cases—I am not a legal expert, so I may be wrong—in which such people have been prosecuted under the Obscene Publications Act 1959 because of the difficulties with Nabokov’s “Lolita”. The defence that such activity is a fantasy will be used regularly.

Margaret Mitchell: Although the fantasy defence can be used, is any account taken of the psychological effect of such play on the child?
Rachel O'Connell: That is difficult. It is important to ensure that we protect people's rights to engage in fantasy and role playing online. The online gaming environment has a massive element of fantasy. It will be incredibly difficult to tease out the issue. The psychological harm to children has not been properly assessed yet, because—

Margaret Mitchell: There is not enough evidence and there has not been a sufficient number of test cases.

Rachel O'Connell: That is right.

Margaret Mitchell: Thank you; that was excellent.

Stewart Stevenson: I notice that in the first and second lines of your paper, and elsewhere, you talk about "adults or adolescents engaging children in varying degrees of sexually explicit conversations". What evidence do you have on the age range of the abusers?

Rachel O'Connell: It was clear from operation ore, which identified that 7,000 people were collecting child abuse images, and from operation amethyst, which was the equivalent operation in Ireland, that some teens were engaged in downloading child-abuse images. There was also evidence to suggest that they were engaged in grooming activities. Recent research in New Zealand by David Wilson, a friend of mine who works for the New Zealand Government's Department of Internal Affairs, suggests that there has been an increase in the number of teenagers who view images of child abuse and who engage in child-sex related activities. That is a complex and challenging issue.

Stewart Stevenson: I want to be quite specific, because the bill that we are considering specifies ages. What is the youngest age at which such abuse has been identified? I am talking about the abuser—the potential offender.

Rachel O'Connell: There have been two child abuse cases in the UK—one in the west midlands and one in London—involving teenagers' engagement in downloading images of child abuse. In relation to grooming, I am afraid that I cannot give you an exact age.

Stewart Stevenson: I want to pin down the fact that there is no magic age at which people suddenly start to become a risk to eight-year-old, 10-year-old or 12-year-old girls. There is nothing to suggest that a 14-year-old boy could not abuse an eight-year-old girl using all the mechanisms that you have described.

Rachel O'Connell indicated agreement.

The Convener: We will discuss age limits soon. You mentioned that a friend of yours has done research in New Zealand. Could the committee have access to that research? As you will realise from our questions on the subject, we need such research to allow us to make a judgment about the age at which abusers should be identified in law.

Rachel O'Connell: I can certainly get hold of that.

Mr McFee: Your evidence has been illuminating. We have had a number of evidence sessions on the bill, but this one goes into the practices and how offences come about.

We have started to discuss ages, which is a relevant issue to which I will return, but I want to cover other ground first. Of the adults who use the internet to make contact with children—perhaps I should widen that beyond adults, depending on the definition of "adult" that we use—how many go on to meet or attempt to meet a child in person? Of a hundred contacts with children over the internet, what proportion will result in personal contact?

Rachel O'Connell: That is a difficult question to answer, given the present police information set-up, but it need not be so difficult. If there were a central point where the information was recorded in a database and collated, we could begin to answer such questions. However, at present, although the police record cases, the record may not state that the internet was involved, how many victims were contacted, the number of victims who chose to proceed with the case or the number who held back. Until recently, the only way in which we could gather information was to use Google and national newspapers and try to pull out the cases and count them up.

The first case of grooming in England to come to the attention of the media was the Georgina Moscott case, on 9 May 2000. That case came to the attention of the media and, subsequently, the media recorded cases that involved paedophiles, but there has been a lapse in interest in the issue, so we do not know whether the recording is adequate. In an eight-week period, the Accrington police, with whom I work occasionally, were made aware of four individuals who were engaged in grooming. Between them, they had about 32 victims in six months.

We sometimes think that such people operate alone, but if they become integrated into a paedophile community, they receive information from others about how to avoid detection, about where best to post their pictures so that they are not observed by law enforcement and about grooming practices that work well. Some guys work together: one guy will try to seduce a kid and if he feels that the kid has "gone cold"—to use a
paedophile’s words—or suspects that something is going on, he will instant-message his friend to tell him that. The friend will then come in and say to the kid, “Oh God, you don’t want to talk to that guy. Come over here.”

Mr McFee asked what proportion of people who contact children go on to attempt to meet them, but that is difficult to answer. Paedophiles talk about “honning their grooming skills”. In the real world, a person would have to invest a huge amount of time on grooming a child and tackling their line of defence—their parents and teachers. Online, a person does not have to go to such efforts. If a kid says, “You’re a weirdo, get away from me,” they just log out and log into a different chatroom and start again, until they perfect their skills.

That is a roundabout way to say that we are not clear about the answer to the question. One way to address the situation would be to consider how law enforcement bodies might develop a database in which information about such people is entered. We could then begin to get a picture.

Mr McFee: I ask because the bill concentrates on attempts that a paedophile may make to travel to see children or to encourage children to travel to see him or her—it is usually him. I want to establish whether the bill comes at the issue from the right angle. I am starting to have suspicions about that because there are issues about transfer of information between paedophiles that have not been considered until now. Thank you for putting that on record.

11:00

In your paper you break down grooming activity into a number of different stages through which activity progresses—perhaps “regresses” is the correct word. I understand that the timescale is different in every case, but can you give an indication of upper and lower limits? Your paper refers to “hit-and-run tactics”. In your experience, what is the minimum grooming time and over what period of time might a paedophile concentrate his efforts on a particular victim?

Rachel O’Connell: That depends on the individual and the psychological motivation that underpins his efforts. In one case, an individual groomed three girls for more than a year—he groomed one girl for 18 months. When the case came to court, it was assumed that the man had been waiting for the girls to reach the age of 13 so that if he was caught—as he subsequently was—the offence would incur a lesser sentence. That is that if he was caught—as he subsequently was—come to court, it was assumed that the man had groomed one girl for 18 months. When the case groomed three girls for more than a year—he underpins his efforts. In one case, an individual and the psychological motivation that

Mr McFee: In your experience, can grooming continue for more than a year?

Rachel O’Connell: Yes.

Mr McFee: What about the lower end?

Rachel O’Connell: Grooming can take place in a very short timeframe, even within a single day. The shortest period of which I am aware was in the Wigan case.

Mr McFee: Thank you. That is useful.

The Convener: You said that paedophiles tend to be involved in a ring—[Interruption.] I always think that it is George Lyon’s voice on the fire alarm test message. I will wait to see whether the message stops, because the past it has got stuck. The test seems to have stopped, so I will continue.

I do not recall asking the police about their investigation techniques. If, as you say, quite a high percentage of paedophiles are involved in rings or are working together, how important is it for the police to use investigation techniques that can identify that someone who appears to be acting alone is part of a network?

Rachel O’Connell: That is a good question, which I can answer with two points. First, West Midlands police have an operational policing unit, the high-tech crime unit, which proactively monitors paedophile activity on the internet. That is one strand. Secondly, by definition, the internet networks people, so as part of the investigative process forensic computing experts seek details of contacts and the people with whom a person has been communicating when they analyse computer hard drives and external storage devices. In my experience of working with the Scotland Yard paedophile unit, I have seen charts being developed that show, for example, that person X connected to and communicated with someone for a period of time. The identification of contacts is part of the investigative process.

The Convener: What success do the police have in cases in which they identify an individual’s contacts, given what you said about the nature of the internet? Is there a tendency for the police to charge one or more individuals in such cases?

Rachel O’Connell: There certainly is such a tendency in relation to child-abuse images. In the
Wonderland case there was a swoop on 16 individuals in different countries across the globe. Those people were picked up almost simultaneously, because it was important that no individual had an opportunity to notify the others, who might then clean their computer hard drives.

The search for networks was part of the traditional investigative process in the real world, prior to the advent of the internet. For example, if someone was discovered to be abusing boy scouts, the police would check out all that person’s connections. The internet facilitates that.

Mrs Mary Mulligan (Linlithgow) (Lab): My question follows on from your answer to Stewart Stevenson about whether a young person could be involved in grooming. If I recollect rightly, you said that you accept that a young person could be involved and not only an adult who is over 18. Do you have evidence to support that?

Rachel O’Connell: There is evidence to support the view that children are engaging in the collection of child-abuse images and that teenagers are becoming integrated into paedophile communities. From what we know from the real world—the pre-internet stuff—adults co-opt teenagers for the purpose of using them to procure children on their behalf. There may also be teenagers who are interested in children.

David Finkelhor introduced the issue of peer-to-peer abuse, asking how bad it is if a 13-year-old boy is looking at 13-year-old girls. One might presume that it is normal, as the boys will be looking at the girls on the beach, at school and so forth. However, the boy in the west midlands case, for example, was found with over 300 images of abuse on babies in nappies. The difference in age in that case was substantial.

From the psychological perspective, the question is what needs to be taken into account to combat the problem. From the legislative perspective, the question is how the teenager will be dealt with. Such cases have a massive impact. One case that I have been dealing with recently concerns a boy who was accused of having images of child abuse on his computer. His father works at a senior level and it has taken more than 18 months to investigate the case. That is an incredible amount of psychological pressure to place on a minor.

Guidelines need to be drawn up that set out how such an eventuality should be dealt with. Teenagers are very different from adults. We need to ask questions such as what measures should be taken, whether teenagers should be put on the sex offenders register and what kind of support should be available to families as they go through the process. Obviously, families can suffer massive upheaval. Although the number of cases is limited, from my experience or contact with them those are the issues that immediately jump out. The legislative framework is not equipped to deal with that kind of scenario.

Mrs Mulligan: An issue that has been raised with us is whether, when young people are involved, there is an age range beyond which the behaviour becomes oppressive. We have been told that, at that point, it is possible to see a perpetrator and a victim instead of two people involved in the sort of sexual exploration that young people undertake. The age gap applies not only to those who are over the age of 16, but to those young people who are sexually active at a younger age. From the legislative perspective, it becomes difficult to make a judgment on whether a young person is taking advantage of another young person or whether they are engaging in sexual exploration.

Rachel O’Connell: That is challenging. The only guidance that I can think of is that written by David Finkelhor of the University of New Hampshire. Writing about adolescent sexual abuse, he suggested that abuse occurs when there is a five-year age gap between the children involved and that, if the gap is less than five years, a complex range of issues has to be considered. His guidelines say that a five-year age gap is the point at which the activity enters into the domain of abuse.

Mrs Mulligan: That is interesting. The bill sets out specific ages. One of the issues that we have to consider is whether those ages might not be appropriate for individual cases involving children. I suggest to you that an arbitrary figure of five years might not be appropriate in certain circumstances. Should we stipulate such figures in legislation or leave the matter to individual cases?

Rachel O’Connell: I would imagine the latter, because that will introduce the possibility of addressing the issues and drilling down to see what the circumstances are.

Mrs Mulligan: You will have seen that certain ages are stated in the bill—over 18, in the case of perpetrators. Do you think that that is appropriate, or do you think that the bill should be more flexible and should not state ages?

Rachel O’Connell: Given what we have just discussed, I think that it is certainly worth considering including guidance on dealing with individuals below the age of 18. Perhaps, subject to review, the increasing amount of evidence that becomes available can feed into the process. That would be my suggestion.

Mrs Mulligan: That is helpful. Thank you.

Mr McFee: I know that we are asking you to comment on the hoof, as it were, but just to clarify,
does the age of the victim not matter more than the age of the abuser?

Rachel O'Connell: You could approach the matter in that way, also.

Mr McFee: The word “grooming” suggests to me an essential inequality, whether in age or in mental capacity, between the abuser and the victim. We are considering setting an age of under 16 for the abused, but is there not an argument that the age of the abuser does not matter, except perhaps in a case that involves two 15-year-olds, which is a different situation? The important point is the essential imbalance of power between the two.

Rachel O'Connell: That is another way of coming at the matter, which circumvents the issues about the age of the abuser. However, what happens if a case involves two 15-year-olds? We still come back to that basic impasse.

Mr McFee: That comes back to discretion.

Rachel O'Connell: The idea is worthy of consideration, I think.

Marilyn Glen (North East Scotland) (Lab): To continue on the theme of victims, do children disguise their identities when they use the internet, by saying that they are older than they are, for example?

Rachel O'Connell: Yes. We tell children not to give out their personal details—that is what the adverts say. What is the first question when someone goes into a chatroom? If you could not see me, you would want to know what age I was, whether I was a girl or a boy and where I was from. Age, sex and location—ASL—is one of the first questions. One of the other fields of my work involves developing an education and awareness programme for children and young people, which tries to address that issue. We urge them to engage in identity deception.

Our studies—I will make our research findings available to the committee—have involved about 3,000 children and young people so far, of which two samples of about 1,000 consisted of children aged between seven and 11. Typically, about 19 to 20 per cent of them use chatrooms on a regular basis. When we ask them about their experiences, they are reasonably confident, although not as confident as the older age sample of nine to 16-year-olds, who will put their hands up and say, “Yes, we talk to weirdos. We can spot them. We know them. There are weirdos and pervs online all the time. We know what to do.” That reflects the invincibility that comes with being a teenager—they think that they know it all.

The younger kids have similar experiences, but in the focus groups it is more likely that they will say, “I was a bit upset because someone was trying to talk to me about sex.” Girls will say, “I don’t like boys—I don’t want to do that.” Those are the typical, age-appropriate responses, but children are being put in a position in which they have to navigate such things.

In our awareness campaign, we tell kids to engage in identity deception and not to let anyone know who they really are, but always to be themselves online, so that they can spot when someone is not being themselves. That is an incredibly difficult skills set to inculcate in children.

11:15

Our research findings suggest that boys are more likely to give out their real age, plus two years. The majority of girls do the same, but some pose as being five years older than they are. That is a problematic area. The girls are 12 or 13 and are discovering their sexuality, so they may quickly end up way over their heads. They do not have the skills set or the knowledge to say, “Oops, I should pull back from this, as it is getting scary.” There is a big need for education, awareness raising and research into the efficacy of campaigns. We need to consider exactly what we are telling kids.

I was at a recent Federal Bureau of Investigation conference, at which people spoke about compliant victims—girls of 13 who have been seductive in a chatroom, go to a meeting, see a guy who is clearly not 18 but 47 or so and get into his car. In my opinion, that is a worrying trend. Typically, it is girls who pose as being older than they are. That is true not of all girls, but of a proportion.

We wanted to get a psychological profile of kids who take greater risks online. What emerged was no surprise. Those are kids who score highly on thrill and adventure seeking, extroversion and social disinhibition. There are things that normally make a kid think, “Oops, my mum will be really cross if I do that,” so that they stop. Because those kids have high social disinhibition, that does not work for them. The more that we run fear campaigns, the more attractive the thing that we are warning them against becomes. When I go into schools and ask how many kids use chatrooms, most kids say that they would not, but there are some who say, “Yeah, I do, because I’m cool and can do the dangerous thing.” Because of a combination of psychological factors, our media portrayal of issues and the need for risk and adventure seeking, kids may end up in a very difficult situation.

Marilyn Glen: Do those who chat to the kids say that they asked how old the kids were and were told that they were 16?

Rachel O'Connell: Yes. They are trying that as a defence.
The Convener: You have said that girls, in particular, sometimes say that they are up to five years older than they are. Do you think that paedophiles are aware that children disguise their ages? I do not want to take it for granted that you believe that to be the case.

Rachel O’Connell: It is. Paedophiles have a checklist that tells them how far they are likely to get with someone. If a kid says that they are older than they are, that indicates to the paedophile that they will be more malleable. Because the child is concentrating so much on portraying themselves as older, they do not have the cognitive leeway to assess whether they are dealing with a really nasty person.

The Convener: I know that there are chatrooms for particular age groups—I am not talking about instant messaging. Probably the most popular internet service provider at the moment is msn. Do any providers put out warnings to children about entering chatrooms for which they are not the right age?

Rachel O’Connell: Some of the big ones do. AOL, Yahoo! and msn put up messages and msn has shut down its chatrooms in the United Kingdom—those chatrooms can be accessed only through premium rate services, so people have to pay for the service. Moreover, there are moderators in the chatrooms. The big companies are putting out the message in relation to chat and instant messaging, but there are many smaller operations that have to be brought in to toe the line.

The fact that the reporting structures behind the internet are not linked up is incredible. The reporting structure of msn is not linked to that of AOL or of Yahoo!, so paedophiles tell one another to spread themselves around in order to avoid detection. I have just heard on the news that the virtual global task force of the National Crime Squad in England has launched a reporting structure. That means that reports will come into a central database, from which people can analyse and look for similar behaviour patterns and forensic evidence to link individuals.

The Convener: Let me be clear about what you have said about msn. From what I have seen, it encourages users to post profiles and photographs. I have not seen any warnings. It encourages use of the webcam, which is where a lot of this behaviour begins. I did not see any warnings on msn.

Rachel O’Connell: It has one warning at log-in, telling people not to give out personal details.

The Convener: But the system is specifically designed for that.

Rachel O’Connell: Yes. Let me take this opportunity to tell you about what is on the horizon and what is happening now—it is scary when you think about it. There are blogging sites on which people can keep an online journal. They sign up for a service and get a pre-made web page. They can put in a list of their favourite music and write things like, “Today I ate a tomato sandwich and I went to such-and-such a place.” Kids have the opportunity to give out details of their routine activities.

A lot of those services are free. The blogging people’s perspective is that the products—they are called “social networking products”—are a good way for people to communicate with one another. For example, when I went to Ireland for Christmas, I was able to take pictures around Cork city—which has been done up and is beautiful; I recommend that you go there—with my phone and send them through multimedia messaging service to a website where they were uploaded within a minute. That meant that people in the UK could see what I was doing.

That system is a paedophile’s dream, because children are uploading pictures and giving out the details of their everyday lives in online journals. Some of the websites can be syndicated, so an individual can find the code of the website, which is easily accessible, and get a programme through an RSS, or really simple syndication, feed so that any time someone—a little girl—uploads pictures, those pictures will be sent directly to their e-mail account. The parameters of grooming are therefore about to change, because the individual does not necessarily have to make contact with the child.

Here is the scenario. A kid goes to hockey on Wednesday and she takes photos of the hockey pitch with the name of the school—say “St Mary’s School”—or the name of a street on them. She then uploads those photos and thinks that it is all really great. An individual who likes brown-haired, sallow-skinned, green-eyed little girls might decide to keep an eye on that. Through looking at the pictures, he discovers that he can uniquely identify her face, her daily routine and her location without ever even having to speak to her. As a result of the blogging sites, she is effectively making that information publicly accessible.

The paedophile may then contact his friends and engage in what paedophiles refer to as “chicken hawking”—they are the hawks and the kids are the chickens. Using blogs is like mobile chicken hawking. The paedophile can send messages to his friends to say, “Look, there’s a really good one here.” They might follow the girl as she walks home one evening and then decide their plan of action. If the paedophile operates alone, he might decide to abduct her when she turns a certain
corner, where the absence of street cameras or overlooking windows makes it a good place to park and wait. Alternatively, he might contact his friends and, in a paedophile version of dogging, say, “Let’s meet, let’s abduct and let’s take.”

In my experience—I put the weight of nine years of research behind this—that is what we are facing. In the situation that I have outlined, the paedophile has had no prior contact with the child. When the police analyse his computer, they say, “Oh, gee, he was going repeatedly to this website and the girl was subsequently attacked.” If he sexually assaults her, he can be convicted under existing legislation. However, someone might intervene and say to the girl, “What are you doing getting into that car? Come away.” I am not sure that the bill will deal with that situation.

The Convener: That takes us into a whole new dimension. That is excellent information. I begin to wonder whether the bill even begins to tackle the protection of children. We will certainly give that some thought.

Rachel O’Connell: As you pointed out earlier, blogging sites typically provide absolutely no safety information or guidance. I mean zero. The whole point of blogging is to give out personal information in order to network and to make contact. Indeed, msn launched a blogging site that is linked to its instant messenger. This will become a huge issue.

Stewart Stevenson: Over the next few minutes, I want to ask you about some of the issues around ISPs, instant messaging and so on, which are developed at the bottom of page 14 of your paper. I want to try to get on the record some simple ideas that are probably obvious to both of us—I spent 30 years in computing—but I want to do that for the benefit of others who will read the Official Report in due course.

Will you confirm that the whole thing works by two people using a device, such as a mobile phone or computer, to connect to a shared resource—which, in general terms, we call the internet—that is made available to them by a facility, or computer, that is operated by a company called an ISP? Does not the ISP provide the door into that shared resource? Basically, there are two devices for the two parties and there are two ISPs—although both parties may use the same ISP—to connect everything together. Do you agree that that is a fair description?

Rachel O’Connell: Yes.

Stewart Stevenson: Will you also confirm that, once the connection is established, the technology will enable the transfer of data or character streams whose meaning and use is not necessarily immediately obvious?

Rachel O’Connell: Yes.

Stewart Stevenson: I want to cover the location of an ISP relative to the person who is connecting with it. Do you agree that the ISP need not be within the same legal jurisdiction or geographical area as the person who is connecting with it? For example, would it be possible for someone in Scotland to make a direct telephone call to connect to an ISP in Nicaragua? Is that your understanding?

Rachel O’Connell: They could, but it would be a bit expensive.

Stewart Stevenson: I will come to that. A number of suppliers provide packages with a significant amount of cheap call time, including international calls, so that, for example, one can connect to Nicaragua for tuppence a minute. In any event, I would like to know what costs paedophiles would be prepared to incur in travelling to meet someone and in preparing for the meeting. Do you have any experience of that?

11:30

Rachel O’Connell: In my experience, the technically minded people use network address translators to avoid detection. However, it is incredible how people go through a psychological process of de-individuation. [Interuption.]

The Convener: Sorry, I forgot to turn off my mobile phone.

Rachel O’Connell: People do not take even fairly obvious measures to protect themselves, nor do they go to lengths such as using an ISP in Nicaragua.

Stewart Stevenson: You have described the interworking and exchange of experience and techniques among paedophiles. The key point that I want to get on the record from you is that, if a technically aware paedophile takes the necessary actions, they will be able to access services without there being a meaningful record that can be accessed after the event. I am not talking about cases in which the police monitor somebody’s activity by carrying out the internet equivalent of tapping a phone.

Rachel O’Connell: Let me clarify. I think that you are asking whether a paedophile could be so effective in covering his tracks that he leaves no forensic evidence behind.

Stewart Stevenson: That is correct.

Rachel O’Connell: If the activity can be carried out by a sole person, such as downloading images of child abuse and posting them on the internet, it can be difficult to track that person. An example springs to mind: a guy who was kaboom@kaboom.com. He was difficult to track.
and he must have been technically capable. With grooming, when a person communicates with his victim, he leaves a trail behind on the victim’s computer. The process of developing a case involves putting those two pieces together. In theory, the answer to your question is yes, but, in practice, trails will probably be left behind.

Stewart Stevenson: In every case, will sustainable technology evidence that demonstrates a particular perpetrator necessarily be left on the victim’s computer?

Rachel O’Connell: The issue that you raise—the admissibility of evidence in a court of law—is a huge one. The more technically sophisticated the individual is, the more challenging the court case will be, because it will have to address such issues. People in the criminal justice system need training to bring them up to speed on the issues. I understand your point on a theoretical level, but, from my operational experience, people usually slip up at some point. That is just human nature and identifying those people is down to the investigative process.

Stewart Stevenson: Given that I am a mainstream internet user—I use AOL—would it surprise you to learn that I have discovered by tracking that the computer with which I first connect to the internet is outside the United Kingdom? That will be true for most AOL users in the UK.

Rachel O’Connell: Is that because they are going through a central server that is based in the United States?

Stewart Stevenson: No. For people who use AOL, there is a direct communication link to a computer outside the UK, without intermediate computers in the UK.

Rachel O’Connell: When a person is tracked, the investigators look for a caller line identity—the telephone line to the person’s house—and credit card details and then start piecing the information together.

Stewart Stevenson: Right, but we are now talking about non-technology evidence. I am seeking to get a limited discussion on the record. Of course, the nature of the interaction and some of the things associated with it may create evidence as to who the person is. However, one of my concerns about this discussion, beyond the scope of the bill, is that there appears to be a belief that the problem can be solved by technological means. I am trying to get on the record the fact that extremely significant issues are likely to mean that the use of technology as a means of gathering evidence can almost always be circumvented by an informed user, so evidence has to be gathered by other means.

Rachel O’Connell: I concur with that. Reliance solely on technological and forensic evidence related to the computer will not be sufficient in a court case, so a full package of evidence is required. The forensic evidence and forensic computing evidence will be part of that.

Stewart Stevenson: May I ask a brief supplementary on that subject, convener?

The Convener: It will have to be very brief, as we are running out of time.

Stewart Stevenson: In that case, I will finish there.

Margaret Smith (Edinburgh West) (LD): That has been very useful, if a little harrowing for the mother of four teenagers.

What information do you have about the implementation of the equivalent legislation in England and Wales? Have any cases been brought to trial under section 15 of the Sexual Offences Act 2003?

Rachel O’Connell: It came into force on 1 May 2004.

Stewart Stevenson: We are running behind England and Wales. What has happened so far in England and Wales and what is your view on how it is going?

Rachel O’Connell: I am not sure that I can be very helpful on this point but, to my knowledge, in all the cases that may have relied on the sexual offences prevention order, the commission of the sexual offence has taken place. I am not sure that any precedents have been set.

Margaret Smith: I am a lay person on these matters. Unlike our colleague Stewart Stevenson, most members of the committee do not have a high level of computer knowledge. Most of us may know a little bit about this subject, but, we are opening up what is a whole new world to most of us—it is not a particularly nice world. It is obviously very difficult for the police to police this activity. What control can the police and other law enforcement agencies have on internet service providers in general? We heard in previous evidence that the police and other law enforcement agencies in America are much more proactive in sitting online and watching what is going on. They try to keep an eye on people who they think may have done this sort of thing previously. How does what British police forces do compare to what other people do elsewhere in the world? How limited is what can be done to police such activity?

Rachel O’Connell: I will answer those questions in order. There is definitely a great deal of scope for the police and the ISPs to collaborate more closely to prevent crime. It is about
encouraging reporting systems to be set up. I hope that such systems will be utilised and exploited so that individuals who are spreading their activities out can be identified. More could be done.

Much of the work that has been done has been at a top level. For example, work has been done by corporate and social responsibility people at Yahoo! and Microsoft. Those people probably have a good understanding of the technology, but not at the computer programming level. We must ensure that there is an interface between law enforcement and product developers. If the companies release new products and release their product range across different platforms, it is important that the product developers have child safety on their agenda. That must be built in.

An interface could be created between the product developers in the companies, the forensic computing experts and people who are doing the kind of research that I am doing, on risk mapping, to discuss what will happen next and what measures can be put in place. If that level of dialogue were to take place, remarkable strides could be made. At the moment, the child safety agenda does not cascade down to the product developers. They are the code writers, but we need to ensure that that interface with law enforcement takes place. It is handy to have an interface at the ISP level—the policy level—but it also needs to go lower down.

On proactive activity, I have with me a proposal for a national internet safety centre, which Stuart Hyde at West Midlands police is putting together in collaboration with the children’s charities. The centre will be the equivalent of the National Centre for Missing and Exploited Children in the United States, which has an incredibly close relationship with the Federal Bureau of Investigation. That model is being adapted to be culturally specific to the United Kingdom and to take account of the legislation here, so that a similar situation will develop here. A lot of progress is being made. The proposal will be put before the Home Office internet task force on 23 February. I am sure that West Midlands police would be happy to share the model, because it might be useful for the committee’s deliberations.

On proactive monitoring, although he is now retired, Terry Jones of Greater Manchester police’s obscene publications unit was working with a company called CyberPatrol. I mentioned IRC-based paedophile chatrooms, which are chatrooms where no company is necessarily involved and the most evil parts of the internet seem to congregate. All the fetish stuff, porn, paedophilia and bestiality is in there, and kids have chatrooms there as well. It is a very difficult area to patrol. CyberPatrol modified a software programme that could identify the unique IP addresses—the unique number that is given to me by my service provider when I am online—for people based in the UK. In one night, CyberPatrol hauled off about 64 UK guys who were exchanging child abuse images. That led to 16 arrests.

Issues that arose were resources, training and the finance implications. In addition, because the policing system is traditionally based on the idea of jurisdictions, when Terry Jones asked Thames Valley police for information, Thames Valley police told him that it was none of his business. The difficulty is not tracking or monitoring those guys, although there are difficulties with resources and training. What needs to be thought through is what the fact that 64 of them can be identified in one night means in terms of investigative time and resources, and how that result contributes to the figures at the end of the year. There needs to be a rethink of those issues. There could be more proactive monitoring, which would yield results such as the result of that night. It is a question of trying to address all the attendant issues, such as whose responsibility the work is, what budget the money for it comes out of, and who co-ordinates it. Those are the logistical constraints.

The Convener: We have to leave it there, unfortunately. It has been a superb session, which will probably take us into a new dimension on the bill. I quite like the idea of calling Bill Gates to give evidence on what his company has been doing on the internet. Margaret Smith mentioned Stewart Stevenson’s capabilities, and as we have been sitting here he has taken a photograph of the room and sent it to his personal digital assistant. That demonstrates what can be done, even by members of the Scottish Parliament—or rather by one member of the Scottish Parliament. In no way do I wish to trivialise the issue, though. What you have said this morning has probably blown our minds a wee bit as it has highlighted aspects of the issue that the bill does not cover.

The committee might have to make comments about the obligations of internet service providers that will fall outwith our remit, given that we are considering the protection of children. I cannot thank you enough for your superb evidence. If you find any information that might be of interest to the committee as it drafts its report during the next few weeks, we would be grateful if you would pass it on to us.

Rachel O’Connell: Thank you for giving me a wonderful opportunity to share information with people who are in a position to do something about the matter. This has been a wonderful experience for me.
11:45

The Convener: We are running late, as ever. Members should note that the minister will be able to give evidence until 1 pm. The committee will want to ask a number of questions and we will have to get through as much as we can.

I welcome Hugh Henry to the Justice 1 Committee and I apologise for the late start of this part of the meeting. It is a pity that the minister did not have a chance to hear the evidence that was given by our previous witness, who was from the cyberspace research unit at the University of Central Lancashire. Her evidence was interesting and when it has sunk in I think that it will generate questions. I hope that you get a chance to read it.

The Deputy Minister for Justice (Hugh Henry): I listened to some of the evidence, which was fascinating. However, I might be the wrong person for the committee to speak to about cyberspace.

The Convener: The committee has its own experts.

Will you identify on the record the scale of the problem and why the Protection of Children and Prevention of Sexual Offences (Scotland) Bill is needed?

Hugh Henry: I hope that members of the committee agree that the bill is important. The protection of children is a priority for the Scottish Executive and the Parliament and it is essential that the law on the matter is robust. We want to ensure that the law allows early intervention to help to prevent predatory sex offenders from targeting and abusing children. The bill will ensure that the police and procurators fiscal have a robust package of measures to deal with predatory sex offenders before they commit physical assaults on children and other victims. There are three different elements in the bill, which I will mention in turn.

The grooming offence in section 1 will tackle the problem of the predatory adult who seeks to gain a child’s trust in order to persuade the child to enter a situation in which he or she can be sexually assaulted. I acknowledge that to some extent the offence is unusual, because it does not involve an assault on the victim. It is a preparatory offence. There has quite rightly been public concern about adults who attempt to exploit modern methods of communication to gain a child’s trust and to dupe the child into a meeting at which he or she would be in danger. In recent years there have been examples of such activity.

Scots law as it stands can deal with many such instances of grooming and successful prosecutions attest to that. However, the Executive and the public rightly want to be assured that the law is absolutely robust and can deal with adults who are engaging in a deliberate course of action. Given that the proposed offence is unusual, we also want to be sure that unwise or ill-considered communications and actions by adolescents do not lead to unnecessary actions in the criminal courts and potentially serious criminal charges. That is why we set the age limit for the offence at 18. I believe that you have had some discussion about that matter with my officials. Of course, if people under 18 commit physical sexual assaults they will face the possibility of serious criminal charges, and it is right for them to do so.

Child protection professionals tell us of cases in which they know that someone represents a risk to children or to a particular child. Although the way in which those people are acting does not necessarily constitute an offence, it is inappropriate and it suggests that an actual sex offence could be just round the corner. If we know that the risk is there, we need to ask ourselves whether we are prepared to do something about it. I would argue that it is our responsibility to do something about it if we know that there is a risk.

I appreciate that there are concerns about the use of civil orders in what might be seen as a criminal context, but I believe that there are sound reasons for their use. It would be irresponsible to fail to take action when there were concerns about the risk to children from an individual. We think that it would be wrong to wait until that person commits a physical assault on a child before we take action. I do not think that we would be able to forgive ourselves if we knew that there was potential danger but failed to act. We would all agree that the damage that is caused to children by sex offenders is sufficiently great to justify tough preventive measures. The new order will give us the power to stop predatory sex offenders before they are able to commit an offence and before they do serious harm to children.

Finally, the bill will extend the use of sexual offences prevention orders. As the law stands, a person cannot be made subject to such an order when he or she is convicted of an offence with a sexual element. Before an order can be applied for or made, we have to wait for further evidence that the offender represents a risk to the public. I argue that in some cases we cannot afford to wait for that further risk to emerge. If someone is being dealt with in a court for committing a sexual offence, and if the sheriff considers that the person is a risk, I believe that it is right to restrict their movements there and then with a sexual offences prevention order. I hope that the bill will give added protection to young people, and I think that it will help to address the risk that too many of them face. I hope that we will not expose people to more risk than is necessary.
Hugh Henry: In the financial memorandum we give some estimates of the numbers and the potential costs that are involved. We recognise that it is not a huge problem, but if we can bring in legislation that helps even one child and prevents their suffering, that is to be welcomed. The financial memorandum suggests that there could be 50 or so grooming offences per annum and 10 to 20 applications for RSHOs. Of course, those are estimates and we have no absolute way of knowing how many cases will be acted on when the legislation is in place. However, based on previous experience we think that it is reasonable to anticipate those numbers.

The Convener: We heard quite a bit of evidence—both this morning and at our seminar last week—to suggest that the monitoring of adults who engage in such activity shows that it can include sexually explicit conversations that do not necessarily form an intention to meet. Has any work been done on whether, once an adult engages in lewd conversation with a child, they invariably meet the child for the commission of an offence? There seems to be evidence that there may be a type of offender who would go no further than sexual fantasy-type communication.

Hugh Henry: You are right to say that there are those who engage in that type of activity. Some thought was given to creating an offence of grooming for the purpose of sexual gratification, rather than abuse. If a conversation is sexually explicit, it may be covered by other offences. If it is not and there is no intention to commit a sexual act, we would not want to criminalise it. There are other offences that may be committed because of a conversation that may or may not lead to further action.

The Convener: We have heard that there is a tendency in this type of offence for there to be networks and rings of individuals who exchange information that they have about a child. Are you satisfied that the legislation deals with that scenario?

Hugh Henry: Yes. We are all learning as we go along about what new technology is capable of doing to benefit humanity. Unfortunately, we are also learning just how it can be misused to cause danger and harm to others. There are some very motivated and malicious people who are seeking to advance their knowledge and techniques as the technology develops. We need to watch out for the situation that you describe of people acting in rings. If someone assists another person as part of a ring, they may be prosecuted on an art-and-part basis or for conspiracy to commit an offence.
those who are 18. That is a difficult issue and there has been debate on it. We have attempted to recognise that, notwithstanding the rights that young people in Scotland have at the age of 16, development issues still need to be considered. We want to avoid the possibility of adolescents at the age of 16 and 17 being inadvertently caught up in criminal activity. We thought long and hard about that difficult issue. I am not sure that there is an easy answer to the question whether 16 and 17-year-olds should be held legally responsible in the same way as 18-year-olds are. However, I accept, as you outlined, the physical damage that people of that age can cause.

Stewart Stevenson: I want to develop the point. Section 1 refers to the schedule, which contains a list of 22 offences. Relatively arbitrarily, I have chosen the one in paragraph 15, which is the abduction of a girl under 18 for the purposes of unlawful intercourse, which is an offence under section 8 of the Criminal Law (Consolidation) (Scotland) Act 1995. Could a 17-year-old inadvertently undertake a course of action that would be seen as preparatory to committing the offence and that should not be treated in the way that it would be treated if the person was 18?

In other words, I am inviting you to consider whether there is a distinction between adolescent sexual exploration, which might involve some of the activities that are listed in the schedule, and the offences in the schedule that could not in any sense reasonably be considered to constitute adolescent sexual exploration. We do not want to criminalise adolescent sexual exploration by catching it under section 1.

Hugh Henry: The offence of planning to abduct someone in order to have unlawful intercourse is clearly very different from sexual experimentation among young adolescents. I am not sure that the two activities could be confused and I am struggling—

Stewart Stevenson: I am not trying to catch you out.

Hugh Henry: I accept that, but I genuinely fail to understand—

Stewart Stevenson: I chose that example—I could have chosen others—because I want to know why a 17-year-old who planned to abduct a girl under 18

"for purposes of unlawful intercourse"

would not be guilty of an offence, whereas an 18-year-old who did so would be guilty of an offence.

Hugh Henry: We come back to my earlier point. A 17-year-old who abducted a girl under 18 for the purposes of unlawful intercourse would be committing an offence. We are back to the dilemma about the age at which we draw the line for the preparatory offence, which is always an issue. What is the difference between the actions of a 17-year-old and those of an 18-year-old? Indeed, what is the difference between the actions of a 14-year-old and those of a 16-year-old? There is no easy answer. The convener explored the issue when the committee discussed the appropriate age limit with officials. We drew the line at 18 and we wanted to try to avoid a situation in which 16-year-olds and 17-year-olds who engaged in the sexual exploration that Stewart Stevenson described would be unnecessarily criminalised. There is no right or wrong answer. An argument could be made for setting the limit at 16 rather than 18, but we decided on a limit of 18.

Stewart Stevenson: I will turn the example on its head. If a 17-year-old—I choose that age because it is close to the boundary—or a 14-year-old were to undertake the preparatory activity that, if they were 18, would constitute an offence under section 1, what would be the correct intervention from social work, the criminal justice system or the children’s panel? You have acknowledged that the activity would have exactly the same impact on the victim, regardless of the age of the perpetrator.

Hugh Henry: Clearly, the provisions of the bill would not apply in such a situation. Cases have been highlighted in the press that involved children of the ages that Stewart Stevenson mentioned and, in such cases, it is for the social work department and other agencies to determine a course of action. The child might be referred to the children’s panel, or the agencies might decide that no further action is necessary.

Consideration would be given to the age not just of the perpetrator but of the younger victim. Consideration would also need to be given to the security and safety of the younger person and to whether, given the younger person’s needs and behaviour, they needed to be referred to the children’s panel. The Crown Office could decide to prosecute the 17-year-old for the offence of lewd and libidinous behaviour. Those penalties would exist. Under the bill as it stands, in such cases, it would be for the agencies to decide on the most appropriate action, which might involve the use of the children’s panel or invoking criminal legislation against the older person.

The Convener: I think that I have sorted out in my mind the distinction between the two issues. It should be clear whether a person has committed one of the crimes that are listed in the schedule, which just gives the criminal law of Scotland. In the bill, we are trying to criminalise the act of preparing to commit one of those crimes, provided that the person is of the right age. As Stewart Stevenson said, the abduction of an 18-year-old by a 17-year-old is one example that might not be caught under paragraph 15 of the schedule.
For me, although the bill’s intention might be clear, what is missing is an attempt to identify what it is driving at. Bruce McFee highlighted that in the line of questioning that he pursued. For me, the nature of a grooming offence is that it occurs where someone uses their age or their position of power to build trust in someone who is more vulnerable than them and then relies on that relationship to draw in the more vulnerable person in preparation.

The explanatory notes talk clearly about the bill introducing an offence of “grooming” children. However, although the bill specifies what the offence is, its description of the acts that might be involved in such an offence does not mention any of that. We all understand what the bill is about. Could we resolve the issue that Stewart Stevenson has raised by amending the long title, which currently refers to

“An Act of the Scottish Parliament to make it an offence to meet a child following certain preliminary contact”?

Could a reference to “grooming” offences be inserted into the long title? Then it would be clear.

Hugh Henry: Sorry, what would be clear?

The Convener: It would be clear that the bill is not simply about applying the legislation to the ages that are set out but about looking for something else, namely the important nature of the relationship between the two parties. What the bill is driving at is making it an offence to groom a more vulnerable person—it is more likely that the person being groomed would be a child, but it could be an adult, as we have discussed—into trusting someone who is in a position to know better. That is what the bill should be about.

Otherwise, all that people will be able to consider is whether, under the bill, an act has gone far enough to charge the person with attempting to conduct a crime. We want to try to go to the stage before that. If the bill stated more explicitly what it was driving at—that is, the grooming nature of attempting to build trust with a child—it would have no problem in dealing with the abduction of an 18-year-old by a 17-year-old. I am not sure that I would want that situation to be caught by the bill, although I want the law to be clear that anyone, whether they are 17 or otherwise, who abducts someone else is committing an offence.

Hugh Henry: I agree that what we are describing is power relationships and how one person uses power over another. However, irrespective of what is in the bill, the Crown would always need to consider the circumstances and would not simply follow things rigidly. It would need to take into account whether the age criteria had been met and consider a wide range of factors. I am struggling to think what could be added to the bill to help to clarify the matter. I know exactly what you are saying, but I am not sure that adding anything to the bill would necessarily help. However, we will consider the issue and have some further discussions about that.

The Convener: I am not absolutely certain what one would add to the bill. I draw your attention to the objectives of the bill. The policy memorandum refers to

“offenders who seek to “groom” children for the purpose of committing sexual offences.”

That helps to address the problem, but those words are not in the bill. I wanted to draw your attention to that point, as it is perhaps a matter that could be made clear in the legislation.

12:15

Margaret Smith: Currently, the law states that 16 is the relevant age in relation to unlawful sexual intercourse with someone under the age of 16, but we all know that, although that is in the legislation, prosecutors use discretion and consider the circumstances of each case. For example, in the case of two 15-year-olds who are in a consensual sexual relationship and have been for some time, it is highly unlikely that the case would go to court and that they would be criminalised. Fifteen-year-olds feel that, as long as they are in a consensual relationship, they should not get caught up in the fact that what they are doing is a criminal act.

The issue is much more about the power balance, agreement, consent and so on. If legislation on a similar matter can be open to discretion, as we all know, why could this bill not also state the age of 16? That would catch a number of people who are likely—as we have heard in evidence, as Stewart Stevenson pointed out and as you agreed—to cause the same amount of harm. Guidance could state that such people should be dealt with by the children’s panel, but 16 could be the age stipulated in the legislation. That would avoid the anomaly that arises, but enable the matter to be dealt with in a discretionary manner, which is what happens in relation to a similar sexual offence that is currently on the statute books. Why could we not do that?

Hugh Henry: The short answer is that we could. Margaret Smith is right to point out that discretion is applied to existing legislation. The procurator fiscal considers all the facets of a case before they decide whether to proceed, and that principle would apply to any charges brought under this legislation. Although I say that the age of 16 could have been applied, it is a matter of striking a balance. We considered ages, maturity and some of the wider issues and felt that, on balance, 18 would be an appropriate age.
We considered the difference between two adolescents being engaged in something and someone of an older age abusing some of the power that comes with age and using their knowledge and maturity inappropriately against someone else. As I said, we wanted to avoid inadvertently categorising teenage adolescent behaviour as a crime. There is not any absolute right and wrong on the matter. It is about which age, on balance, is the best place to draw the line. We felt that 18 was the most appropriate age.

Margaret Smith: Did you consider and reject the idea of including wording that referred to an age difference?

Hugh Henry: Yes. We considered that issue, but it is also fraught with difficulties. The age gap might be one year outside such an age difference. Even if we come down to younger ages, there might be a difference between a 16-year-old and an 11-year-old being involved as opposed to a 15-year-old and a 10-year-old.

We considered that option, but we thought that if we drew an age gap of, for example, four years, someone would point to circumstances in which a gap of three years would be more appropriate. It is not an easy issue.

Margaret Smith: I wanted to ensure that you had considered that option, and have that noted on the record.

Marilyn Glen: My question is about prior communication. The offence requires communication between the parties “on at least two earlier occasions”.

It has been suggested to the committee that a single, extended exchange between the parties could be indicative of the offender’s intentions in respect of the child but would not be an offence under the bill. Why must there be two earlier communications?

Hugh Henry: We wanted to focus on something that is being done intentionally and someone who is setting out deliberately to commit an act that we would deem to be criminal. We believe that if there is more than one act, that gives credence to the claim that the person is acting in that way. Notwithstanding Marilyn Glen’s point about long communications, we were worried that if a single offence was capable of triggering the criminal action, that might catch out people who were inadvertent or who had not thought their actions through and who, once they had done so, might not engage further.

I know that sometimes people go on for hours on end in a single chat and the issue develops as they go; we are coming to terms with the way in which technology is developing. We thought that requiring two communications would enable us to prove to the courts that there was an intention, whereas if only one communication was required, that might be more open to debate. If there was a long chat during which someone left for a few minutes and an argument arose about whether there were one or two communications, that would be a matter for the prosecution to argue and for the court to decide. Also, depending on what is said during the chat, other offences could come to light even if there is only one communication.

Marilyn Glen: I am still concerned about the definition and how it would be argued in court. It seems to me that to require communication on at least two earlier occasions complicates things unnecessarily, but I hear what you are saying.

For the purposes of section 1, does it matter who initiates the contact between the parties? Does it have to be the adult who establishes contact with the child?

Hugh Henry: No. It does not matter who initiates contact. The key issue is what the adult does with the communication and contact. For the adult to say that they were originally contacted by the child is no defence. If, as the relationship developed, the adult’s behaviour was inappropriate and they followed that up on a second occasion, taking further steps to meet, that would be sufficient for a prosecution. It would not matter that the child initiated the contact.

Marilyn Glen: As they stand at the moment, the explanatory notes lead one to look at the matter the other way. There is no offence under section 1 if the adult reasonably believes that the other person is over 16. A couple of issues arise in relation to that, given the evidence that we have just heard. When girls—in particular—go online, they often add perhaps five years to their age when they describe or identify themselves. In relation to sexual offences, a belief about age is usually excluded as a defence, or at least is seriously restricted—for example, if the accused has previously been charged with a similar offence. Why is that policy not pursued in the bill?

Hugh Henry: In a sense, the argument is objective. We are saying that an offence will have been committed only if the adult did not reasonably believe that the child was 16 or over. I accept that that takes us into the use of the word “reasonably”, but the test is whether there is an absence of belief, based on reasonable grounds, that the child is 16 or over. The Crown would have to show that, in the circumstances, the accused could not have reasonably drawn the conclusion that the victim was 16 or over. That is a difficult issue, because some people might use that defence spuriously. However, equally, a person might believe that they were acting legally and responsibly, but find out later that that was not the case.
If the accused held an honest but unreasonable belief that the child was 16 or over, they could still be found guilty, because although the belief might be honest, it was not based on reasonable grounds. The argument would be about what it was reasonable for the person to conclude, not about whether the belief was honest. Clearly, the prosecution would have to take account of all the circumstances and find out whether anything within the communication that had been made could have reasonably led to the belief that the person was younger than they claimed to be. The belief does not simply have to be honest; it must also be reasonable.

We think that the definition as drafted, in which the Crown Office has been closely involved, is workable. The fact that the adult did not reasonably believe that the child was 16 or over is an essential element of the offence, rather than the defence—it will be one for the Crown to prove.

Marilyn Glen: The concern arises because there are articulate or literate 12-year-olds. The guidance that is given to parents, and by parents, is that children should not give their identity on the internet—they are told to mask their identity. Children can add five years to their age and claim to be 16.

Hugh Henry: If a person honestly and reasonably believed that they were communicating with someone who was over 16, it would not be right to criminalise them.

The Convener: The Law Society of Scotland told us that it would be more consistent with Scots law for the defence to have to prove reasonable belief, rather than the onus being on the Crown. The Law Society suggested that the bill simply takes procedures from the English legislation, the Sexual Offences Act 2003. We can debate whether that defence should exist at all, but the suggestion has a resonance with me. It would be better for us to remain consistent with the way in which similar offences are dealt with in Scots law.

Hugh Henry: That is a reasonable argument and we are considering it. We have seen what the Law Society said and we will give further consideration to whether it would be appropriate to shift the burden of proof on to the accused. We will let the committee know when we have come to a conclusion on that.

Mr McFee: The minister talked earlier about the lines that we draw in relation to 16-year-olds and 18-year-olds and, indeed, whether we draw any lines. He said that the matter is one of reaching a balance, which I accept. However, one issue that is not so much a matter of balance is the situation in which a foreign national who is resident in Scotland is lawfully married to somebody who is under 16. If that person arranges for their wife to come to Scotland with the intent of engaging in some form of sexual relations, will they commit an offence under section 1?

Hugh Henry: A person who is in that situation could be committing an offence under existing law, depending on the age of their partner. We would not necessarily recognise that the age of responsibility in another country should pertain here. It would be for the Crown Office and Procurator Fiscal Service to decide whether it was in the public interest to prosecute. I do not know the lawful age of marriage in all countries, but if someone brought over a child bride of 12, for example, we would not necessarily say that, because the marriage was legal in the country from which they came, it was acceptable here. Such matters would be for the Crown Office and Procurator Fiscal Service, and the same would apply under the bill.

12:30

Mr McFee: So you do not believe that there needs to be a marriage exemption in the bill?

Hugh Henry: No. There could be circumstances in which it would be right for a person who attempted to act in the way that the member describes to be prosecuted. There could be other circumstances in which a case was on the boundary and the Crown Office and Procurator Fiscal Service decided that it would be unreasonable and not in the public interest to proceed. Rather than have a fairly specific test of marriage, we should retain the element of discretion that currently exists and works reasonably well.

Mr McFee: Although I agree with the minister, we are getting fairly strong advice that the provision may contravene article 8 of the European convention on human rights.

Hugh Henry: We will take advice on that issue. No legislation that we introduce or that the Parliament approves should contravene the ECHR.

Mr McFee: What advice was taken on the matter before the provision was drafted?

Hugh Henry: We have been in consultation with the law officers and our legal officials have considered the matter. I am not sure how much further we can go.

Mr McFee: Under section 1 of the bill, the adult must have the intention to engage in conduct that would constitute a “relevant offence”. That is defined in section 1(2)(b) as either any offence mentioned in the schedule to the bill or “anything done outside Scotland which is not an offence mentioned in that schedule but would be if done in Scotland”.

"anything done outside Scotland which is not an offence mentioned in that schedule but would be if done in Scotland".
What is the intention behind the second part of the definition?

Hugh Henry: The aim is to catch anything that would be an offence here but may not be an offence in the country to which a person travels with the intention of committing the act.

Mr McFee: The provision is extremely wide. It refers to

"anything done outside Scotland which is not an offence mentioned in that schedule"—

that is, something that would be an offence if the bill is passed—

"but would be if done in Scotland".

Anything that is not in the schedule would be an offence.

Hugh Henry: Yes, if it is an offence in Scotland.

Mr McFee: How wide is the provision?

Hugh Henry: It applies to anything that is covered by Scots law—anything that would be an offence in Scotland. If a person travels abroad for the purpose of committing an act that is an offence in Scotland, that would be covered.

Mr McFee: I will give a ridiculous example to test how wide you intend the provision to be. In this country, it is an offence to drive with 80mg of alcohol per 100ml of blood. In another country the level might be 100mg. If someone went to that country with the intention of driving with a blood alcohol level of more than 80mg, would that act be covered by the provision? Surely it is not supposed to be that wide.

Hugh Henry: We are talking about anything that has reference to the schedule and is specific to the bill. We are not talking about housebreaking and drink driving.

Mr McFee: The provision says the exact opposite of what you suggest. It refers to anything that is not mentioned in the schedule. That is why I asked how wide you intend the provision to be.

Hugh Henry: To be honest, I think that we might be talking at cross purposes. The acts referred to in subsections (1) and (2) above are—

(a) engaging in sexual activity involving a child or in the presence of a child;
(b) causing or inciting a child to watch a person engaging in sexual activity or to look at a moving or still image that is sexual;
(c) giving a child anything that relates to sexual activity or contains a reference to such activity;
(d) communicating with a child, where any part of the communication is sexual.

Margaret Mitchell: In what circumstances would it be appropriate to apply for a risk of sexual harm order?

Hugh Henry: The circumstances are specified in section 2, which is entitled “Risk of sexual harm orders: applications, grounds and effect”. Section 2(3) provides that

"The acts referred to in subsections (1) and (2) above are—

(a) engaging in sexual activity involving a child or in the presence of a child;
(b) causing or inciting a child to watch a person engaging in sexual activity or to look at a moving or still image that is sexual;
(c) giving a child anything that relates to sexual activity or contains a reference to such activity;
(d) communicating with a child, where any part of the communication is sexual."

Margaret Mitchell: Can you give concrete examples? Will you suggest a scenario in black and white? What situations do you envisage that the provisions would cover?

Hugh Henry: The detail will be in orders that follow the bill. To some extent, the identification of
a scenario would be speculation on my part that would have no substance. I am not sure that it would be wise to engage in speculation at this stage.

**Margaret Mitchell:** When we think about legislation, it is always good to be able to pin it down.

**Hugh Henry:** I am sure that you are more than capable of thinking of circumstances that might apply, just as I am. Whether we would agree is another matter and at this stage I do not want to put a personal interpretation on the provisions.

Section 2(3)(a) refers to
“engaging in sexual activity involving a child or in the presence of a child”,
which is fairly specific and does not leave much to the imagination.

Section 2(3)(b) refers, first, to
“causing or inciting a child to watch a person engaging in sexual activity”
I am not sure that I can give more graphic detail than is contained in that provision. The paragraph also refers to causing a child
“to look at a moving or still image that is sexual”.
I am sure that you can imagine what that might be. We could speculate on what relates to
“sexual activity or contains a reference to such activity”,
but I am not sure that going into such detail would be particularly beneficial for the purpose of this discussion.

**Margaret Mitchell:** Would an order be used where a criminal prosecution had resulted in a not guilty or not proven verdict? Some people from whom we have taken evidence have suggested that that could be a possibility.

**Hugh Henry:** Yes.

**Margaret Mitchell:** That is interesting.

**Margaret Mitchell:** Would an order be used where a criminal prosecution had resulted in a not guilty or not proven verdict? Some people from whom we have taken evidence have suggested that that could be a possibility.

**Hugh Henry:** Yes.

**Margaret Mitchell:** That is interesting.

**Margaret Mitchell:** Would a risk of sexual harm order apply to someone who has passed themselves off in grooming activity on the internet and who then engages in the examples of cybersex that have been given today and which are difficult to pin down? The defence can be fantasy.

**Hugh Henry:** Such an order could apply, as the bill refers to communication. However, I would hesitate to say that that is the definitive word on the matter, as it would not be for me to decide in every case.

**Margaret Mitchell:** It would be helpful to find out whether an order would apply. Would an order be used instead of a criminal prosecution at any point?

**Hugh Henry:** No. A risk of sexual harm order is not a substitute for a criminal prosecution. Criminal prosecutions should still be pursued if they are relevant. An order could and should apply where a criminal prosecution might not necessarily be relevant. The making of an order does not preclude a criminal trial from taking place.

**Margaret Mitchell:** I am not sure that I can give more graphic detail than is contained in that provision. The paragraph also refers to causing a child
“to look at a moving or still image that is sexual”.
I am sure that you can imagine what that might be. We could speculate on what relates to
“sexual activity or contains a reference to such activity”,
but I am not sure that going into such detail would be particularly beneficial for the purpose of this discussion.

**Margaret Mitchell:** Would a risk of sexual harm order apply to someone who has passed themselves off in grooming activity on the internet and who then engages in the examples of cybersex that have been given today and which are difficult to pin down? The defence can be fantasy.

**Hugh Henry:** Such an order could apply, as the bill refers to communication. However, I would hesitate to say that that is the definitive word on the matter, as it would not be for me to decide in every case.

**Margaret Mitchell:** It would be helpful to find out whether an order would apply. Would an order be used instead of a criminal prosecution at any point?

**Hugh Henry:** No. A risk of sexual harm order is not a substitute for a criminal prosecution. Criminal prosecutions should still be pursued if they are relevant. An order could and should apply where a criminal prosecution might not necessarily be relevant. The making of an order does not preclude a criminal trial from taking place.
matter carefully and I am sure that he will continue
to do so.

12:45

Margaret Mitchell: So you are totally against
the standard of proof being that of beyond
reasonable doubt.

Hugh Henry: Yes, because a different standard
of proof applies in Scottish civil law.

Margaret Mitchell: Even though the offence
almost amounts to a criminal one.

Hugh Henry: It might almost amount to that, but
it is still a civil matter. You are asking us to change
our approach to civil law on the basis of one piece
of legislation, and although the civil law could be
changed, I am not sure that that would be wise or
advisable. You might believe that the matter is
tantamount to a criminal one, but it is civil matter
and we think that the civil law test is the right one.

Margaret Mitchell: Even though, as you said,
the provision could be used after an unsuccessful
criminal prosecution that resulted in a not proven
or not guilty verdict.

Hugh Henry: That is correct, because the
matter would be pursued as a civil matter, not as a
criminal one. The criminal approach would be
exhausted and a civil approach would then follow.

Margaret Mitchell: Will you consider that issue
again, or is it set in tablets of stone?

Hugh Henry: It is not set in tablets of stone. You
raise significant issues, but the legal advice from
Scotland’s law officers is that the provision is
acceptable.

Margaret Mitchell: I have a brief question about
proportionality. The sheriff will grant a risk of
sexual harm order in the first place, but the chief
constable will decide whether there is to be any
variation in the two-year stipulation. It has been
suggested that that may well be a problem. Is it?

Hugh Henry: In some cases, the chief
constable’s consent might be necessary, but
section 4(1) states:

“Any of the persons within subsection (2) below may
apply to the appropriate sheriff”.

It would be for the sheriff to determine whether
“an order varying, renewing or discharging”
the original order is required. The list of persons
who can apply to the sheriff includes the person
against whom the order has been made, as well
as the chief constable of the relevant police force
area and a chief constable in another area. However, it will be for the sheriff to determine any
variation.

The Convener: I have an open mind on the risk
of sexual harm orders, for the reason that the
minister gave earlier: the bill is about the
protection of children. However, I do not like the
analogy with antisocial behaviour orders that some
witnesses have used to describe the risk of sexual
harm orders, particularly the interim orders,
because a greater magnitude of stigma will be
attached to the risk of sexual harm orders. I would
be happier if we were clearer about when they will
be used, with the balance of probability test. You
said that the orders can be used at any point,
whether or not there is a court case or if a court
case has reached a not guilty verdict. It would be
helpful if we were a bit clearer about when the
orders will be used.

I do not like the fact that after evidence has been
tested in a criminal court and a jury has said that a
person is innocent, another chance is created to
go to a civil court, where the threshold is lower.
Technically, a person cannot be convicted of a
crime in a civil court, but an order will have the
practical effect of attaching quite a bit of stigma to
a person who has been found not guilty. I am
satisfied with the idea of the test when the police
think that enough evidence is available, want to
prevent something from happening and have
decided on a definite course of action to take.

Hugh Henry: In a jury case, a person might not
always be found not guilty; the verdict might be not
proven. We are talking about something that
would not be automatically determined; in such a
civil matter, a sheriff would consider all the
evidence.

Notwithstanding whether evidence was heard in
relation to the concluded court case, there may be
a belief that a risk remains—having regard to all
the circumstances and information that is
available—of a person committing an offence at
some point. A civil case would not depend on the
conclusion of a criminal case. The intention would
be to ascertain what might happen. A court would
look forwards, rather than backwards.

The Convener: If the police were satisfied that
they needed to take action, I would have thought
that they would test that before proceeding. It is
open to them to do that.

Hugh Henry: The orders are not forms of
punishment.

The Convener: I appreciate that.

Hugh Henry: The orders will give protection. An
order will not punish an individual for something
that they have or have not done. The attempt is to
build in protection because it is believed, on the
balance of probability, that something might
happen to a child. That represents a difference in
concept.
The Convener: I have a question about section 2 and risk of sexual harm orders. Section 2(3)(d) covers “communicating with a child, where any part of the communication is sexual.”

You are considering harm to a child. Does the bill need to specify that harm can be physical or psychological, or are you really thinking about physical harm to a child?

Hugh Henry: We should not specify such matters. Two questions are involved: what communication is and what is sexual. Section 2(3)(d) refers to communication that is sexual. I do not know how we could make the provision more specific.

The Convener: The question is what harm means in the bill. Does it mean physical harm or any harm? If we want to ensure that a broad definition of harm is used, does the bill need to specify that?

Hugh Henry: I am not sure what more we could say. The bill actually refers to “physical or psychological harm”. I struggle to think what definitions could be added for clarification. I honestly do not know.

Margaret Mitchell: Could more of a distinction be made? A risk of sexual harm order could follow a not proven verdict when the evidence was insufficient to prove the accused guilty beyond a reasonable doubt but disquiet was expressed about his conduct and doubt remained. Alternatively, the accused could be cleared as not guilty. Could a distinction be made in using orders after those two verdicts?

Hugh Henry: No. The orders are completely separate. In fact, even where there has been a not guilty verdict, if there were sufficient concerns about the potential future activities of an individual, a sheriff could decide that an order might apply, if it was required to protect a child. The sheriff would not be trying to revise or rehearse what had already happened in a court of law. They would look at the information that was provided to him or her and then decide whether an order was necessary—not to punish that individual, but to protect the child. It would not matter what the verdict was. The issue is whether the sheriff believes that added protection is needed for the child at some point in the future on the basis of the information provided.

The Convener: I am going to have to shut down this discussion.

Margaret Mitchell: I find it extraordinary that that might be done following a not guilty verdict. It is absolutely against the principles of Scots law.

Hugh Henry: It is not extraordinary, because if the facts of the case have been determined and there is no proof that a crime has been committed, it is absolutely right that that person is found innocent. However, if information is available that points to activities that have taken place since the trial commenced or to things that are happening that pose a potential threat to a child, irrespective of what happened in the case it is right that we use an order to protect the child, not to punish the adult who had previously been found innocent in relation to something else.

The Convener: The Executive’s position is clear.

Marlyn Glen: Concerns have been expressed to the committee—not least at the seminar last week—that persons engaged in providing sexual health services or advice or education might run the risk of being exposed to a risk of sexual harm order, for example by giving a child something that relates to sexual activity or contains a reference to such activity. Would it not be desirable for the bill to contain provisions that explicitly exclude such activity when carried out in good faith for the child’s welfare?

Hugh Henry: I do not think so. A chief constable and a sheriff would need to be satisfied that the person concerned was a risk to a child or children generally. I am not sure that putting class exemptions in the bill would be wise. Tragically, if a class exemption were given, it would not be beyond the bounds of possibility that a person within that class behaved inappropriately.

Marlyn Glen: Absolutely. I was not thinking about a class exemption. At the seminar last week, people mentioned that they did not want workers to be discouraged, as a consequence of the bill, from giving sexual health information. They hoped that some kind of comfort and support would be given to professional workers and volunteers. I am talking about joined-up government. The issue might be addressed in the announcement on the sexual health strategy tomorrow.

Hugh Henry: Let me reflect on the concern that Marlyn Glen expresses for a moment. If that broad group of people was potentially threatened by the bill, clearly there would be something manifestly wrong with the curriculum and the whole system. It would be absurd to suggest that everybody who was engaged in giving advice on health and sex education could be caught by the provisions. If someone is working within the curriculum and the recognised framework, there is no potential for them to be caught by the provisions in such a way. However, if someone starts off from the standpoint of the curriculum and the guidelines and then perversely imports some individual idiosyncratic construction that deviates way beyond what is widely regarded as acceptable, of course that individual could be putting themselves within the
bounds of the provisions that we are considering. That happens anyway when people deviate from the curriculum and do things that are inappropriate and could leave them open to action. However, anyone who sticks to the curriculum would not have any problems.

**Marilyn Glen**: I wanted to record that there was concern, not particularly in education where there is a set curriculum, but with respect to more informal relationships in which workers give advice. People want to be assured that they will still be backed up.

13:00

**Hugh Henry**: It is important to put on record that, in circumstances such as Marilyn Glen described, workers giving such advice are currently constrained in what they can and cannot say and in what they should and should not do. There are parameters that already pertain. We are trying to identify situations in which someone moves beyond those acceptable parameters. I do not think that including an exemption such as we have discussed would be of any great benefit.

**Margaret Smith**: Let us take an example involving a teacher in a Catholic school. Who decides what constitutes acceptable parameters or whether something is manifestly wrong in the curriculum? If a child comes to a teacher and asks about same-sex relationships and the teacher answers the question, believing that the child is distressed, could the bill be used against the teacher?

**Hugh Henry**: I think that Margaret Smith is drifting into a much more fundamental debate than the one that applies here. The issues that she raises would apply elsewhere, but I do not think that it is appropriate to have a wider debate on sexual health strategy and the role of faith schools or the Roman Catholic Church in this discussion. Whether the situation involved someone in either a Catholic school or a non-denominational school giving advice or making comment in respect of any relationship, it would ultimately be for the chief constable and the sheriff to satisfy themselves that the individual concerned and their actions constituted a risk to a child.

Notwithstanding differences among people about what is taught in schools of whatever description, there would still need to be a test of whether the person’s giving the advice constituted a risk to a child. Even if a teacher or head teacher believed that advice had been given with which they did not necessarily agree or which they considered to be inappropriate, it would still be a matter for the chief constable and the sheriff to decide whether that constituted risk. We are in danger of getting into a much bigger debate here.

**Margaret Smith**: That was just the clarification that I was seeking. I wanted to confirm that it was for the chief constable and the sheriff to consider what constitutes risk to the child, and that it will not be a matter for interpretation by any group of people. It is up to the justice authorities rather than teachers, head teachers or whomever. It is about the risk to the child and not about anybody else’s interpretation of what is or is not a sexual aberration.

**The Convener**: Yes—we have to consider the whole provision. In his evidence to us, James Chalmers of Barnardo’s asks us to note that the Sexual Offences Act 2003 in England gives an exemption in that respect. I accept that it might not be necessary for us to do the same.

**Mrs Mulligan**: I return to risk of sexual harm orders, in particular the use of interim risk of sexual harm orders. Section 5 will apply where an application for a risk of sexual harm order has been intimated to the person against whom the application has been made. What is meant by “intimated” in this context? Would it be possible for an interim order to be sought without the individual concerned being aware of that?

**Hugh Henry**: I am not able to give Mary Mulligan an exact definition. The normal sheriff court rules would apply, but we will consider the point and clarify it in writing.

**Mrs Mulligan**: A full RSHO can be made only if the sheriff considers it necessary to protect children generally or a particular child, but an interim order can be made if the sheriff thinks it is “just to do so”. Can you reassure the committee that that test fulfils the requirements of the European convention on human rights?

**Hugh Henry**: Yes, we believe that it does.

**Mrs Mulligan**: Why is there a different test for the making of an interim RSHO from that for the making of a full order? The convener does not like us to use the analogy of ASBOs, but the test for a full ASBO is the same as that for an interim one. For RSHOs, it is not. What was the thinking behind that?

**Hugh Henry**: There are two issues: one is practicality and the second is the degree of urgency. As the convener and Mary Mulligan have said, RSHOs are not exactly the same as ASBOs. I do not wish to downgrade the necessity of ASBOs, because they are making a significant contribution in many communities, but the urgency of the situation in which an RSHO might be necessary could be very different from what someone who needs the protection of an ASBO faces.

**Mrs Mulligan**: You were not keen to give an example of a situation in which a full RSHO might
be used; are you happier to give an example of a situation in which an interim RSHO might be used?

Hugh Henry: No, other than to say that it would be a situation in which the relevant authorities thought that urgent action was needed for whatever reason. I hesitate to identify such reasons.

Margaret Smith: I have questions about disclosure. What is the effect, for the purposes of disclosure, of making a risk of sexual harm order? Who would be informed of the making of such an order or an interim order? That picks up on a number of points that people who work in the field made at the seminar we had last week. For example, social workers asked who would be told and at what point RSHOs would be subject to disclosure.

Hugh Henry: Any information that the police hold, including information about civil orders, could be disclosed under an enhanced disclosure if, in the chief constable’s opinion, it is relevant to the inquiry in question. Any associated conviction would be shown in the standard and enhanced disclosures. There are no provisions to require automatic notification of other people such as employers, local authorities and child protection professionals but, following the Bichard recommendations, we have to consider the wider issues of disclosure of information. That needs to be reflected on further.

Margaret Smith: What is the timetable for that and how will it dovetail with the bill?

Hugh Henry: The matter will not be in the bill, but it could have an impact and we are anxious to resolve the issue as soon as we can, given its sensitivity.

Margaret Smith: As I said, it was raised by a number of people.

Section 8 provides that a person who is convicted of an offence under section 7 of the bill will be subject to the notification requirements of part 2 of the Sexual Offences Act 2003. Can you confirm how long that person would be subject to the notification requirements when he had become subject to them only because of an offence that was committed under section 7?

Hugh Henry: Section 8(3)(a) specifies that it would be

"from the time this section first applies to the person and remains so subject until the relevant order (as renewed from time to time) ceases to have effect".

Margaret Smith: What would happen if somebody who was the subject of an order was imprisoned and their sentence fell within the period for which the order applied? It would not be possible to do the kind of things that the order is about. What steps, if any, would be taken when the person was released?

Hugh Henry: Potentially, it would be for those responsible to decide whether to seek variation or renewal of an order. They might decide that the length of imprisonment had been so long that there was no longer an issue; however, they might decide that the problem remained and that the order should therefore be either renewed or varied. It would be a matter for the relevant authorities.

Margaret Smith: Some of the evidence that we heard earlier from Rachel O’Connell was about the steps that are being taken by the Home Office in relation to grooming-type offences generally. The police are moving towards a US model of being more proactive in that kind of work. What liaison do you have with the Home Office on the issue? Are you aware of that work and is it expected to be undertaken in Scotland as well?

Hugh Henry: There are different issues. We liaise quite closely with the Home Office on a range of matters, including legislative and policy issues; however, it will be a matter for police chief constables to decide how best to deploy resources. Our chief constables in Scotland work closely with their colleagues in the rest of the United Kingdom and with police forces in other jurisdictions to try to improve practice. Several initiatives in this country have been influenced by what is happening elsewhere. If anything that is happening elsewhere can help to improve police operations, chief constables will be keen to consider it. However, at the Justice 2 Committee yesterday, I was involved in a discussion about political interference; I suggest that it would not be for politicians to determine how chief constables operate.

Margaret Smith: Dutifully guided, I will ask my colleagues on the Justice 1 Committee, who I am leaving behind, to take that issue up with the Association of Chief Police Officers in Scotland.

The Convener: Now she leaves us.

I have a final question on disclosure. If a person who was the subject of an RSHO was subsequently charged with a further sexual offence, would that information be available to the court during their trial? In other words, would the RSHO be treated in the same way as previous convictions?

Hugh Henry: An RSHO is not a conviction: it is important that we say that clearly. It may well be a matter for the Crown Office to decide whether that would be relevant, but it is something that we will look at.
The Convener: I put it to you that it should not be a matter for the Crown Office but for Parliament to determine the status of orders. I accept your point that an RSHO is not a conviction; however, it might prejudice a person’s right to a fair trial if that information could be referred to. If a prosecutor referred to an existing RSHO, that would have the same effect on the jury as would revelation of a previous conviction. I am not saying whether I am persuaded that that might be a good thing or a bad thing; I am just saying that, if it were put to the court, such information would influence a criminal trial. I would like the Executive’s intention on that to be made clear.

13:15

Hugh Henry: It is always for the courts to decide whether information might impact on the fairness of a trial. That would be the ultimate test, whether the trial was on this matter or on anything else. We will consider the broader point that the convener makes.

The Convener: We have to stop our oral questioning there, although we have some more questions. We will deal with those—as usual—by correspondence. We have held you for long enough, given that it is quarter past 1. You have given us notice of amendments to the bill, which we have not yet seen. We will need to discuss with your office how we will deal with that. It is difficult for us to formulate questions without having seen the amendments, although I appreciate that we have got the gist of where the amendments are coming from. I propose that we discuss with your office whether you might be able to come back to the committee. That would probably happen at stage 2. We can at least have a discussion about how we are going to put our questions on the Executive’s view of the two proposed amendments.

Hugh Henry: Okay.

The Convener: That ends the evidence session. I thank Hugh Henry and his officials for attending the meeting this morning.
2nd Meeting, 2005 (Session 2), 26 January 2005, Associated Written Evidence

SUBMISSION FROM RACHEL O’CONNELL, UNIVERSITY OF CENTRAL LANCASHIRE

Introduction

The purpose of this introduction is to provide a brief overview of both the scope of the program of research, which has given rise to this paper and the methodology employed for the particular research reported in this paper. This paper summarises a section of a key-note address at the Netsafe conference to take place in Auckland, New Zealand, July 2003. The following paragraphs provide a general background to the area of research and a rationale for the investigation is outlined. A summary of the main findings are outlined in the Executive Summary and the implications of this research are provided followed by recommendations for further action in this area.

Background

The program of research began in October 1996, at University College, Cork, Ireland, as part of an M.Phil. programme and shortly after was converted to a Ph.D. Parts of this program of research are ongoing at the Cyberspace Research Unit, University of Central Lancashire. The main aims of the research were as follows:

To explore the structure and social organisation of paedophile activity on the Internet:

1. To investigate the nature and qualities of child sex-related activities such as collection, dissemination and trading of child erotica and child pornography.

2. To explore, using qualitative research techniques, particularly discourse analysis, the psychological structures underlying adult sexual interest in children.

3. To inform and improve the capacity of law enforcement organisations to more effectively deal with this important social problem.

The methods employed to explore paedophile activity on the Internet combine both qualitative and quantitative research methods. The following paper focuses on the findings of one part of this program of research, i.e., an exploration of both cybersexploitation and grooming practices employed by adults and adolescents with a sexual interest in children when operating in chat rooms intended for either children or teenagers. In cases of cybersexploitation and grooming, language is a tactical implement, which is used by adults with a sexual interest in children to identify, deceive, coerce, cajole, form friendships with and also to abuse potential victims.

Methodology

A participant observation methodology was employed in this study, which involved over 50 hours of research in chat rooms conducted intermittently over 5 years. Methodological considerations were numerous and rigorous ethical procedures were formulated and implemented according to APA guidelines both before and during research. For a full account of the ethical guidelines adhered in this study please contact ro-connell@uclan.ac.uk.

The procedure involved the researcher entering chat rooms or channels intended for child or teen users and posing as an 8, 10 or 12 year old child, typically female. The researcher utilised the usernames: angel or honez and frequented both web based and IRC based chat rooms and channels respectively. Details of the fictitious child’s life were that she had moved to a new location, her parents were constantly fighting, and that she had not yet made friends with peers in her new school. Essentially, the hallmarks of a socially isolated child were the messages that were to be divulged to any other user with whom the researcher, posing as a child, engaged.
Analysis

A conversation analytic methodology was employed in order to explore how adults and adolescents with a sexual interest in children cybersexploit and groom children on-line. The following section provides a summary of the main findings.

Executive summary

A TYPOLOGY OF CYBERSEXPLOITATION AND ON-LINE GROOMING PRACTICES

This Executive Summary outlines the main stages of cybersexploitation, i.e., adults or adolescents engaging children in varying degrees of sexually explicit conversations which may or may not progress to ‘Fantasy enactment’ (the enactment of sexual fantasises and in some instances to cyber-rape scenarios). A subset of cybersexploitation is grooming, which may or may not involve explicit conversations of a sexual nature, or indeed online enactment of fantasies but still falls under the umbrella of cybersexploitation because the intention is to sexually abuse a child in the real world but one of the points of contact occurs in cyberspace. Grooming, which has been defined in the proposed ‘anti-grooming legislation’ announced in the November 2002 Protecting the Public White Paper refers to the following:

‘A course of conduct enacted by a suspected paedophile, which would give a reasonable person cause for concern that any meeting with a child arising from the conduct would be for unlawful purposes’

For the purposes of providing a broader outlook the anticipated impact of 3G mobile phones was considered when drafting these recommendations and a range of both pre-emptive strategies and proposals for policy makers in relation to 3G are included here. For a fuller account of the capabilities and risks associated with 3G phones please read relevant section in the paper entitled, From Fixed to Mobile Internet: The Morphing of Criminal Activity Online,(O’Connell, 2003) which this briefing document summarises.

Victim selection methods

In teen chat rooms the activities that precede the processes of initiating direct contact with a child may simply involve the adult providing a description of himself to all of the users of the public chat room so that he is masquerading as a particular kind of child, of a particular age in the hope of attracting an equivalent age and same or opposite sex child, for example:

Adult\textsuperscript{175}: 14/m/uk

Once these vital details are stated the adult simply waits for a child to respond and once a child has responded they will either chose to pursue the conversation with the child on the basis of the child’s answers to a few initial vetting questions or not.

A different behaviour pattern can also be adopted whereby some adults will simply lurk in a chat room for some time assessing the conversation and each of the children participating in the conversation and only then will they choose to introduce themselves, often to one individual child whom they have been observing. The adult may choose to send a private message to the child that they have been observing, for example:

Adult: ‘hey angel, sounds like things are hard for you right now 😌 you wanna chat’*

It is important to note that certainly not all adults with a sexual interest in children pose as teenagers. A proportion of adults appear to be truthful with respect to their adult status and may indeed give accurate information about their age.

\textsuperscript{175} All references to ‘Adult’ in excerpts from conversation refer to adults or adolescents with a sexual interest in children. In reality these users employ usernames such as, for example ‘lookingforyoung’, or ‘bigdaddy’
Paedophile advice to paedophiles regarding cybersexploitation and grooming:

Research conducted by the author into the content of conversations between adults with a sexual interest in children in child-sex related chat rooms indicated that whilst the majority of the activity in paedophile chat rooms centred on the exchange of child pornography images another of the frequent topics concerned on-line grooming and in particular, ways in which to avoid detection. The full scope of that section of the research is outlined in a separate paper but findings which are particularly relevant to this paper are mentioned here; in paedophile chat rooms users exchange information with one another about how best to target a child that most closely matches individual’s predilections. The advice regarding selection and targeting involves paedophiles viewing children’s public profiles on-line. Public profiles consist of on-line forms that chat service providers request children to complete, with typical information fields such as real name, age, location, and children are also invited to upload their photograph, and to give details about their hobbies and interests. In addition, if a child has created their own web site they are requested to provide the URL. In effect, these forms provide paedophiles with enough information to satisfy their curiosity about the physical appearance of the child and proximity or otherwise of the paedophile to the child’s physical location.

Patterns of cybersexploitation and grooming conversations

Throughout each of the stages there are clear and easily identifiable differences in the patterns of behaviour of the individuals, and these appear to relate closely to their motivations, which will be discussed later in the paper. But, it is important to note that whilst the stages outlined here provide a summary of the possible stages of cybersexploitation and grooming conversations, not all users will progress through the stages in the conversations sequentially, i.e. some adults will remain in one stage for longer periods than other adults and some will skip one or more stages entirely. The order and number of stages will vary and these variations provide clues of the user with ill-intent’s motivations. Furthermore, whereas some stages, for example the risk assessment stage, have specific and identifiable goals, the goals of other stages are psychological and relate closely to both the aims of the adult and his perceptions of, for example, how malleable a child is in terms of meetings his requirements. Very early in the initial friendship-forming stage the adult will suggest moving from the public sphere of the chat room into a private chat room in which rather than the one-to-many facility of a public arena, an exclusive one-to-one conversation can be conducted.

The following paragraphs provide a summary of the findings of an ongoing program of research, which aims to explore the possibility of developing socio linguistic profiling techniques designed to analyse the speech employed by people who engage in on-line grooming.

Friendship forming stage

The friendship-forming stage involves the paedophile getting to know the child. The length of time spent at this stage varies from one paedophile to another and the number of times this stage of the relationship is re-enacted depends upon the level of contact the paedophile maintains with a child.

Relationship forming stage

The relationship-forming stage is an extension of the friendship-forming stage, and during this stage the adult may engage with the child in discussing, for example, school and/or home life. Not all adults engage in this stage but generally those who are going to maintain contact with a child will endeavour to create an illusion of being the child’s best friend. More typically an initial
relationship-forming stage will be embarked upon and then interspersed in the conversations will be questions that relate to the following risk assessment stage.

Risk assessment stage

The risk assessment stage refers to the part of the conversation when a paedophile will ask the child about, for example, the location of the computer the child is using and the number of other people who use the computer. By gathering this kind of information it seems reasonable to suppose that the paedophile is trying to assess the likelihood of his activities being detected by for example the child’s parent(s), guardian or older siblings.

Exclusivity stage

The exclusivity stage typically follows the risk assessment stage where the tempo of the conversation changes so that the idea of “best friends” or “I understand what you’re going through” and so you can speak to me about anything ideas are introduced into the conversation by the adult. The interactions take on the characteristics of a strong sense of mutuality, i.e. a mutual respect club comprised of two people that must ultimately remain a secret from all others. The idea of trust is often introduced at this point with the adult questioning how much the child trusts him and psychologically people, especially children, respond to the tactic by professing that they trust the adult implicitly. This often provides a useful means to introduce the next stage of the conversation, which focuses on issues of a more intimate and sexual nature.

Sexual stage

The sexual stage can be introduced with questions such as ‘have you ever been kissed?’ or ‘do you ever touch yourself?’ The introduction of this stage can appear innocuous enough because typically the adult has positioned the conversation so that a deep sense of shared trust seems to have been established and often the nature of these conversations is extremely intense. Therefore, from the child’s perspective the conversations are not likely to be typical and perhaps the intensity of the conversation makes it more difficult for the child to navigate because they have entered a previously unfamiliar landscape of conversations of this nature. Alternatively for children who have previously been sexually abused, and it seems reasonable to assume that there is a high likelihood that at least a percentage of the children using chat rooms will have previously encountered child sexual abuse; adults will modify their approach in a manner that affords them the greatest amount of leverage with a child. The ‘you can talk to me about anything’ is a relatively staple part of the conversations of those adults who intend to maintain a longer term relationship and for whom the child’s apparent trust and love is a vital part of their fantasy life.

Patterns of progression through the Sexual stage

It is during this stage that the most distinctive differences in conversational patterns occur. For those adults who intend to maintain a relationship with a child and for whom it seems to be important to maintain the child’s perception of a sense of trust and ‘love’ having between created between child and adult, the sexual stage will be entered gently and the relational framing orchestrated by the adult is for the child to perceive the adult as a mentor or possible future lover. Certainly a child’s boundaries may be pressed but often gentle pressure is applied and the sense of mutuality is maintained intact, or if the child signifies that they are uncomfortable in some way, which implicitly suggests a risk of some sort of breach in the relationship precipitated by the adult pushing too hard for information, typically there is a profound expression of regret by the adult which prompts expressions of forgiveness by the child which tends to re-establish an even deeper sense of mutuality. During the relationship forming stage the adult may outline the rationale of the relationship to the child whilst also intimating his intentions. The rationale for intended activities may include, for example, ‘forming a loving lasting relationship / friendship’. This rationale may or may not include an outline of future activities, for example ‘maybe we could meet some day and I could show you how much I love you’ or ‘maybe you could take photographs of you touching yourself’. The nature of sexual conversation will vary from mild suggestions to explicit descriptions of, for example, oral sex. The focus may be on the child, i.e. the adult asking the child to touch itself and to explain what it feels like. The usual rationale for this approach is that the adult is somehow perceived as a mentor who will guide the child to a greater understanding of his or her own
sexuality. This can sometimes be taken a little further with the promise that by engaging in these activities the child will grow to become a wonderful lover. The interaction may be about how to self-masturbate and if the adult is a different sex to the child he will explain the techniques a child could use if they were together so that the child could bring the adult to orgasm. Research findings indicate that this pattern of conversation is characteristic of an online relationship that may progress to a request for a face-to-face meeting and arguably most closely resembles the course of conduct the ‘anti-grooming’ legislation is designed to combat.

**Cyberexploitation: Fantasy enactment**

Fantasy enactment can be said to occur when an adult engages a child in enactment of a sexual fantasy. Typically the initial stage of fantasy enactment involve the adult describing a particular scenario, for example,

*Adult: 'I am lying naked in a warm bath and you are sitting at the edge of the bath wearing only a silk robe that falls open'*

It seems reasonable to suggest that in the majority of interactions of this nature, and this could also be said for adult to adult cybersex related interactions, the ultimate goal of fantasy enactment is the achievement of sexual gratification.

The following descriptors provide an insight into the nature and variations of online fantasy enactment.

**Fantasy enactment based on perception of mutuality**

In terms of fantasy enactment based activities, a range of differing approaches may be employed whereby the adult will fluctuate between inviting and emotionally black-mailing a child into engaging in cyber sex, which may involve descriptions of anything from mutual masturbation, oral sex or virtual penetrative sex. Typically, this persuasive approach seems to focus a great deal on the child feeling loved and the desire on behalf of the adult that the child will fall in love with the adult is often openly stated. Fantasy seems to be an important element of the adult’s interactions with the child and for the fantasy to work there seems to be a need for the child to appear willing to engage in online sexual activities.

**Fantasy enactment: overt coercion counterbalanced with intimacy**

However, the research findings indicate that at least some of the individuals who engage a child in the virtual enactment of their fantasies may adopt a far more overt pattern of coercion, which is sometimes counterbalanced by intimacy and friendship.

For example

*Adult: 'Tell me how you would touch my c***k’
Child: ‘I feel uncomfortable’
Adult: ‘Just do it, come on just do it, what are you waiting for?’
Child: ‘I don’t want to’
Adult: ‘Don’t let me down, come on now, I am touching you making you feel really good, I love you, come on you will like this, don’t you want to make me happy’

**Cyber-rape fantasy enactment: overt coercion, control and aggression**

Furthermore, some individuals will resort to the use of aggressive phrases to coerce a child and this method will be replaced with a much more directive and aggressive commands, e.g.

*Adult: ‘Do as I f**king say right now bitch or you will be in big f**king trouble’*
Methods of concluding a cybersexploitation and / or grooming encounter.

Damage limitation

Online grooming or cybersexploitation encounters are sometimes characterized by a set of what could be termed as ‘damage limitation’ exercises by the adult or adolescent with a sexual interest in children. These involve very positive encouragement and high praise for a child and it seems reasonable to conclude that the intention is to reduce the risk of a frightened child divulging details of the on-line activities to anybody else. This damage limitation stage typically involves repetition of phrases by the protagonist of ‘this is our secret’ and ‘I love you’. In particular, this is a common characteristic of the latter stages of online grooming and over time it can acquire an almost ritualistic quality that is a necessary part of the encounter.

Hit and run’ tactic

More typically, especially in the case of very aggressive cyber-rapists, there is evidence of what could be termed a ‘hit and run’ mentality and rarely during the course of research was the aggressive cyber-rapist interested in either damage limitation, extending contact or indeed in scheduling either a repeat online or an offline encounter. This raises issues about our understanding of the motivations of these offenders, the need for education for children and the possibility of low risks of detection due to perhaps guilt, embarrassment, shame, and fear of an angry response from parents. Currently, there are low levels of provision of help lines for children where they could bring these activities to the attention of relevant authorities and receive adequate counselling and support. At present it is only possible to hypothesize about the possible psychological impact of these kinds of experiences on vulnerable children, but it seems reasonable to suggest that there is a likelihood that for some children at least, these experiences may have both short and long-term ill effects.

Adjusting for age

The level of duplicity engaged in by the adult means it is very difficult for a child to detect that firstly, they are not in fact talking to a child, and secondly to discover the true intentions of the adult. The patterns of conversation will vary slightly with the age of the child, but it would be contrary to evidence to assume that because a child is, for example, 8 years old rather than 12 years old, that there is a very significant difference in the degree or extent of sexual suggestion or coercion employed. The variations relate to providing more explanations of what, for example, ‘fingering’ or ‘touching oneself’ actually means, but once those baseline levels of understanding have been achieved then the pattern of the conversation continues in a manner that closely approximates what is outlined above.

Recommendations

Growing out of the research findings outlined in this paper, in particular the typology of cybersexploitation and grooming practices, which have relevance on a number of levels, the following recommendations relate to a number of those levels; i.e. legislative changes, operational policing strategies, strategic management of reports of cybersexploitation and grooming, and also a proposal detailing the parameters of longer term programs of research designed to increase our working knowledge of the processes that underpin both cybersexploitation and grooming. Whilst this list of recommendations is certainly not exhaustive, it serves as a useful starting point to initiate discussion about possible ways to strategically combat these illegal and harmful activities. A comprehensive rationale behind the recommendations follows each individual recommendation.

Recommendation 1: Test proposed changes in legislation

A review of the findings of this research with regard to cybersexploitation and grooming practices by those involved in discussing issues surrounding the introduction of the proposed ‘anti-grooming’ legislation would afford the opportunity to clarify the nature of criminal activities, which are being legislated against. It would be judicious to consider not only the fixed Internet context but also the mobile Internet when conducting the proposed review. In addition, this process might expose potential loopholes, which might be unwittingly be built into the process.
Hypothetical scenario 1 might include the following features:

An adult with a sexual interest in children engages in cybersexploitation of a 10 year-old girl, involving the child in the enactment of a particularly violent rape fantasy, utilising an overtly coercive approach counterbalanced by aggression. However, throughout the whole conversation no mention is made about an intention to meet with the target victim in the real world. Scenario 1 concludes with this adult employing a ‘hit and run’ method to end the conversation and seemingly makes no further contact with the 10 year old girl.

Hypothetical scenario 2:

Which, for illustrative purposes, is the same in every respect to scenario 1 except that at the end of the Fantasy Enactment stage instead of terminating contact the adult in this scenario does make an effort to reassure the 10 year old girl and goes through what has been termed the ‘Damage Limitation’ stage before scheduling a number of repeat meetings on-line which involve cybersexploitation. Similar to scenario 1 the adult in scenario 2 never mentions a real world face-to-face meeting and it might seem therefore that proving a course of conduct indicative of the intention to meet with a child for sexual intercourse in the real world under the proposed ‘anti-grooming’ legislation would not be relevant. However, it seems reasonable to suggest that the adult in scenario 2 does engage in a course of conduct with the intention of repeatedly engaging the child in what might be termed as cybersexploitation or non-contact sexual abuse, which occurred in a virtual setting.

Let’s say for arguments sake that the cybersexploitation in scenario 2 becomes increasingly more violent and abusive in nature over the course of numerous meetings on-line throughout a 12-month period. The cyber-rape scenarios become more explicit and the adult provides increasingly more graphic details of various sex acts accompanied by explicit pornographic images which he sends to the child using the ‘File send’ option and he is aware that the child has viewed the material. It seems reasonable to ask if, and indeed how, one might put cybersexploitation of this kind on some kind of gradient, which would facilitate the criminal justice system devising some kind of tariff in relation to activities of this nature so that for example, one might suggest that at one extreme is the one-off incident with a ‘hit and run’ modus operandi and at the other extreme would be a collection of activities which might include some of all of the following activities over a lengthy period of time: engaging a child in conversations of an explicitly sexual nature, sending pornographic images to a child, inciting child to create pornographic images, instructing a child to engage in various sex acts either alone, with another child or with an adult.

Hypothetical scenario 3:

In this instance the details of the case mirror scenario 2 but in this instance the cybersexploitation has been going on for 18 months at which point the child has proposed a real-world meeting, which the adult agrees to.

Utilising the research findings regarding the patterns of cybersexploitation in this way would serve as a useful exercise to test the applicability of the proposed changes to the legislation under a number of circumstances prior to making actual changes to the law. The research findings could also have some relevance with regard to developing training materials for both law enforcement and the criminal justice system.

Recommendation 2: Recognition of the evidential issues that the proposed anti-grooming legislation will give rise to at two levels are as follows:

From an operational policing perspective, in addition to cyber trails the potential evidential aspects of the content of conversations ought to be considered, i.e. the information an adult or adolescent with a sexual interest in children reveals throughout the course of a conversation, for example, real world location, occupation, hobbies, which, although it would have to be regarded as open source information, i.e. needed to be verified, nonetheless it may still be worth investigating.
Arguably the content of conversations will play an integral role in establishing a ‘course of conduct’ if and when the proposed anti-grooming legislation becomes law. This will inevitably give rise to questions concerning the evidential integrity and admissibility of copies of conversations, which allegedly contain evidence of grooming and cyberexploitation. The questions will relate in part to the source of the alleged cyberexploitation conversations and whether or not computer analysis of both the alleged perpetrator’s and victim’s computer provide corroborating evidence to verify that the conversations occurred but also the alleged course of conduct took place. It is possible now to anticipate what scenarios might arise in this regard and it seems reasonable to recommend that some kind of guidelines should be established in this respect for use by both law enforcement but also the criminal justice system. Therefore, decisions in this regard will not necessarily have to rely wholly on precedents but at least in part on guidelines that could be arrived at by experts in the field of network security and cyber crime investigations.

It seems reasonable to suggest that when the proposed anti-grooming legislation becomes law, that it may serve to heighten the public’s awareness of the possibility of a recourse to either civil or criminal law in cases of on-line grooming, which may or may not precipitate a higher incidence of reporting of these kinds of activities. The issues of how such a reporting structure might be set up will be discussed in the next recommendation, but for now the main point is that it is important that law enforcement recognise the potential evidential aspects of copies of conversations that contain evidence of either cyberexploitation or grooming, or indeed both, which will come to their attention prior to the commission of an offence in the real world. Therefore, the potential exists for police officers to respond to reports of grooming either as it occurs in a chat room, or a short time after, hopefully prior to the commission of contact sexual abuse in the real world. From an investigative perspective tracking and locating the alleged offender in the real world will be one of the primary objectives and therefore it is important to recognise that clues as to the whereabouts of an alleged offender may be present in whatever section of the conversation that is available to a police officer. At an operational policing level, the evidential value of copies of the conversations will be apparent and it seems reasonable to argue that the conversations and other details of the alleged offence, for example, the geographical proximity between the alleged perpetrator and the alleged victim will provide insights into offender’s motivations and behaviour patterns.

One crucial issue is that copies of conversations may be acquired in any number of ways, for example;

- The alleged victim may have intentionally saved the conversation on his/her hard drive, which subsequently are accessed by the police.

- The alleged victim may have sent a copy of the conversation to the Chat Service Provider as part of a report of abuse, which is subsequently accessed by the police.

- Computer crime units may be able to retrieve part or whole sections of conversations from swap files on the alleged victims hard drive. Similarly, as soon as the investigation leads officers to the alleged offender whole or part of conversations may be retrieved from the alleged offenders computer hard drive.

- The Chat Service Provider may capture a copy of a conversation server side as soon as an alleged victim alerts them to the abuse, or perhaps a moderator becomes aware of abuse taking place.

- However, if the alleged incident of cyberexploitation and /or grooming took place via a 3G mobile phone and included for example, SMS, MMS, video messaging, and voice-mail it is important to take into account the limited capacity to save copies of communications on a mobile device. This issues needs to be taken in account not only by law enforcement but also legislators and most importantly by mobile phone product developers and software engineers.

A host of issues with respect to the evidential nature of material gathered client versus server side will arise as a result of proposed changes to legislation, not only at an operational policing level but also in terms of the admissibility of evidence in a court of law. Arguably, there is a need for clear
guidelines to be laid down with respect to Chat and IM for Service Providers, users and law enforcement - not only with regard to what level of detail in terms of traffic data is recorded by Service Providers, but also with respect to ensuring that systems are set in place so that end users have the facility to save copies of conversations that meet certain requirements in relation to admissibility in a court of law. Currently, software exists which will record every keystroke made on a computer, but the robustness of this software in terms of foiling attempts to tamper with evidence is not as yet established and perhaps some kind of testing in this regard would benefit the inevitable debate that will arise.

**Recommendation 3: A networked reporting structure designed to deal with reports of cybersexploitation and grooming that contributes to a central repository ought to be established**

The fact that individual adults or adolescents with a sexual interest in children utilise a number of strategies to avoid detection, including using different Chat Service Providers to target victims, combined with the large number of possible Chat Service Providers, suggests the need for a networked reporting system which feeds into a central repository handled by law enforcement. A central repository would facilitate the systematic analysis of reports of online grooming that would assist law enforcement to not only link offences committed by individuals across different Chat Services, but also to identify distinctive modus operandi’s and identify elements of victimology, all of which may have an important role from both a crime preventative and crime reactive perspective. Crucially such a system would serve to increase police officers opportunities to become involved in alleged cases of grooming before any offence occurs in the real world.

A possible adjunct to the networked reporting structure would be a ‘one-stop’ advice line where children can find sources of advice about how to cope with negative experiences they have encountered either on the fixed or mobile Internet.

From an operational perspective the proposed networked reporting system recommended here would involve each Chat Service Provider filtering and processing details of complaints of cybersexploitation sent by alleged victims to a central repository. The details might include for example, the alleged victims report, a saved copy, or screen shot of the conversation, and the relevant traffic information of the alleged offender, i.e. IP address, Caller line ID, Username, Date and Time stamp. In addition the Chat Service Provider ought to provide details of any action that has been taken in response to the compliant.

The suggested model for such a database ought to be developed in conjunction with, for example, software engineers who are familiar with a range of real-time communication applications and programs. Clearly the proposed networked reporting system with a central repository would raise a myriad of issues from a number of perspectives for example;

- Data protection with respect to chat users personal details and on-line interactions, and these issues would need to be explored. One possible solution to this issue would be to encrypt information that the Data Protection Act deems ought not be readily available until such time as the police had established reasonable support for the suspicion of criminal activity and upon securing a warrant they would be provided with the key to decrypt the information. These issues would be particularly pertinent in cases involving for example false allegations.

- The issue of costs incurred by Service Providers to gather, filter, capture, escalate and store information pertaining to reports of abuse.

- A set of criteria would need to be arrived at and protocols established that underpin a decision on the part of the Chat Service Provider to escalate a complaint for attention of police.

- The issue of Service Providers liability with respect to what happens in their chat rooms and the level of security and safety features they have incorporated designed to prevent what has occurred will undoubtedly become a contentious issue when the proposed anti grooming legislation becomes enshrined in law.
• From the law enforcement perspective the question arises as to who would fund, manage and run the central repository?

• Furthermore given the global nature of the Internet will it suffice to have a national central repository?

• Given the fact that the repository would be designed to identify users with serious ill-intent toward children using one or more Chat Services, the question arises in relation to adapting the current system with respect to investigating police officers acquiring warrants to access pertinent information from ISP’s be handled and the associated costs be handled.

• Arguably mobile phone companies would benefit most from the idea of a networked reporting structure with a central repository, especially if it were set up with some of the capabilities outlined below whereby server-side automated capture of communications which allegedly involve cyberexploitation and grooming and are subsequently forwarded to a central repository.

The following is a brief outline of how the central repository might operate:

Complaint made in real time, i.e. as alleged abuse is taking place:

• If a complaint were made as the alleged offence were taking place it would be relatively straightforward to automate the process of data capture, i.e. a system could be set in place whereby an alleged victim ticking of a box to indicate cyberexploitation or grooming had occurred, coupled with the provision of the alleged offenders username, would trigger the capture of that users information and a screenshot of the conversation.

• Non-real time reports would need to be set up in a slightly different manner with the facility for the alleged victim to send a copy of the alleged conversation to the repository along with details of the alleged offenders username, date and time the conversation took place. With this level of information it would be possible to gather the appropriate traffic information from the Chat Service Provider.

Furthermore, the central repository ought to be set up whereby mechanisms are set in place such that information regarding cyberexploitation of children from disparate sources is processed as follows:

• Police officers who may uncover details of cyberexploitation during the course of an investigation have the facility to upload information. Therefore the facility to upload information regarding grooming and cyberexploitation would be available not only to potential victims via their Chat Service Providers but also to law enforcement.

• Child welfare organisations, social workers, teachers, and parents need to be made aware of the repository and a set of procedures established whereby the information they have with respect to cyberexploitation is vetted by relevant law enforcement personnel and then entered into the database.

The repository would contain details of reports of grooming and sexual solicitation on-line, which where possible, would be accompanied by copies of conversations, and also where applicable, the users IP address, username, and caller line ID to check for previous complaints against an individual and activate monitoring of his/her activity. Currently reporting structures are not joined-up or co-ordinated in any way and this creates a potential gap in the security which paedophiles are only too happy to exploit. It is not sufficient for law enforcement and the Internet industry to continue to operate in full knowledge of these aspects of criminal activity on-line without attempting to devise some measures to address this.
Advice Line

A practical strategy as regards the provision of sources of help for children who have had negative experiences would be the establishment of a 'one-stop shop' whereby children have a contact point, a source of help for children who have had negative experiences either on the fixed or mobile Internet. Such a service would need to be staffed by people who have the technical expertise and knowledge to be able to handle the issues and advise children about positive action they can take themselves in order to protect themselves and decrease their likelihood to be victims of such an incident.

Recommendation 4: Programs of education ought to be developed for the criminal justice sectors:

Crimes which involve both existing and emerging communication technologies increasingly feature in cases that reach court rooms but it doesn't always follow that members of the judicial system have received any kind of basic or indeed advanced training about how to deal with these kinds of crimes, and in particular how to deliberate in relation to the admissibility of computer based forensic evidence.

Clearly there is a need to equip these people with the understanding they need that is targeted and specific to the kinds of cases they are likely to encounter. At present no such training exists. There is a dearth of adequate and comprehensive training courses and this situation needs to be addressed.

Recommendation 5: Programs of education and awareness raising ought to be developed for children, parents, teachers and those who work with or come in contact with children on a regular basis.

Programs of education need to address issues in relation to both the fixed and mobile Internet.

One of the most significant crime preventative tactics in this arena is to empower children with the tools, knowledge, and skills they need to navigate the Internet safely. By focusing on equipping children and teenagers to deal effectively with harmful and illegal contact activities on-line we are essentially increasing their resiliency whilst reducing their vulnerability. Furthermore, anticipating potential risks associated with children using 3G technology prompts us to look at devising strategies that ought to be employed whereby we can augment children's resiliency and in effect serve to off-set the impending risks.

Arguably, one of the key strategies to counteract both existing and anticipated risks ought to be the development and delivery of programs of education to address these issues for delivery in both school and a range of other environments. Clearly it would be completely naive to assume that messages from existing programs of education regarding the fixed Internet would suffice. As outlined earlier many of the Internet safety programs that currently exist consist of little more than a handful of inoperable guidelines. Emerging technologies will affect people's lives at an existential level and it will no longer suffice to regard communication technologies as some kind of add-on to children's lives, or some additional element of their education or indeed as some kind of hindrance to efficient operation of the classroom as many teachers currently regard mobile phones.

Communication technologies are becoming integral parts of children’s lives and arguably this needs to be reflected in programs of education that teach children how to recognise, establish and maintain the kinds of boundaries they ought to have with respect to, for example, recording and disseminating images using their mobile phone handsets. Teaching strategies will have to include modules designed to enhance children's critical reasoning with a view to facilitating children making informed decisions about appropriate and safe use of communication technologies. In effect educators will be enhancing one of life’s newest life skills, i.e. safe use of communication technologies. In addition, to be effective these programs of education will need to grapple with these issues on a context by context analogy based methodology engaging children in the processes of making decisions about when and where and in what contexts it is that certain actions are, and indeed are not appropriate. Undoubtedly, this will involve bringing these technologies into the classroom.
Whilst conducting research in schools during the previous two years many schools balked at the idea of talking to children about chat rooms; they were seen as taboo and many schools did not want to accept responsibility for teaching children about them. However acknowledging the issue and teaching children actively about the capabilities of technologies is an effective way of grounding their knowledge and enhancing their understanding of what might be dangerous or risky and empowering them with skills to enhance their resiliency. We need to recognize that we are at the cusp of a huge evolution in terms of communication technology. There is a potential gap, a deficit in children and parent’s knowledge, and we need to begin to counteract this gap.

Similarly, parents, carers, teachers and all those who work with children on a regular basis ought to be empowered with the tools knowledge and skills to address issues such as cybersexploitation and grooming. Often these people may not be very computer literate and therefore their efficacy in terms of helping people in their care to deal effectively with their online experiences is seriously hampered. In addition, people operating help lines have limited experience or knowledge of the kinds of practical advice that can be offered to people who contact them looking for advice regarding harmful on-line incidents. Clearly there is scope in this area for capacity building and training and delivery of comprehensive courses to address these kinds of shortfalls.

**Recommendation 5:** It is imperative to set up programs of research designed to explore the impact of both existing and emerging technologies.

There are a whole host of potential programs of research far too numerous to mention in this paper and therefore only two will be referred to here.

*An exploration of the potential of developing sociolinguistic profiling techniques in relation to cybersexploitation and both online and offline grooming.*

Identifying strategies within the speech of the adult with a sexual interest in children has the potential to provide information about an alleged offender's modus operandi and signature behaviours, as well as potentially providing indicators of potential risk an individual might pose to intended victims. Therefore analysing conversations in a systematic manner provides the potential to build linguistic profiles of offenders. In addition, comparing the language used to cybersexploit victims, for example, cyber-rape scenarios in on-line contexts with details of assault(s) which subsequently occurred during real-world face-to-face meeting(s), could begin to provide insights into whether or not a cycle of abuse exists that occurs in both real and virtual worlds, or indeed whether some kinds of cybersexploitation scenarios are confined to the virtual world. Such a program of research might begin to answer questions about the relationship between, for example, violent sexual assaults where the original point of contact was on-line and the nature of that contact. Furthermore from a psychological perspective this kind of analysis lends itself to both cross-sectional and longitudinal studies designed to analyse behaviour patterns, career trajectories, and risks associated with on-line offenders. In addition a socio-linguistic profile generated through analysis of on-line conversations may form an important part of an overall offender profile, crucially, the extent of an alleged offenders immersion in a range of both on-line and offline activities including, for example, online child pornography related activities, or interfamilial abuse. A clear recommendation arising out of this research is that both the evidential nature and potential for providing psychological insights into the mindset of adult with a sexual interest in children who engages in cyber sexploitation must not be overlooked.

*An exploration of the psychological effects of exposure to cybersexploitation and online grooming on both children and teenagers who have experienced these activities on-line.*

What kind of harm, if any, does exposure to cybersexploitation and grooming cause to children in both the short and the longer term? Does exposure to non-contact child sexual abuse make them more susceptible to further abuse?

Verbal coercion, aggression, bullying and emotional black-mail are the stock trade of adult and adolescent child sex related activities. What impact does this have on children and what, if any, level of imitation and experimentation does it generate?
Exposures to rationalizations and justifications for child sex compounded, for example, by exposure to images of child pornography or indeed involving children in the production of both text and image based child pornography may have a long-term emotional black-mail quality which means that children may remain entrapped in a cycle of abuse and as in the real world may be used to recruit new children for either an individual or group of adults of adolescents with a sexual interest in children.

Recommendation 6: Set up a working group comprised of peoples whose fields of expertise lie in Internet architecture, e.g., network engineers and product developers.

It is anticipated that the remit of such a group would include at least some of the following:

- To conduct a review of existing and emerging networking protocols with respect to enhancing child safety on-line,
- To focus on the processes underpinning industry’s product development, and an exploration of the options pertaining to, for example, product differentiation on the basis of the end-user,
- Creation of outlines of possible minimum standards for industry with respect to child users, ensuring the implementation of these standards, and development of mechanisms, whereby industry compliance can be tested, so that there is an ongoing evaluation process designed to establish the effectiveness of these standards.

The working group could critically review documents such as, for example, the guidelines prepared by the Home Office for Chat Service Providers with respect to the safety measures they ought to consider putting in place. These guidelines could be discussed more thoroughly, with the view to creating a document(s), which would provide more depth and scope in terms of detailing how and in what circumstances these recommendations and indeed more far reaching recommendations would be implemented, on various networks using different programming languages, whilst taking into consideration issues surrounding interoperability. One of the key aims of this working group would be to create a set of consultation papers which would, for example, specify protocols in relation to enhancing child safety in a format that is easily accessible to network and software engineers who are the people who would be implementing the proposed practices. This approach would I feel alter the landscape of this area of discussion tremendously in a positive manner.

The working group, which would be comprised almost exclusively of people with a good baseline technical knowledge, could potentially benefit the subject area of child safety on the Internet greatly. Having an opportunity to discuss ways in which for example, 3G based products are developed with a view to maximising safety features either universally or perhaps in ways which were more specific to the end-users needs, would be an interesting thread for a discussion.

Additionally protocols relating to interoperability could be explored in such a way so that it is possible to discuss what the implications are likely to be from, for example, an investigative point of view. From a pragmatic perspective police working in computer crime units have acquired a useful working knowledge of the implications of on-line criminal activity for investigative strategies and could be invited to make some valuable contributions to the creation of a set of papers, which would outline for example, key points that operational police officers need to be aware of when investigating child-sex related crimes which involve the Internet. One of the questions this research gives rise to is whether or not individuals have a stable style of interacting that remains consistent throughout their on-line interactions, or if there is some sense of progression as, for example, their skills in grooming become more refined, or the desire to enact in the real world a rape fantasy becomes greater than cyber based enactment?

Consultation papers would be useful at the product development and software engineering level within mobile phone companies to ensure that the issue at the top of their agenda is child safety, and in particular, how to reduce risk. It is not uncommon to find that a number of different teams of

176 http://www.homeoffice.gov.uk/docs/ho_model.pdf
software engineers, sometimes in the same office, working toward developing new products, but firstly, child safety is not on their agenda, and secondly, different teams do not necessarily communicate with each other so there is no consistency in terms of the applications that they are developing or the safety features that are built in. Child safety is currently not an issue on their agenda yet it needs to be. Whatever the fixed Internet industry might say in their defence, there certainly is not room for the product developers in the emerging mobile industry to exclude this issue. There can be no defence for the mobile industry such as that they did not realise children were going to be using services such as chat, video calling and MMS, and that therefore they were going to be at risk. This is a given, and the only question now is what measures these companies take to enhance the number of safety features and the levels of product differentiation they engage into offset these risks.

Rachel O’Connell
Director of research
Cyberspace Research Unit
University of Central Lancashire

CORRESPONDENCE FROM THE DEPUTY MINISTER FOR JUSTICE, SCOTTISH EXECUTIVE

Thank you for your letter of 31 January in which you ask about the scenarios which have been considered as potentially appropriate for the imposition of a Risk of Sexual Harm Order.

The Bill sets out that an RSHO can be made if the Sheriff is satisfied that the adult has carried out a act listed in section 2 on at least two occasions, and that it is necessary to make an order for the purpose of protecting children generally or any particular child from harm from that person. The acts referred to in section 2 of the Bill are:

- engaging in sexual activity involving a child or in the presence of the child;
- causing or inciting a child to watch a person engaging in sexual activity or to look at a moving or still image that is sexual;
- giving a child anything that relates to sexual activity or contains a reference to such activity;
- communicating with a child, where any part of the communication is sexual.

The Committee will appreciate that the list above covers a wide range of activity from that which is a serious offence, for example engaging in sexual activity with a child, to that which might be entirely innocent and proper behaviour, for example sex education lessons. In between these extremes will be a range of behaviour and actions, some of which will not be unlawful but nonetheless gives rise to serious concerns about the motivation and future actions of the adult concerned and the consequent risk of harm to children.

An example of this type of behaviour might be giving a child or children condoms or other sexual paraphernalia. This is unlikely to be considered to constitute a criminal offence in itself, but the circumstances might be such as to cause concern about future offending. If there is no apparent justification for the behaviour and it is repeated or another act is carried out, then it is possible that the behaviour will be used to support an application for an RSHO.

Another example might be allowing a child to watch a pornographic film. I am advised that this is not necessarily unlawful. However, if someone was encouraging a child to watch indecent videos, then, depending on the circumstances, it is possible that that could be interpreted as potentially risky behaviour. Again, in that case, the court might consider that an RSHO would be appropriate, even though no offence had been committed.

It is important to note that proving that the adult did the acts in question would not in itself be sufficient for the Sheriff to make the Order. The Sheriff would also need to be satisfied that the Order was necessary to protect a child or children in general.
As the Committee is aware, it is also possible that Risk of Sexual Harm Orders could be used in cases where behaviour which would constitute a criminal offence is said to have taken place, but where it is difficult to find sufficient corroborated evidence to raise criminal proceedings. The court would still have to prove that the alleged behaviour had taken place – on the balance of probabilities – and be satisfied that the person in question was a risk. I can appreciate that there might be unease at the idea of using evidence in relation to a possible criminal act to make a civil order, but I think the imperative to avoid serious harm to children outweighs these concerns. In this respect I should emphasise that the RSHO is not intended as an alternative to prosecution. The focus of the RSHO is on preventative measures for the future rather than any punitive action in relation to the events which have taken place in the past.

It is important to be clear, though, that the Crown will always prosecute where there is sufficient credible and reliable evidence and it is in the public interest to do so. There is no question that RSHOs will be used instead of prosecution in cases where criminal proceedings would otherwise have been raised. In cases where it is unclear whether criminal proceedings or an RSHO would be the correct option, I would expect police and prosecutors to discuss the best course of action, bearing in mind the nature of the acts alleged to have taken place, the evidence available, and the perceived risk to a child or children.

I hope that this is helpful.

Hugh Henry
Deputy Minister for Justice
11 February 2005

BRIEFING FROM THE SCOTTISH EXECUTIVE

Internet Safety Campaigns

The Scottish Executive has run internet safety campaigns for the past 4 years. For the first three years the Scottish Executive paid for Home Office advertising to run in Scotland which was adapted for a Scottish audience. The Home Office campaign followed a recommendation from the UK Government’s Task Force on Child Protection on the Internet. The campaigns included:

- radio and cinema advertising which warned parents and children and young people that people in internet chatrooms are not always who they seem to be;
- adverts in the teenage press;
- adverts in the press and in magazines;
- a leaflet was produced aimed at parents called ‘Keeping your child safe on the internet’;
- a website was launched aimed at children and young people available at www.thinkuknow.co.uk

In December 2004 Peter Peacock launched a new internet safety campaign commissioned for the Scottish Executive. The campaign was aimed at warning parents of the dangers of chatrooms. This will supplement the Home Office campaign focusing on children and young people. The Scottish Executive campaign includes:

- advertising on the radio and online;
- leaflets which should be available in PC World shortly; and
- and a new website aimed at parents called www.chatsafer.co.uk
Advice on all these campaigns has included how to set up filtering systems on a PC and block unsuitable material and what to do if a child is sent unsuitable material by email or text.

The internet safety campaign is part of a wider project to increase public awareness of child protection issues as part of the 3 year Child Protection Reform Programme.

Internet Safety in Schools

In response to general concern about personal safety the Executive issued, in March 2003, guidance regarding the safe use of the Internet. The advice was published on the web at www.ngflscotland.gov.uk/doubleclickthinking, and a paper copy was sent to all Education Authorities. Its purpose is to support Local Authorities in their role of managing the risks associated with Internet access.

Background

Advice was first issued in 1999 under the title “Click Thinking” http://www.scotland.gov.uk/clickthinking. That advice was addressed to all those who might be involved with young people accessing the Internet and included information and resources for children and young people, parents, carers, teachers and managers.

The original Click Thinking Working Group and the subsequent Action Group to Review internet Safety (AGRIS) group, which considered how to update the advice, both consisted of members from the fields of Child Protection, Education, Social Work, Technology and the Police.

The AGRIS Group’s recommendations were accepted by Ministers and implementing these led to the DoubleClick Thinking publication.

The advice in DoubleClick Thinking includes a number of references to Child Protection, and clearly places issues of Internet Safety in the context of the broader considerations regarding Child Protection.

The internet is a reserved matter and we keep in touch with the Home Office with regards to developments on this front.

Children and Families
Scottish Executive Education Department
21 February 2005

CORRESPONDENCE FROM THE DEPUTY MINISTER FOR JUSTICE, SCOTTISH EXECUTIVE

Thank you for your letter of 3 February in which you ask a number of questions about the Protection of Children and Prevention of Sexual Offences (Scotland) Bill (“the Bill”). This letter answers the questions you have raised, as well as providing other information I undertook to provide during the evidence session. A paper is also attached containing comments on some of the issues raised by Professor David Feldman in his written evidence paper.

Making specific reference to “grooming” in the Bill

At the evidence session, I agreed to give further consideration to the question of whether specific reference to “grooming” should be made in the Bill. Committee members considered that this might help to clarify the type of behaviour which the offence aimed to tackle. I have given this matter further consideration and do not think that a specific reference to grooming would be helpful.

As is made clear in the Policy Memorandum, the Bill is intended to deal with those offenders who seek to “groom” children for the purpose of committing sexual offences. A criminal offence must be worded in clear and precise terms to ensure that persons are aware of the types of behaviour which will constitute an offence. I am satisfied that section 1 achieves that clarity in that the provision is very specific as to the steps that must be taken for the offence to be complete. It
should be noted that the Bill does not require the earlier meetings or communications to have any sexual content, as might be implied if use were to be made of terms such as “sexual grooming”.

Interim RSHOs

Section 5 of the Bill, which makes provision for interim RSHOs, applies only where an application for a full RSHO has been intimated to the person against whom the application is made. Intimation, in this context, is the formal way by which a person receives notice of the fact that proceedings have been raised.

Accordingly, an interim RSHO can only be sought where a person has been notified of the fact that an application for a full RSHO has been made.

Where such an application is made, the applicant must, in accordance with the court rules, arrange for the application papers to be served on the person against whom the order is sought. This ensures that the person is made fully aware that an application has been made against them.

The papers will contain details of the grounds on which the application is based. They will also specify the date and time when the person must appear or be represented in the court if he wishes to contest the application. At the first calling of the case, the sheriff will usually fix a date for a further hearing and give the person against whom the application is sought a chance to make written representations to the court. At the hearing, that person will also have an opportunity to make oral representations, either personally or through a solicitor.

In terms of section 5(2) of the Bill, an application for an interim RSHO may only be made either at the same time as or after the making of the main application. It is therefore not possible for an interim RSHO to be sought without the subject of the application knowing that an application for a full RSHO has been made.

When an application for an interim RSHO is made, it is the sheriff who regulates the procedure relating to the interim order. This means that the sheriff can effectively tailor the procedure to the particular circumstances of the case, taking into account the urgency of the application and the risk to a particular child or children and balancing that with the rights of the person against whom the application is made. Depending on the circumstances, the sheriff may require the person against whom the interim order is sought to be invited to attend a hearing at which s/he would be entitled to make representations. In cases of extreme urgency, the sheriff might arrange for the application to be decided in the absence of the adult. However, bearing in mind the requirement that courts must always act in accordance with ECHR, there would have to be a clear justification for such an approach.

Once an order has been made, whether a full or interim order, it will require to be served on, or notified to, the person against whom it was obtained. There is no possibility that a person could be convicted for a breach of an order if they had not been made aware of the existence of the order.

Would it be appropriate for a person subject to an RSHO, who was subsequently charged with a sexual offence, to have the existence of the RSHO referred to in court?

In general, the Crown Office takes the view that disclosure of the fact that the accused was the subject of an RSHO would be likely to be prejudicial to a fair trial because it would point to what might be regarded as offending behaviour. If it were to be disclosed in the course of a trial, it is likely that the defence would ask for proceedings to be deserted as it would raise in the minds of the jury / judge that a court had found the accused to have displayed sexually inappropriate behaviour towards children in the past. It would then of course be for the judge to decide on whether the trial should continue.

There may however be circumstances where the Crown may argue that the existence of an RSHO was relevant to the issue being considered. For example there may be occasions where it would be relevant in terms of public protection when considering an application for bail.
There may also be occasions where the existence of an RSHO is considered to be relevant information that the Crown has a duty to bring to the attention of the court when an accused is sentenced following conviction. This might arise where the offence the accused had been convicted of was similar in nature to the behaviour which triggered the RSHO. I should emphasise however that we are quite clear that an RSHO does not amount to the equivalent of a criminal conviction. It would be for the court to decide on what weight to give to the existence of the RSHO in setting a sentence in these circumstances.

**Was the National Hi-Tech Crime Unit (Scotland) Consulted on the draft Bill?**

A copy of the consultation document was sent to the Scottish Drug Enforcement Agency, of which the National Hi-Tech Crime Unit is a part.

**Reasonable Belief of the Child’s Age – Burden of Proof**

At the evidence session, during our discussion of the grooming offence, we looked at the burden of proof in relation to the adult’s “reasonable belief” about the child’s age. As the Bill currently stands, it is for the Crown to prove that the adult did not reasonably believe that the child was 16 or over. The Law Society has proposed that the burden of proof in this case should be on the defence – i.e. it should be for the defence to prove that the accused had a reasonable belief that the child was 16 or over.

I am continuing to consider this issue and I will write to you when we have reached a conclusion.

**Section 1(2)(b)(ii) – meaning of “anything done outside Scotland which is not an offence mentioned in that schedule but would be if done in Scotland”**

The Committee raised concerns about the meaning of this provision of the Bill. I undertook to consider it further.

I am content that the provision has the meaning that we intend. Members of the Committee appear to have interpreted “anything done outside Scotland which is not an offence mentioned in that schedule but would be if done in Scotland” as “anything done outside Scotland other than an offence mentioned in that schedule”. Given that section 1(1)(b) requires that the adult intends to do something “to or in respect of the child” which if done would constitute the commission by the adult of a relevant offence, offences such as housebreaking or drink driving (the examples provided by the Committee) would clearly not be relevant.

Furthermore, it is clear that after the words “but would be” it is necessary to read something into the provision. “But would be” what? One has to reach back to the words earlier in the subsection for the answer. Again, it is clear that the words one reaches back for are not only “an offence”, but the complete phrase “an offence mentioned in that schedule”. The full meaning of the subsection is therefore “anything done outside Scotland which is not an offence mentioned in that schedule but would be an offence mentioned in that schedule if done in Scotland.”

However, I will give further consideration to lodging a stage 2 amendment to ensure that the provision is as clear and straightforward as possible.

**Proposed Executive Amendments**

You have asked a number of questions in relation to the proposed child prostitution and pornography amendments. It would be inappropriate to attempt to answer these questions at this stage, as the detail of the amendments is currently being considered. I can assure you, however, that the amendments will be with you as soon as possible, and my officials will ensure that the Committee clerks are given as much notice as possible of the date on which they will be available. I would, of course, be pleased to give further evidence to the Committee on these amendments at Stage 2.

Hugh Henry
Deputy Minister for Justice
COMMENTS ON PROFESSOR DAVID FELDMAN’S EVIDENCE TO THE JUSTICE 1 COMMITTEE OF THE SCOTTISH PARLIAMENT DATED 31 JANUARY 2005

General

Many of the issues raised in Professor Feldman’s paper have already been commented on by the Deputy Minister for Justice or by Executive officials in the course of Stage 1 evidence. What follows is supplementary to the evidence that has already been given by the Scottish Executive and does not attempt to address every point raised by Professor Feldman.

Should there be a marriage exemption in section 1 of the Bill?

We do not consider that section 1 needs to contain a marriage exemption. The Bill will not criminalise activities within marriages that have been validly constituted under the law of Scotland.

It is recognised that some countries have differing age limits for marriage. This has not prevented the operation of section 5 of the Criminal Law (Consolidation) (Scotland) Act 1995 which makes it an offence for any person, in Scotland, to have sexual intercourse with a girl under the age of 16. Before bringing any prosecution under this provision, the Crown will take all the circumstances of the case into account and consider whether it is in the public interest to prosecute. However, a blanket marriage exemption is not considered appropriate either in the context of the section 1 of the Bill or section 5 of the 1995 Act. In both cases, the provisions could operate so as to bring proceedings against adults who exploit lower age limits for marriage in other countries in order to commit acts which, in terms of the law of Scotland, amount to sexual offences against children.

Risk of sexual harm orders

Preconditions for making an order

At page 3 of Professor Feldman’s paper, it is stated that the first two preconditions set out in section 2(3) of the Bill are criminal offences while the last two may in some circumstances constitute criminal offences. Various provisions of the Sexual Offences Act 2003 are referred to in support of this proposition. It should be noted that these provisions do not extend to Scotland.

We would refer the Committee to the Minister’s letter of 9 February 2005 which discussed the preconditions set out in section 2(3) in further detail.

Applicable standard of proof

Professor Feldman states, with reference to the case of R (McCann) v Crown Court at Manchester [2002] UKHL 39, [2002] 3WL 131, [2002] 4 All ER 593, HL that the seriousness of the consequences for the person subject to an order will mean that the “balance of probability” test will probably not be considered to have been met if there is any reasonable doubt that the facts have not been proved.

We have given careful consideration to the decision in McCann. We are not convinced that the Scottish courts would follow it in so far as it concluded that the applicable standard of proof for anti-social behaviour orders was effectively the criminal standard. In a number of cases in recent years, the Scottish judiciary has emphasised that there are only two standards of proof in Scots law (see, for example, Mullan v Anderson 1993 SLT 835, 1st Indian Cavalry Club ltd. v Commissioners of Customs and Excise 1998 SC 126 and, most recently, the decision of the Inner House in Robert Napier v Scottish Ministers, issued on 10 February 2005, at paragraph 20).

The criminal standard of proof has only been applied by the Scottish courts in cases not involving prosecution for a criminal offence where what was directly at issue was the possibility of the defender losing his or her liberty, as in the case of proceedings for breach of interdict, contempt of court and breach of probation. It is not sufficient, as in the case of an application for an RSHO, that proceedings may operate as a first step in a process by which a person may ultimately lose his
liberty by virtue of a failure to obey an order duly made in that first step. Accordingly, we are of the view that the applicable standard of proof in proceedings involving an RSHO application is the civil standard.

Requirements that may be imposed in an RSHO

In the final paragraph of page 4 of Professor Feldman’s paper he states that “The requirements that can be imposed by a RSHO are unrestricted by anything on the face of the Bill: see clause 2(5)(a)”. However, there are two key restrictions that apply to RSHOs, namely (i) they cannot require positive action, they can only prohibit a person from acting in a specified manner, and (ii) the only prohibitions that can be imposed are those necessary for the purpose of protecting children generally or any child from harm from the person against whom the RSHO has effect (section 2(6)).

It will be the responsibility of the sheriff who makes the RSHO to ensure that the conditions are proportionate to the risk of sexual harm that has been identified. It should be noted that orders granting, refusing, varying, renewing or discharging RSHOs will be appealable (section 6).

Interim RSHOs

At page 5 of Professor Feldman’s paper he discusses the applicability of article 6 of the Convention in relation to interim RSHOs. He indicates that the making of an interim RSHO would not be regarded as the determination of either a criminal charge or of a civil right or obligation because of the essentially temporary effect of an interim RSHO pending a full hearing. He indicates that the position would probably be different if there was a long delay between the making of the interim order and the hearing of the application for the full order.

It should be noted that the Bill contains a key safeguard which is designed to ensure that there should not be long delays between the making of the interim RSHO and the determination of the main application. Section 5(2) of the Bill limits the circumstances in which interim RSHOs can be sought to situations in which either (i) the main application is being made at the same time as the interim application or (ii) the main application has been made prior to the interim application. Accordingly, whenever an interim application is made, a full application must also be in process. Both applications will be subject to the normal summary civil process. This process is designed to ensure that matters are dealt with as expeditiously as the administration of justice will allow: without delay and with as little form as possible, avoiding any unnecessary multiplication of procedural steps and dealing with procedure so as to meet the justice of the case.

An additional safeguard is contained in section 5(4) of the Bill. This provides that an interim RSHO has effect only for a fixed period specified in the order and ceases to have effect, if it has not already done so, on the determination of the main application. Furthermore, an application may be made for the interim order to be varied, renewed or discharged at any stage (section 5(5)). Any interlocutor which grants, varies, renews or discharges an interim RSHO is also appealable (section 6).

Scottish Executive
Justice Department
February 2005
ANNEX D: OTHER WRITTEN EVIDENCE

SUBMISSION FROM ABERDEENSHIRE COUNCIL

Aberdeenshire Council welcomes this opportunity to comment on the proposed Bill. This document has been circulated amongst both our Children’s Services and Criminal Justice workers. Their comments and concerns are noted below. These points relate to both the Bill and its Explanatory Notes.

Meeting a child following certain preliminary contact

Aberdeenshire Council welcomes this proposed legislation and shares the hopes of the Bill’s authors that this will prove a useful child protection measure. We assume that detailed guidance will be issued that will make clear the roles and responsibilities of services such as the Police and Children’s Services Social Work when a prosecution is undertaken. Clarity on the support services that should be set in place for young people and their families during and following an investigation and prosecution would also be welcome.

The Financial Memorandum indicates that it is not expected that there will be a significant increase in the net numbers of prosecutions following the introduction of the Bill. This statement could be interpreted in several ways;

- It is seen primarily as a preventative measure aimed at deterring inappropriate contact between young people and adults.

- The proposed legislation does not go far enough. As we noted in our response to the consultation document on this subject in July 2004, the specific set of circumstances necessary to pursue a prosecution limit the opportunities to use this offence as opposed to offences already at statute.

Risk of Sexual Harm Orders: applications, grounds and effect

Aberdeenshire Council again welcome the intentions of these aspects of the Bill, however, there are a number of points that cause both concern and require clarity.

- The numbers of projected applications is very low. As a major provider of Child Protection services within Aberdeenshire, this figure bears no relation to the number of referrals and subsequent investigations carried out jointly by the Police and Social Work. While clearly there will be instances where no further action is required, the very nature of sexual abuse allows for very few successful criminal prosecutions. It had been hoped that these new measures would be widely used as a further means of providing protection through the civil courts to children at risk of sexual abuse.

- The orders allow for specific conditions to be attached to orders and this is a positive step in protecting children. However, there is no indication of how these orders will be monitored. It appears that the onus will be on the family of the victim or concerned members of the to report the breach. How will the public be aware that there has been a breach of the order if, for example, a condition is that an individual is not to be in the vicinity of schools?

- The age of responsibility being 18 in relation to RSHO’s causes some concern as those convicted sexual offenders aged 16-18 would not be dealt with by the proposed legislation. Aberdeenshire Council currently has involvement with a small but significant number of young adults who have been convicted of sexual offences but would not be included in the range of measures proposed by the Bill.

- It is stated in the Explanatory Notes that criminal justice staff are likely to have contact with individuals with orders but if they have not been convicted of an offence this is unlikely. If the social work service is to participate in the assessment process, clearly this
has cost implications in terms of man-hours and training of staff. No mention is made of the agency or personnel who would monitor the subject of the order or the scope of this work. Therefore, who monitors those under such orders and would there be an expectation that therapeutic input would be offered?

- The Explanatory Notes state that the RHSO “may generate savings as they would prevent offending”. This statement may be misleading as there is little evidence to suggest that imposing a fine, prison sentence, or requiring people to comply with Sex Offender Registration impacts on recidivism levels, particularly for those in the medium-high risk of re-offending category, if underlying motivation is not addressed.

- The inability to enforce any condition that requires the subject of the order to comply with conditions requiring positive action appears to limit the preventative nature of the order. It further raises concern that any person subject to an order but not voluntarily participating in therapeutic intervention may not be monitored in any meaningful way. While there will be instances where the perpetrator is the subject of a probation order which requires meaningful Social Work contact, this will not always be the case.

- The Explanatory Notes makes no mention of the potential for criminal justice staff being involved when orders are appealed or those subject to the orders request changes to the attached conditions. Criminal Justice staff are likely to be called upon by the Court to reassess the circumstances and present reports. Clearly this has implications for our staffing resources.

Despite the above questions and concerns, Aberdeenshire Council remains positive that the proposed legislation can be used in a meaningful way to protect children. This document is a welcome move towards recognising the range of behaviours and strategies employed by adults who wish to sexually harm children and young people. We understand the difficulties inherent in drafting legislation able to protect children that will not find itself constantly challenged under human rights legislation by offenders or suspected offenders.

Aberdeenshire Council expects that there will be accompanying Draft Guidance as the Bill moves through Parliament and we would welcome the opportunity to comment on this.

Sarah Stewart
Strategic Development Officer (Children’s Services)
Aberdeenshire Council
21 December 2004

SUBMISSION FROM ANGUS CHILD PROTECTION COMMITTEE

The Committee previously responded to the consultation on the above earlier this year. Views expressed by Angus Child Protection Committee at that time still apply.

In general terms the legislation is welcomed and is viewed as a positive step in the protection of children. The current draft of the legislation is strengthened due to the substitution of the word “or” for “and” between sections 1(1) a(i) and (iii).

At this stage Angus Child Protection Committee has nothing further to add.

Kate Mearns
Development Manager (Child Protection)
Angus Child Protection Committee
21 December 2004
SUBMISSION FROM APEX SCOTLAND

Apex Scotland is a national voluntary organisation that has worked with (ex) offenders and young people at risk since 1987, to address their employability needs and progress them to positive outcomes.

We welcome the proposed new offences and civil orders set out in the Bill as measures that will further prevent the abuse of children and protect them.

We believe that the grooming of children as a pre-cursor to the commission of a sexual offence is a serious matter and requires new legislation to address. The grooming of children can take many forms, some subtle and some less so, but what needs to be clearly established is the intention on the part of the offender.

Our response to the specific questions posed is as follows:

Q1: We believe that the new offence will prevent the abuse of some children and ensure that offenders can be prosecuted. Some clarity is, however, required on the elements that constitute an offence of grooming: The proposed Bill states that all of the four elements that constitute the offence must be present. We believe that, even if only two of the four elements are present, it could reasonably be inferred that the intention is to commit an offence against a child. An adult, for example, could develop a relationship via the internet with a child under the age of 16, by telling the child that they are also under 16. These conversations could involve sexual innuendo. If the adult then travels to meet the child, this should be sufficient to establish, on the balance of probabilities that they intend to commit an offence, regardless of whether there is other evidence to prove that they intended to do so.

We wonder if the Bill could be strengthened further by an additional element whereby the adult lies to the child about their age?

Q2: As stated above, the Bill might be strengthened where an adult communicating with a child under 16, informs the child that they are under 16 and the conversations have a sexual element.

Q3: The length of conviction should be proportionate to the harm caused. Therefore we agree with the penalties being proposed.

Q4: This is a difficult one and poses a dilemma, given that the age of sexual consent in Scotland is 16 years. On balance, we agree with the minimum age being proposed but would also argue that the maturity of both parties and the composition of the relationship needs to be taken into account. Individual cases may need to be considered on their own merits.

Q5: RSHO’s could help to restrict an offender’s behaviour early in the grooming process by allowing the police to intervene and prosecute earlier. To be of maximum impact, we would recommend that orders are reinforced by access to programmes to address and challenge the perpetrators behaviour and provide support to victims.

Q6: Yes.

Q7: Yes.

Q8: As stated earlier, the deterrent measures proposed in the Bill should be underpinned by access to treatment and rehabilitative programmes and support for victims.

It is likely that an Apex client subject to a RSHO would find it extremely difficult to secure employment that involves working with children, as this information would be contained in an Enhanced Disclosure Check. If their offence involved use of the internet, then they might also be prevented from using I.T. This would again impact on the employment options open to them.
Apex staff would need to be informed that the person is subject to an order and any conditions attaching to it, prior to undertaking any work with them. Consideration needs to be given to how this information would be shared with our organisation and other voluntary agencies.

In a situation where a person has been subject to an interim RSHO, but is subsequently cleared of any wrongdoing, consideration needs to be given as to whether this information would be included on an Enhanced Disclosure Check.

Finally, clarity is needed about whether someone who is subject to a RSHO would be included on the excluded from working with children list, under the Protection of Children (Scotland) Act 2003.

Bernadette Monaghan
Director
Apex Scotland
21 December 2004

SUBMISSION FROM ASSOCIATION OF DIRECTORS OF SOCIAL WORK

ADSW welcomes this Bill as another positive step to protecting children. We are supportive of most of its provisions and would merely like to comment on a few areas where we think the Bill could be improved.

Whilst we acknowledge that the grooming of children using the internet has widened opportunities for stranger abuse, children are still more likely to be harmed by a relative, friend or someone that they trust. The message that the risk is not only from strangers needs to be restated.

Section 1 – Meeting a child following certain preliminary contact

Age of the offender
The Bill states that the offence would be committed by “a person aged 18 or over”. Research has indicated that a significant number of sexual offences are committed by young people below the age of 18 years with their offending behaviour no different to that of adult sex offenders. Consideration needs to be given to the circumstance of a young person ‘grooming’ another young person. We would therefore consider the minimum age should be 16.

Age of the child
The Bill states that child is a “person aged under 16” however the Children Scotland (Act) defines a child up to 18 yrs. Consideration needs to be given to extending the defining age of child. The Bill does not acknowledge those children of 16 to 18 yrs who are very vulnerable for a whole range of issues, and who would be likely targets for sex offenders. Looked after children and those with a disability are two particularly vulnerable groups.

The offence
The Bill tries to distinguish between those individuals who use the internet to contact children with no intention to ever arrange to meet a child, and those who set out with the intention to meet the child / young person. The grooming behaviour is not sufficient in itself for the offence to be committed. We are concerned about those individuals who seek to engage in contact with children for their own sexual gratification. While they may never move on to arrange a meeting with a child, their behaviour is likely to be inappropriate and potentially abusive and may have significant impact on the child.

The requirement for having communicated with the child on two separate occasions is prohibitive. A meeting can be set up with just one communication.

The Bill makes no reference to those individuals who set up and groom a child on behalf of someone else. An individual could groom and set up a meeting on behalf of another person who goes to meet the child, or they take the child to meet another individual.
Evidence
It is welcomed that the evidence of the adult's intention to commit an offence can be drawn from a wide range of circumstances and information. It is essential that the legislation allows for close scrutiny of the contact and for a picture to be created as to how the adult offender has targeted, manipulated and groomed the child to the point where the child agrees to meet.

Sentence
It is noted that the sentence in Scotland -10 years - will be different from England where maximum sentence is 14 yrs. We would wish to see consistency of sentencing across the UK, as we know sex offenders will travel significant distances to sexually abuse and exploit children and young people. An individual could travel from England to commit an offence in the knowledge that if he/she were caught they could potentially receive a lesser sentence for the offence in Scotland than in England.

Given the knowledge we have about the way sex offenders operate, we can assume that individuals will continue to find ways of circumventing the legislation and undertaking grooming activity. Experienced abusers are manipulative and are often able to exploit loopholes. This means that the law constantly requires to be kept up to date.

Sections 2 - Risk of sexual harm orders: applications, grounds and effects

The Risk of Sexual Harm Order is a useful additional item and, as part of the preventative strategy, has the potential to assist in managing a range of concerning behaviour. Such an order highlights concern about an individual's behaviour and by attaching specific conditions, provides a clear marker. However, the orders will be limited in what they will achieve given that it does not require the individual to undertake any activity to try to get them to tackle their behaviour. It is not clear how these orders will be monitored.

Our view is that the Police should carry out the assessment along with other relevant statutory agencies who may both have information about the individual child and their circumstances, the alleged perpetrator and their circumstances and have the expertise in order to provide information that can help the Police decide whether or not to make an application. We hope that guidance will be made available to make sure agencies are clear about their respective roles.

Section 7 – Offence: breach of RSHO or interim RSHO

While the Sexual Harm Order may potentially be useful to assist in defining and recording an individual's behaviour, again it is unclear how such orders would be monitored.

Section 9 – Prevention of sexual offences: further provision

The Sexual Offences Protection Order will also be useful. Grounds for the other two may be difficult to establish and therefore few people eligible for such an order.

Financial Implications: Costs on Local Authorities

The section outlining the financial implications of this Bill seems only to consider the impact on criminal justice social work. There will be implications for child protection work too. This Bill may identify a number of sex offenders not known to the criminal justice system – and children who may be vulnerable but who are not known to children and families teams.

The costs to criminal justice social work will indeed by that of social enquiry reports and risk assessments. However, there are also the costs of assessment and work with offenders not covered by throughcare arrangements. If social work are going to do the level of work required with these individuals it must have properly identified funding. Most authorities are already inadequately funded for this work and the system would struggle to accommodate additional pressures. We would therefore welcome proper assessment of the cost of working with these sex offenders.

The legislation may also lead to subsequent child protection investigations regarding children who may be at risk. The successful conviction of the offender may not necessarily mean that the child
SUBMISSION FROM CHILDNET INTERNATIONAL

Introduction:

This briefing paper is by Childnet International, the children’s charity that exists to make the Internet a great and safe place for children. This paper will:

- explain the need for the proposed offence of the sexual grooming of a person under 16 by an adult,
- illustrate initiatives taken in other countries,
- analyse the proposed offence and explain how it will work.

It should also be noted that the bill also includes a Risk of Sexual Harm Order. This can be applied where an adult is sexually harassing a child online but has not (yet) arranged a meeting. This paper will not consider that Clause but Childnet supports its introduction.

The need for the proposed offence:

The Internet offers enormous positive opportunities for children and young people to connect, create and discover. However, there is a negative side of the Internet which poses potential dangers to children. It is important both to be aware of this ‘negative side’ and to respond to it in order to enable children to exploit the enormous positives offered by the Internet and the online experience.

If one looks at the potential negatives on the Internet for children in terms of the ‘Three Cs’ of inappropriate Content, Commercialism and inappropriate Contact, Contact is the one which potentially causes actual physical harm to the child and subsequently is the issue of most concern to parents. Since the first case in the UK of a child being sexually abused by an adult following an initial contact in a chatroom there have been many more of children being hurt in this way and which have ended in the conviction of the adult offender.

Experience in other countries support this view of the inherent risks to children posed by such interactive services where users are anonymous and children are in contact with people they do not know. There have been a number of cases worldwide of children being contacted in interactive areas of the Internet, such as chatrooms, by adults and then manipulated over a period of time – usually over increasingly private and personal communication media, such as instant messenger, e-mail and mobile phone - to agree to an offline meeting where they have been sexually abused. This phenomenon has been called ‘grooming’ where an adult makes contact with a child in a chatroom, then develops a relationship with this child, manipulating the child’s emotions with the intention of arranging a meeting and sexually abusing the child.

Chat Rooms and other interactive communication technology can afford the predator invisible access to children from a safe distance, allowing contact to be made even while the child is using the Internet in the secure surroundings of their own home, even their own bedroom. Once contact has been established the grooming process can proceed via e-mail and instant messages, and

177 This was also one of the findings of the Netaware research undertaken by Childnet International for the European Commission, see www.netaware.org.

178 The first case in the UK took place in 2000, with the offender Patrick Green being sentenced to prison in October that year.
then even via mobile phone. This grooming process can go on for weeks and months, as it may take this long for the child to feel truly comfortable. The patience may also be explained partly by the fact that it is not uncommon for them to be grooming several children at the same time. In this way, even if a child begins to feel uncomfortable and breaks off the relationship there are others lined up.

In England in 2000 Patrick Green (33) ‘groomed’ a twelve-year-old girl into an offline meeting where he sexually abused her, following initial contact made in an Internet chatroom. While on bail he travelled to Cumbria where police intercepted him as his next young victim was getting into his car. In Milton Keynes and in Crewe in 2000 there were also cases where the police intercepted and arrested adults who were attempting to meet young children they had groomed to offline meetings. Patrick Green was sentenced for 5 years imprisonment for sexual assault. The examples given from Milton Keynes, Crewe and the Cumbrian part of the Patrick Green case illustrate how predators are able to arrange to meet and even meet children offline with the intention of sexually abusing them, and even where the police step in at the point of the meeting the predators have not been charged.

**Initiatives in other countries:**

The Grooming clause, as introduced in England and Wales in the Sexual Offences Act 2003, would have enabled the police to arrest and charge the men in these three cases. This legislative initiative has followed similar initiatives elsewhere in the world- other countries have already taken steps to counter the grooming or luring of children for sexual purposes. In the USA, for example, Federal Law states:

```
a) Whoever knowingly persuades, induces, entices, or coerces any individual to travel in interstate or foreign commerce, or in any Territory or Possession of the United States, to engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title or imprisoned not more than 10 years, or both.

b) Whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title, imprisoned not more than 15 years, or both.
```

US state law often goes further than this. For example, state law in Georgia states:

```
It shall be unlawful for any person intentionally or wilfully to utilize a computer online service, Internet service, or local bulletin board service to seduce, solicit, lure or entice, or attempt to seduce, solicit, lure, or entice a child or another person believed by such a person to be a child, to commit sodomy or aggravated sodomy, child molestation or aggravated child molestation, enticing a child for indecent purposes, public indecency, or to engage in conduct that by its nature is an unlawful sexual offence against a child
```

The laws in the US have made it possible for people to be arrested and imprisoned before the offline offence is actually committed. One can see a similar degree of protection offered in Australia’s Northern Territory where there is an offence of “enticing away a child under 16 for immoral purposes”. The Canadian Government introduced “luring” legislation in 2002.

---

179 The reference here to “interstate or foreign commerce” is necessary to allow federal jurisdiction under the commerce power of the US Constitution.
182 Section 201 of the Northern Territory of Australia Criminal Code Act, para 3.4.2, as in force 1.1.97.
How the offence would work:

The new ‘grooming’ offence would enable police to arrest the predator before the child was physically or sexually abused. The police would be empowered to make an arrest once the predator met, or travelled with the intention of meeting a child under 16 with the intention of committing a sexual offence. The intent would be drawn from a course of conduct, either the communication itself or other circumstances, such as going to meeting with pornography, condoms or lubricants, for example.

It would be simply inaccurate to argue that this new offence equates in some way to creating a ‘thought crime’. To argue this would ignore the fact that the contacts and communication are linked incontrovertibly to arrangements for a meeting with the purpose of committing a sexual crime in order for the grooming offence to have been committed.

The online nature of the communication between the suspect and the child can be very helpful for evidential purposes. Proving offline communication can be very difficult, and often depends on taking one person’s word against another in the absence of witnesses, but in communication via e-mail, text message, voice message, instant messenger, and even chat, the possibility exists of the actual communication being recorded and kept. Records may exist in the victim’s or perpetrator’s computers 184.

The new offence will enable law enforcement to become proactively involved in catching and deterring online predators. For example, where a predator is grooming a child, but the child has told their parents, and the parents have contacted the police, the police can step in and continue the communication with the predator to the point where the predator arranges a meeting. The police can therefore ensure that they have got all the evidence they require from the communication before they agree to the meeting, where they would then arrest the predator.

This offence would be more effective if it was used in conjunction with covert Sting operations 185. Covert Sting operations in this context refer to the practice of police entering Internet chatrooms and pretending to be children – ironically a technique used by online predators at present to great advantage. To avoid defence pleas of enticement to commit a crime or entrapment, the police should only respond to invitations and offers made to them in these chatrooms and not take the initiative or approach someone they suspect of paedophile activities to arrange a meeting 186. The suspect should take the first step that leads to a criminal act. The police should prove beyond reasonable doubt that the defendant was ready and willing to commit the crime prior to being first approached by the police, in other words that the suspect was predisposed to commit the crime.

The most readily obvious advantage of covert Sting operations is that they allow the police to be proactive in their fight against online paedophiles. They enable the police to use the online predators most potent tool, anonymity, against them 187.

The advantages are more far-reaching than that. With the police at the end of, and able to monitor, the entire grooming process, they can be sure they possess all the necessary documentary evidence needed for successful prosecution.

The presence of covert Sting operations on the Internet could have a powerful deterrent effect on any prospective online predators, as it would introduce an element of uncertainty into their online grooming activities which is simply not there at present. It is possible to see the immunity with

---

184 The requirements on the Internet Service Providers to help will differ little from the current cooperation they provide in cases of alleged serious crime identifying their customers on presentation of appropriate documents for the police.

185 The grooming offence in the Sexual Offences Act 2003 in conjunction with Clause 15 of the Sexual Offences Act 2003 in England and Wales – Arranging or facilitating commission of child sex offence – enables the type of operation that has been used to great effect in other parts of the world by law enforcement, namely covert Sting operations.

186 It would of course be necessary to ensure transparency and accountability of police actions, to ensure that ‘entrapment’ techniques were not being used.

187 See http://news.bbc.co.uk/1/hi/uk/2733989.stm - the news report highlights how adults with a sexual interest in children do respond to the presence of ‘young people’ in chatrooms, even though in the case in question the ‘child’ was a 25 year-old private investigator.
which they currently feel on the Internet in the fact that they will very often be grooming several children simultaneously\textsuperscript{188}.

It seems readily apparent that covert Sting operations add a valuable component to the protection of children. Internet users with legitimate reasons for meeting children, for example counsellors and youth group workers, have no fear of such operations. The police could not act unless there was clear evidence of intent to commit a sexual offence at a meeting with the child.

\textbf{Conclusion:}

The problem of grooming children online for sexual purposes has emerged in the last few years in the UK. There have been many cases since the first in the UK in October 2000, and there is no evidence to suggest that the problem is a short-term one or one that will disappear quickly. A new offence of ‘grooming’ a child with intent to have sexual relations would provide greater protection for children. This would bring Scottish law closer to that of other countries who have had greater success in bringing online predators to justice. It would also enable covert operations by police to be more effective.

Childnet International believes this offence would provide a significant additional mechanism for law enforcement to act against those seeking to exploit children online. This would afford a much-needed degree of protection for the ever-growing number of children online.

Will Gardner  
Research and Policy Manager  
Childnet International  
8 December 2004

\textbf{SUBMISSION FROM CHILDREN IN SCOTLAND}

Children in Scotland is the united voice of over 350 voluntary, statutory and professional organisations and individuals working with children, young people and their families throughout Scotland. It exists to identify and promote the interests of children, young people and families and to ensure that relevant policies, services and other provisions are the highest possible quality and able to meet the needs of a diverse society. Children in Scotland believes that: all children are of equal worth, whatever their ability, colour, ethnicity, gender, health, religion, sexual orientation or social class; Children have the right to protection, provisions and participation in decisions affecting them, as outlined in the UN Convention on the Rights of the Child; Families are entitled to support and assistance to fulfil their responsibilities towards their children; and Children should be seen as the responsibility of society as a whole, as well as of their families.

\textbf{Key Points}

Children in Scotland welcomes the Bill in its intention to further protect children from sexual harm and abuse.

Two key issues, identified by Children in Scotland members that need to be addressed during scrutiny of the Bill and these are:

\begin{itemize}
  \item The definition of age limits, in relation to the new offence of meeting a child following preliminary contact or ‘grooming’ and Risk of Sexual Harm Orders (RSHOs):
    \begin{itemize}
      \item Children in Scotland believes that 16 and 17 year olds, and vulnerable young people up to the age of 18, need to be protected from sexual harm.
      \item Clarity is required on the whether or not 16 and 17 year olds can be prosecuted in relation to the new offence or subject to a RSHO. This must be made explicit.
    \end{itemize}
\end{itemize}

Legislation alone cannot protect children and young people from sexual harm. Continued public awareness and education of adults and children and young is required.

\textsuperscript{188} See http://news.bbc.co.uk/1/hi/england/london/3177010.stm - the offender in this case had built up a sexual profile of over 70 children.
**Introduction**

Children in Scotland welcomes the opportunity to submit evidence to the Justice 1 Committee in relation to the Protection of Children and Prevention of Sexual Offences (Scotland) Bill. This evidence is informed by the views of Children in Scotland’s member organisations, discussion with other professionals from the voluntary and statutory sector and previous work undertaken by Children in Scotland in relation to child protection.

The Bill is broadly welcomed as strengthening the measures available to protect children and young people from sexual harm and abuse. It sends a clear message that society and government find inappropriate sexual behaviour towards children and young people unacceptable. Children in Scotland particularly welcomes the proposals in their efforts to further protect children and young people at an early stage i.e. before actual harm occurs. It is also important that legislation and policy reflects the needs for protecting children in today’s society and therefore the fact that modern forms of communication are acknowledged in the Bill is encouraging.

**The definition of age limits in relation to the new offence (s.1) and RSHOs**

An overriding concern amongst Children in Scotland members was the definition of age limits set out in the Bill. The Bill defines an adult as a person aged 18 or over and a child as a person under the age of 16, in relation to the new offence of meeting a child following preliminary contact set out in section 1 of the Bill and in relation to Risk of Sexual Harm Orders (RSHOs) (s.(2) & (3)). It is unclear what the implications are for 16 and 17 year olds. Children in Scotland believes that 16 and 17 year olds, and vulnerable young people up to the age of 18, need to be protected from sexual harm. In its current form the Bill does not do this. Children in Scotland recognises that this is a complex issue that raises a number of questions in relation to the age, maturity and vulnerability of a child under Scots law. The Explanatory Notes nor the Policy Memorandum that accompanied the publication of the Bill provided an explanation of why the Scottish Executive set the current age limits.

Children in Scotland acknowledges that it would be difficult to make it illegal for an adult to groom a 16 or 17 year old without changing the age limits in other legislation but believes that measures must be put in place to protect these young people. It is assumed that the age of a child has been defined in the Bill in relation to the age of sexual consent. The age of sexual consent for females in Scotland is 16. There is no age of sexual consent for males. Therefore it could be argued that young women are afforded more protection than young men under Scots law and in relation to the new offence set out in section 1 of the Bill. (The age of sexual consent to any form of sexual activity is 16 for both men and women in England and Wales.)

It is also true that the Bill does not take account of age limits defined in other sexual offence legislation that recognise the differing levels of sexual maturity and vulnerability of children as they get older. The Bill must be as consistent as possible with other Scottish legislation. It is an absolute offence for a man (over the age of 8 - the age of criminal responsibility in Scotland) to have unlawful sexual intercourse with a girl under 13 (whether or not it is consensual) under section 3 of the Sexual Offences (Scotland) Act 1976. Unlawful intercourse with a girl aged 13-16 is also an offence. A girl or woman could be charged with indecent assault if she had sexual intercourse with a boy under 14. This is because Scots common law regards anyone under the age of puberty (legally defined as 12 for a girl and 14 for a boy) as unable to give consent. In addition, it is a statutory offence for anyone to behave in a lewd, indecent and libidinous manner towards girls under 16 regardless of consent. It is recognised that the Scottish Law Commission is currently reviewing the law in this area and that this may have implications in relation to age limits and sexual offences.

In relation to a child or young person’s maturity and vulnerability in terms of ‘grooming’ it is important to establish and take into account the young person’s perception of any communication or relationship e.g. a 15 year old girl may be having a ‘consensual’ (in her eyes’) relationship with an 18 year old male. It is commonly acknowledged that at this age i.e. late teens young people in relationships often have the same level of maturity. Whilst this could be an exploitative
relationship, it may not be. It is therefore important to draw a distinction between what are legitimate boyfriend/girlfriend meetings and what could be criminalised.

It is also true that young people aged 16 and 17, and vulnerable young people up to the age of 18, can still be vulnerable to abuse from older adults and therefore open to exploitation. A number of factors may affect this such as maturity, family pressures, level of understanding of behaviours, cultural issues, learning disabilities, disability in general or emotional and behavioural difficulties. Recent research by the Joseph Rowntree Foundation has called for greater recognition and more attention in policy to the fact that disabled and other vulnerable children are more likely to be abused than others.190

The law in Scotland generally defines a child as a person under the age of 16, however the Children (Scotland) Act 1995 defines a looked after child as a person under the age of 18 (s. (93)). The United Nations Convention on the Rights of the Child (UNCRC) defines a child as any person under the age of 18. The recently published Children’s Charter states that children have a right to be protected and be safe from harm and refers to the UNCRC. It is also true that someone in a position of trust towards a person aged between 16 and 18, for instance a teacher, is not allowed to have a sexual relationship with the younger party. During oral evidence to the Committee the Bill team stated that past experience has shown that most grooming by adults is done by those much older than 18. One such study states that 86% of sexual offenders are 26 or over with 41% 40 or over.193 For these reason Children in Scotland believes that vulnerable young people up to age 18 should be given added protection against older adults. Children in Scotland strongly believes that all children and young people have an automatic right to be protected. Therefore measures must be put in place to protect these young people from predatory adults.

The analysis of responses to the initial consultation on the proposals stated that 69% of respondents thought that the age of an adult should be redefined as 16. The most common argument for this was that it would be consistent with the age of consent, which as has been pointed out applies to females. It was also pointed out that at age 16 people could be babysitting therefore targeting friends or younger siblings. Children younger than 16 could also be left in charge of other children and therefore a potential risk to them. Children in Scotland is very wary of any measure that could lead to the criminalisation of young adolescents. It is essential that clarity is provided on whether a 16 or 17 year old could be prosecuted for the new offence set out in section one or whether they could be placed on a RSHO. Children in Scotland strongly believes that the age of an adult should not be lowered below 18. A 16 year old boy could be having a consensual relationship with a 15 year old girl and this should not be criminalised. If it is Children in Scotland agrees with Barnardo’s Scotland that there must be additional conditions attached for 16 and 17 year olds and vulnerable adults up to the age of 18 ie. treatment programmes for young offenders.

Around the world ‘grooming’ is a relatively new offence. The United States and Canada have robust laws in place specifically to deal with the issue of online ‘grooming’. It would appear that laws that do exist in this area set the age of the child in line with the age of sexual consent. For example the Maine Criminal Code criminalises anyone 16 years or over if found guilty of ‘soliciting a child by a computer to commit a prohibited act if the person is 16 years of age or older.’195 The age

191 Children (Scotland) Act 1995
192 Official Report Scottish Parliament Justice 1 Committee /12/04
193 Internet sex crimes against minors: the response of law enforcement (Crimes against Children Research Centre, University of New Hampshire) 2003
194 Protecting Children from Sexual Harm: Analysis of Consultation Response (Scottish Executive 2004)
195 Protection of Children and Prevention of Sexual Offences (Scotland) Bill (Spice Briefing 2 December 2004)
of sexual consent in Maine is 16. The Australian Government introduced a Bill in August 2004 that intends to outlaw use of the Internet to "groom" or procure children with the intent of engaging in sexual activity with them. The Bill proposes to define the age of a child and adult in the same way that the Protection of Children and Prevention of Sexual Offences (Scotland) Bill does. The age of sexual consent differs between states but is generally 16 or 17. It will be interesting to follow the progress of this Bill and any changes to the definition of age as the Bill progresses through Parliament.

The arguments outlined above in relation to age are relevant to the new offence set out in section 1 of the Bill and the civil orders set out in sections 2 and 3.

Public Awareness and Education

Another issue that Children in Scotland members consistently raised during the consultation on the draft Bill was that legislation alone cannot effectively address the problem of the sexual abuse of children. The Bill must be accompanied by continued public awareness and education informing people of the relevant issues and threats to children. Respondent’s to the consultation on the draft Bill also overwhelmingly called for this. As the Child Protection Audit and Review suggested it is everyone’s job to protect children and young people. A joint effort from everyone, professionals, school’s, social work department’s, industry, the voluntary sector, parents and communities is required.

Along with any new measures introduced it is essential that work is undertaken with children and young people to raise awareness of what is appropriate or inappropriate behaviour towards them by adults and their peers. It is hoped that the Scottish Executive will publicise any new offence that is introduced so that adults and children alike know what behaviours are unacceptable. Children and young people must be taught to protect themselves from people they know as well as strangers. This education should be part of a wider child protection and sexual health awareness raising agenda. Adults and children and young people must know what the signs of sexual harm are, where to go for help and what will happen if risk or harm is discovered. Adults, particularly professionals working with children and young people, must be made aware of inappropriate behaviours so that they can further educate children and young people. This education could be done in schools through personal education or through developing systems and networks where children can talk about any concerns they have regarding such issues. The Executive must work with relevant agencies such as education, health and social work to ensure that this happens. This is imperative if society is serious about protecting all children and young people.

It is also important to educate adults and children and young people about the dangers of modern forms of communication, particularly the internet in terms of ‘grooming’. While it is important to note that there are many more commonly used forms of communication that perpetrators use to groom children and it should be noted that new technology does make children and young people far more accessible to those wishing to abuse them. It is a more anonymous method of contact but the process is no different from other forms of grooming. One study has estimated that 20% of sex crimes against children are internet initiated. The arrival of the internet has added to the difficulty in detecting and preventing sexual abuse against children and young people. The internet has opened up new means of distributing inappropriate images and chat rooms to children and young people and adults alike. Sex offenders exploit these means of communication to take advantage of children.

The education of parents and children and young people on the safe use of the internet becomes particularly important when considering that 75 per cent of all 5-16 year olds use the internet. A recent UK survey found that 42% of 5-7 year olds, 84% of 7-11 year olds, 94% of 11-14 year olds and 97% of 14-16 year olds were using the internet. While, 68% of 5-18 year olds have access to the internet at home. An NCH Report published this year also highlighted the dangers of the

197 Protecting Children from Sexual Harm: Analysis of Consultation Response (Scottish Executive 2004)
198 Internet sex crimes against minors: the response of law enforcement (Crimes against Children Research Centre, University of New Hampshire) 2003
199 Just One Click (Barnado’s 2004)
internet in facilitating a major increase in children and young people being exposed to age-
inappropriate, illegal sexual and other kinds of material.\textsuperscript{200}

In this context it is essential that children and young people, along with parents and teachers, other
professionals and society as a whole are educated on the dangers the internet poses to children
and young people. Parents, teachers and others with responsibility for children must educate their
children about the internet and how to avoid or deal with problems they may encounter. Parents
and teachers must be expected to take steps to supervise and protect their children. They should
be aware of their role in controlling young people’s internet access. Children in Scotland welcomes
the Executive’s guidance, \textit{Click Thinking}, and the work it does to support child protection online
with campaigns such as Think U Know and Keeping Your Child Safe on the Internet. Further
initiatives and education materials to educate parents and children could be produced to warn of
the dangers and risks of sexual harm via the internet. A Barnardo’s report, \textit{Just One Click}, has
recommended a comprehensive review of all resources used to raise awareness of the dangers of
new technology.

Claire Telfer
Jr. Policy Information Officer
Children in Scotland
21 December 2004

\textsuperscript{200} 2002 BECTa survey cited in UK children go online – Listening to Young people’s experiences
http://www.lse.ac.uk/collections/pressAndInformationOffice/PDF/UK%20Children%20go%20online.pdf and
Child abuse, child pornography and the
internet, NCH 2004
SUBMISSION FROM THE CHILDREN’S PANEL CHAIRMEN’S GROUP

Background

The Children’s Panel is a statutory tribunal under the Inquiry and Tribunals Act 1992. Panels across Scotland have the responsibility for dealing with children and young people under 16 (and in certain circumstances up to 18) who commit offences or are in need of care or protection and in this regard the Children’s Hearings System draws its statutory authority in the main from the Children (Scotland) Act 1995.

Section 18(1) and Schedule 2 of the Protection of Children (Scotland) Act 2003 defines panel membership as a “child care” position making it unlawful to apply for or remain in membership where an individual is included on the List of those unsuitable to work with child under section 1 of the 2003 Act.

The Children’s Panel Chairmen’s Group (CPCG) comprises the 32 Panel chairs and represents Scotland’s 3000 panel members at national level. Additionally the CPCG advises Scottish Ministers on issues to do with the Children’s Hearing System as requested.

Comments on General Principles of the Bill

The CPCG supports a joined-up approach to child protection, in line with the Scottish Executive’s policy underpinned by the recommendations contained in the report “it’s everybody’s job to make sure I’m alright” of November 2002. It is also important however that as a society we are always mindful of the rights of the individual and the presumption of innocence. The CPCG welcomes legal provisions to keep abreast with the ever-increasing dangers to children and young people associated with the internet and communications.

How the Bill Might Affect the Children’s Hearing System (CHS) in the Discharge of its Statutory Duties?

As the opening paragraph states, the Hearings system has no legal jurisdiction in connection with the offending of those who have passed their 18th birthday. Therefore the CHS will not be in a position to address a criminal act committed under section 1 or disposals associated with RSHO/SOPO breaches in the criminal courts. The CPCG consider therefore that the CHS’s main interface with the Bill/Act will be where a child is referred to a Hearing as a result of the imposition of for example an RSHO. As many of the measures contained in the Bill need not necessarily be accompanied by conviction of a schedule 1 offence per se, Panels may need to consider compulsory measures of care in connection with the subject of an adult’s actions who have regular contact with said individual.

It may be that the existing grounds of referral at section 52(2) of the Children (Scotland) Act 1995 are adequate; however the CPCG are of the view that Parliament should give this particular matter consideration.

If requested the CPCG is happy to discuss further any of the issues raised and amplify where required.

John Anderson
Depute Chair CPCG &
Chair of the City of Edinburgh Children’s Panel
21 December 2004

SUBMISSION FROM COSLA

I attach a copy of the consultation submitted by COSLA to the Scottish Executive in August. This is COSLA’s response to the draft bill and our comments still stand.
As you know COSLA is a political organisation and on matters such as these we are happy to refer to professional bodies on the implications of the legislation.

In the draft Bill consultation, the Scottish Executive asked for views on what the minimum age for offenders should be. At the time COSLA suggested that differing views from a number of councils would indicate that further work needed to be done in this area. Since that time we have again asked for views on this issues. Responses from 13 councils broke down into 3 councils recommending that 18 should be the minimum age and 10 recommending that the minimum age for an offender should be 16. As this is really a matter for professional bodies, COSLA would not take a view on this and is information only.

Response by COSLA to the Scottish Executive Consultation

Q1. Does the new offence set out in Section 1 of the attached draft Bill achieve the objective of ensuring that potential sex offenders meeting or travelling to meet a child following grooming behaviour can be prosecuted?

Yes. However, there should be an element of caution in the way in which a conviction can be pursued. It will be difficult to prove that a perpetrator knew a child was under 16 and it will be also difficult to prove their motives without evidence such as explicit sexual content in a previous email. As the onus in the legislation is to prevent crime, it will always be difficult to secure a conviction on. The child (and their family), need to have support, communication and back-up from police and counselling services before, during and after any operation to ‘catch’ someone before they commit any act.

The Scottish Executive should also be cautious not to include unintended adults in the legislation. For example, many clubs and organisations (even absent parents) communicate through email to children under 16. We need to ensure that in curtailing the movements of perpetrators of sexual harm we do not curtail the movements and communications of credible adults.

Q2. Does the new offence strike the right balance in criminalising activity which involves grooming and then meeting or travelling to meet a child? Or should other activities comprise the criminal offence?

The balance is a difficult one to strike and, as above, the legislation should ensure that people communicating in an innocent manner to arrange meetings shouldn’t be vulnerable to allegations.

This bill is about prevention. Children are therefore at the centre of this legislation and their disclosure of solicitation is one of the only routes towards the prevention of an crime. As such children need to be aware, able and supported to disclose their situation to an appropriate person. An awareness raising campaign needs to be set up to ensure children know what to do and support should be available to all children.

Q3. Is the proposed penalty set at the right level?

As many of these cases will be difficult to prove and as this legislation is groundbreaking in its attempt to criminalise the potential for a crime, we would hope that the publicity and the awareness of the crime and the penalty will act as a deterrent.

However, the maximum sentence is 4 years shorter in Scotland (10 years) than in England (14 years). Sex offenders are known to travel distances to meet a child. We would not wish to encourage a practice where an offender would travel to Scotland from England in the knowledge that, if caught they would received a potentially lesser sentence.

Accompanying a conviction, we would like to see the placement of the offending adult on the sex offenders registers, the list of adults unsuitable to work with children and also that their offence would be flagged on all levels of a Disclosure Scotland check.

Q4. Is 18 the right minimum age for the offender or should it be, for example, 16?
This is a very difficult issue and we received mixed views on this. Councils who submitted responses to COSLA were divided between 16 and 18 years.

Further work needs to be undertaken here to ensure that this legislation is appropriate and targeted at the right people, but it should be seriously considered that at 16, young people can be prosecuted through the criminal courts.

Q5. Would Risk of Sexual Harm Orders be a useful measure in preventing sex offences against children?

The RSHO should compliment the offence in that it should pick up on the activity which may lead to or constitute the child being harmed. This should include communication through emails, webcams or audio-feeds etc which is sexually explicit in nature.

Again, this legislation should consider adults served with a RSHO being placed on appropriate registers / lists and made easily identifiable to potential employers.

Q6. Does the proposed list of trigger behaviour cover all relevant activities that might prompt application for a RSHO?

Yes.

Q7. Should the use of Sexual Offences Prevention Orders be extended to allow them to be imposed at time of sentencing?

Yes.

Consideration should also be given to the resources needed to ensure that prevention orders can work in practice and to enable the assessment component of the order.

Q8. Are there any other issues in relation to grooming a child for sexual exploitation that we should take into consideration in the proposed Bill?

- It is important that we take the opportunity presented by the legislation to ensure that we do not leave out other relevant groups, by confining the definitions to children. The Scottish Executive should seek to include vulnerable adults within this legislation also.

- We should ensure that lessons learned from the Bichard Inquiry are not lost to this proposed legislation and that persons convicted under this legislation are placed on appropriate registers and their activities flagged through disclosure checks to potential employers.

- The role of the Reporter should be made clear in this process.

- Should this legislation place a duty upon social work, or any other council service to provide additional services, be it support, assessment or any other service, then we would expect this to be fully resourced by the Scottish Executive.

Jane Kennedy
Policy Manager
COSLA
21 December 2004

SUBMISSION FROM DUNDEE COUNCIL

The Bill

1(1) The Bill appears not to take into account 16-18 yr olds not covered by the Children’s Hearing system and therefore likely to appear in the adult justice system. Consideration should be given to those 16-18 yr olds committing offences of grooming. The clinical factors in risk assessment place
great weighting on the age of the offender with young offenders viewed more likely to be at risk of re-conviction. Similarly, where the age difference between the offender and the victim is 5 yrs plus this also adds to the risk. It is therefore appropriate to consider that 16-18 yr olds should be included in this Bill where victims are considerably younger than the offender.

1(1)(a) Where an existing conviction for a sexual offence against a child exists it can reasonably be assumed that grooming may not require 2 or more communications. The length or frequency of communication is not the issue but the intent behind the communication. Offenders who target public recreation areas with a view to offending are not necessarily grooming the child but the area and it can be reasonably inferred that their presence is part of a grooming process.

Where an alleged offence against a child in terms of the schedule is brought before the Court will the offence of grooming be automatically included in the complaint?

Where evidence exists that an adult has knowingly arranged to meet a child through the communications will this constitute an offence?

Social Enquiry Reports requesting SOPO: It may be necessary to further clarify the status of a SOPO made as part of criminal proceedings by an adult court. It is possible that a degree of confusion will arise between a criminal court order and an order granted after application by the Police (civil order). Further whilst it can be construed to be a community-based order its supervision requirement is not, it appears to be administered by social work.

SOPO’s by the police involve the assessment of potential harm, along with convicted behaviour and information gathered from intelligence. It would be more appropriate to ask for a separate SOPO assessment following an SER where assessment for Probation indicates that the offender is unsuitable for a programme of intervention. Police and social work should submit reports of this type as a joint assessment.

Issues

Where the offence of grooming is established in what way is it measurable within sex offender risk assessment protocols?

Is this offence to be specifically included in Schedule One?

Where suitability for a programme of intervention is positive how will these offenders fit in to the Community Sex Offenders Groupwork Programme where this offence sits as a behaviour leading up to an offence?

Gordon Wood
Service Manager, Criminal Justice Social Work
Dundee City Council
21 December 2004

SUBMISSION BY MARION DYER

I was abused as a child and know only too well the damaging consequences of such behaviour. I have also experienced the helplessness and frustration of the due process of law, as we decided to prosecute our abuser. I would not happily encourage anyone to go through the process, especially as our abuser pled ‘not guilty’ twice and dragged the whole thing out much longer than necessary so, in effect, abusing us again, was sentenced to 18 months and will only serve 9.

I am happy to discuss with anyone any time, any aspect of what I have written in the appended document, and am also happy to clarify or expand on any point.

I would welcome feedback, and would certainly hope that what I have written will be given due consideration.

Marian Dyer
6 November 2004
I have a concern about the impact of ‘Risk of Sexual Harm Orders’ as described in this bill on the provision of sex education (both formal and informal) to young people under 16 years old.

As it stands, the bill indicates that any person over 18 who (on more than 2 occasions) gives a child ‘anything that relates to sexual activity or contains a reference to sexual activity’ or communicates with a child ‘where any part of the communication is sexual’ may be made subject of a RSHO.

At present a large number of people over 18 (including parents, teachers, community workers, health workers, social workers, ‘agony aunts’ and other responsible adults) regularly and routinely play an essential role in providing information, counselling, advice and services on sexual matters to young people under 16 years. Education and awareness in matters of sexual health is seen as an essential part of the learning a young person must undertake to become a competent adult citizen.

My concern is that, as it stands, this bill will force adults over 18 to withdraw from helping young people to learn about the impact of sexual health and behaviour on their lives. We have seen in the past how new legislation (Section 29) prevented young people from receiving education and support in considering matters of sexual orientation and lifestyle choices. This bill could act in a similar way to prevent young people from accessing the health education that they need concerning sexual matters. The effects on future sexual health of young adults could be disastrous.

I trust that the intention of the bill is not to limit the availability of sex education (in its widest sense) to young people under 16 years of age. However, much greater clarity is required in defining the grounds for RSHOs i.e. to categorically exclude the effective provision of education and advice (both formal and informal) on sexual matters, if the future health of our young people is to be protected.

Kate Tomlinson
Policy and Planning Officer
Children's Services Development Team
East Lothian Council
13 December 2004

The EIS, representing over 55,000 members in education, supports the broad thrust of legislation, designed to protect young people from predatory sexual behaviour. The Institute, however, is concerned that the section of the proposed legislation, relating to the Risk of Sexual Harm Orders, is poorly drafted and open to misinterpretation or misapplication.

The Institute is aware that Teachers, who become subject to RSHOs, will be suspended from employment with the matter referred to the General Teaching Council (Scotland). The GTC(S) Disciplinary Committee will almost certainly strike such teachers from the Register. Therefore it is important that the wording of the legislation does not permit arbitrary decision making or is so vague as to allow mischievous complaints to be the basis for action by a Chief Constable.

The Institute has no difficulty with 2(3)(a) of the proposed Act. The language is clear and beyond ambiguity. The other sub-clauses cause concern. The second part of 2(3)(b), 2(3)(c) and 2(3)(d) may be used against teachers who provide formal sex education lessons. While it is for a Chief Constable to decide whether to seek an Order does the Chief Constable become the arbiter on sex education materials and supplant the proper role of teachers working within guidelines provided by education authorities? The qualification 3(d), 3(e)(ii) and 3(f)(ii), which disregard the person’s purpose, will presumably not apply to formal sex education lessons but the concern must be stated that the present drafting will be seen as threatening or worrying to any teacher who delivers sex education.
The point is made above that teachers subject to RSHOs are likely to be struck from the GTC(S) Register and therefore dismissed from employment. There is no reference to an application by a Chief Constable being subject to a legal process and there is a potential breach of Article 6 of the Human Rights Act, the right to a fair trial, or Article 7, the right not to be punished without law.

Drew Morrice
Assistant Secretary
Educational Institute of Scotland
20 December 2004

SUBMISSION FROM FAIRBRIDGE IN SCOTLAND

As an organisation that works with some of the most vulnerable young people in society we readily support any legislation that will further protect them from coming to sexual harm. We believe that, as this is such an important and highly sensitive issue, there can be no room for doubt or misinterpretation. As such we would like to restate our concerns laid out in the response to the Scottish Executive’s consultation on the protection of children from sexual harm.

In its current form, the proposed legislation is at times overly simplistic, a fact that can lead to the criminalisation of totally innocent behaviour through misinterpretation of the letter of the law. In this response we will illustrate our concerns and the specific points that could prove problematic.

Grooming legislation

We welcome the introduction of a new offence to outlaw the grooming of young people for sexual purposes, through the use of communications technology such as the Internet and mobile phones. Our concern is that the offence will have been deemed to have been committed if ‘all’ of the following elements are present:

1. an adult who is 18 or over, travels to meet, or actually meets, with a child who is under 16;
2. the adult intends to commit a sexual offence against the child - evidence for this might be from materials brought by the adult such as condoms or the nature of previous communications on the part of the adult;
3. the adult has communicated with the child on at least two occasions beforehand; and
4. the adult does not reasonably believe that the child is 16 or older.

We feel that this set of criterion is rather generalist, open to misinterpretation and may need some further elaboration.

Points 1,3, and 4 are benign and circumstantial indicators. Any youth worker attached to one of the numerous youth organisations across Scotland could be found guilty of points 1, 3 and 4 on a daily basis, but is perfectly innocent of any ill intent towards a child. We feel that the elements to this offence may put our staff at risk of criminalisation. It would be conceivable for a member of Fairbridge staff to be easily in breach of all 4 points, should they happen to be carrying a condom, defined as evidence above, that they permanently kept in their wallet (as many adults do) whilst travelling to meet a young person, known by them to be under 16, with whom they have been in contact on more than 2 occasions in the normal daily routine of their duties as a youth worker.

Whilst the proposal states that all 4 points have to be present in order for an offence to have taken place, that would suggest that any combination including the far more serious point 2, but not including one of the more benign indicators would not be deemed an offence. For example, a forty-year-old man knowingly travels to meet a 14yr old with the intention of committing a sexual offence against the child after a one-time meeting in an Internet chat room. As the adult has only had communication with the young person on one occasion he would not be guilty of a grooming offence.

We would therefore like to see the prerequisites of this offence expanded upon to cover as far as possible, all conceivable circumstances and to eliminate any unnecessary criminalisation through misinterpretation. We offer the following as a potential clarification of the elements of the proposed offence, to be laid out in the Bill.
1. an adult who is 18 or over, travels to meet, or actually meets, with a child who is under 16 without the knowledge and consent of the young person’s parent/guardian/school or supervising adult and where the circumstances of the meeting cannot be demonstrably explained as having an entirely benign purpose;

2. the adult intends to commit a sexual offence against the child - evidence for this might be from materials brought by the adult, the nature of previous communications on the part of the adult and the location of the meeting (i.e. its relative seclusion);

3. the adult has communicated with the child on at least one occasion beforehand; and

4. the adult does not reasonably believe that the child is 16 or older.

**Risk of Sexual Harm Orders**

Whilst these represent, in the main, some fairly sound proposals, they may in some cases criminalise some benign and in some cases responsible adult behaviour towards young people. Sexual behaviour is described as:

1. engaging in sexual activity involving, or in the presence of, a child;

2. causing a child to watch a person engaging in sexual activity - including still or moving images;

3. giving a child anything that relates to a sexual activity; and

4. communicating with a child where any part of the communication is sexual.

Further elaboration is needed if these points are to be made watertight. No one would suggest that a father concerned for the welfare of his sexually active 15-year-old son, is breaking the law by giving him a packet of condoms, yet he could be seen to be in breach of points 3 and 4.

Fairbridge conducts numerous courses that focus on developing independent living skills in the young people with whom we engage. As part of the holistic package of support delivered to our participants we include informal education about sexual health and related issues. Whilst we conduct this in a candid, informal yet responsible manner, the criteria laid out in points 3 and 4 above would put our staff at risk of criminalisation once again. During such courses staff will openly discuss attitudes to sex and sexual health in frank terms understandable to the young people concerned. These young people come from groups within society most associated with a lack of sexual health awareness and our staff have worked to develop methods of broaching these difficult topics in ways in which the young people will respond and interact.

We believe that the criterion 3 and 4 should be amended to reflect the need for adults to have some latitude in discussing sexual activity with a young person in the context of education, or giving a child condoms if necessary and deemed appropriate. We therefore offer a suggested clarification of points 3 and 4 to prevent misinterpretation or unnecessary criminalisation.

3. giving a child anything that relates to a sexual activity, except if it is deemed appropriate in the context of Sex education, on the part of or with the knowledge and consent of the young person’s parent of guardian; and

4. communicating with a child where any part of the communication is sexual except if it is deemed appropriate in the context of Sex education, on the part of or with the knowledge and consent of the young person’s parent of guardian.

We would be delighted to contribute further to this consultation at any stage in its progress.

Alex Cole-Hamilton
Policy and Communications Officer
Fairbridge in Scotland
21 December 2004
This evidence is offered in response to a number of questions put by the Committee. In what follows, the Committee’s questions are in bold type and are followed by my answers. I draw attention to one other matter at the end.

**Section 1 offence**

Section 1 of the Bill extends to Scotland an offence which was created for England and Wales by the Sexual Offences Act 2003. Are you able to provide the Committee with any information on the use of that offence in England and Wales? Have there been any challenges to it in human rights terms?

I have no information about the way the equivalent of the clause 1 offence in England and Wales has been used, or about any challenges on human rights grounds to the equivalent of the clause 1 offence in England and Wales. It may be that the Home Office would have information about those matters.

The offence under section 1 can only be committed by a person who has reached the age of 18. Do you foresee any objections, in principle, to reducing the minimum age of the offender to 16?

None relating to human rights.

As introduced, section 1 of the Bill would make it an offence for a person resident in Scotland, but validly married to a person under 16, to meet her (or him) for sexual purposes. Should there be a “marriage” exemption? Is this an issue that can best be addressed by appropriate prosecutorial discretion?

There should certainly be a marriage exemption. If the marriage would be recognised as valid under Scots law, it would in my view clearly be an unjustifiable infringement of Article 8 of the ECHR to criminalise the making of arrangements for the parties to meet for sexual purposes. Even if, for public policy reasons, the marriage would not be recognised under Scots law, it seems to me that it would be difficult to justify interfering with marital intercourse through use of the criminal law if the marriage is recognised (a) by the *lex loci celebrationis* and (b) by the law(s) of the parties’ domicile(s). In the European Court of Human Rights, as an international tribunal, the outcome might turn on the ‘margin of appreciation’ allowed to national authorities by virtue of the fact that they are closer than an international tribunal to the problem, and are in a better position to judge (within limits) what steps are necessary to deal with it. However, that does not apply to a court in Scotland, which should make its own assessment of necessity, proportionality, etc., while according such respect as may be appropriate to the judgement of democratically accountable legislators and experts. Without a marriage exemption, there would appear to me to be a significant risk that the legislation would be held to be an unjustifiable interference with the private lives of parties to the marriage.

**Risk of sexual harm order (RSHOs)**

Section 2 of the Bill makes provision for a new civil order, the “Risk of Sexual Harm Order”. This is also an innovation derived from English law. Are you able to tell the Committee anything about the operation of such orders in England and Wales?

I have no information about how RSHOs are currently being used in England and Wales. It may be that the Home Office would have information about those matters.
The Committee has received evidence to the effect that RSHOs are compatible with the European Convention on Human Rights. Could you explain to the Committee what possible challenges might be raised against such orders? What is your view on this question? Are RSHOs compatible with the ECHR?

The issues can be divided into: (A) those relating to due process in the making of orders; and (B) those relating to privacy-related rights.

A. Due process considerations

Article 6 of the European Convention on Human Rights provides:

“1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

“2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

“3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not the means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.”

Applicability of Article 6 of the ECHR—RSHOs:


However, this may not be accepted by the European Court of Human Rights, since the nature and severity of the possible suffering of the person subject to an order may make it a criminal charge for Article 6 purposes: Engel v. The Netherlands (1984) 6 EHRR 409 at para. 50, European Court of Human Rights.

In this connection, it is worth noting that the preconditions for the making of a RSHO under clause 2(3) and (4) of the Bill are that the sheriff must be satisfied that the person against whom the order
is made has on at least two occasions engaged in sexual activity involving a child or in the presence of a child, or caused or incited a child to watch a person engaging in sexual activity or to look at a moving or still image that is sexual, or given a child anything that relates to sexual activity or contains a reference to such activity, or communicated with a child where any part of the communication is sexual. The first two of these are criminal offences (Sexual Offences Act 2003, ss. 11 [engaging in sexual activity in the presence of a child] and 12 [causing a child to watch a sexual act]), while the last two may in some circumstances constitute offences contrary to sections 10 (inciting a child to engage in sexual activity), 11 or 12. The making of a RSHO thus amounts to a finding that the person has done acts that constitute, or may well constitute, criminal offences. The sheriff must also be satisfied that it is necessary to make the RSHO to protect children generally, or any particular child, from harm from the person against whom the order is made. These findings are sufficiently serious to make it possible that an application for an order should be regarded as intrinsically criminal for the purposes of ECHR Article 6, quite apart from the seriousness of the consequences of making an order.

If the application for an order is regarded as a criminal charge for the purposes of Article 6.1, it would bring into play the rights contained in Article 6.2 and 6.3. This would make it more difficult to rely on hearsay evidence, as that might prevent the person from examining the witnesses against him or her. It would also bring the presumption of innocence into play, although if the ‘beyond reasonable doubt’ standard of proof applies (as in McCann) that would make little difference.

Even if the making of an order is not the determination of a criminal charge for the purposes of Article 6.1, it is the determination of civil rights or obligations, since the RSHO imposes restrictions on a person’s movements and liberty. While experience of anti-social behaviour orders suggests that the standard of proof on an application for a RSHO will be that applicable in civil rather than criminal proceedings, the seriousness of the consequences for the person subject to an order will mean that the ‘balance of probability’ test will probably not be considered to have been met if there is any reasonable doubt that the necessary facts have been proved: cp. R (McCann) v. Crown Court at Manchester [2002] UKHL 39, [2002] 3 WL 131, [2002] 4 All ER 593, HL. Nevertheless, if the making of the order is not the determination of a criminal charge it will be possible to adopt relaxed evidential rules, for example by making use of hearsay evidence and the statements of people who are not available for cross-examination at the hearing, in order to establish facts to the tribunal’s satisfaction beyond reasonable doubt.

B. Privacy-related considerations

Article 8 of the ECHR provides:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

“2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

To justify an interference under Article 8.2, the public authority must show that it is:

- in accordance with the law, i.e. has a sufficient basis in positive law which is sufficiently clear and accessible to allow people likely to be affected by it to understand (with appropriate advice if necessary) what their potential liability and obligations are;

- serving one of the legitimate aims set out in Article 8.2; and

- necessary in a democratic society for that purposes, i.e. a proportionate response to a pressing social need, without subjecting minorities to repressive or discriminatory treatment.
See *Handyside v. United Kingdom* (1976) 1 EHRR 737 at para. 49, European Court of Human Rights.

**i) Making RSHOs:**

There is no doubt that any requirement imposed by a RSHO or by an interim RSHO would be likely to engage rights under Article 8.1, since (for example) restrictions on the places one can go and the people with whom one can mix affect one’s private life. (In this connection it is important to note that ‘private life’ is given a wide interpretation by the European Court of Human Rights: see e.g. D. Feldman (ed.), *English Public Law* (Oxford: Oxford University Press, 2004) paras. 8.60-8.69.) Any such requirement must be justifiable under Article 8.2. The requirements that can be imposed by a RSHO are unrestricted by anything on the face of the Bill: see clause 2(5)(a). This raises the question whether the interference could be said to be ‘in accordance with the law’ for the purpose of Article 8.2. If it is in accordance with the law, it would probably serve a legitimate aim, and the necessity provision would ensure that it is likely to meet the ‘pressing social need’ test. However, it might not satisfy the proportionality test, because the order must remain in force for at least two years (clause 2(5)(b)), and cannot be discharged within two years on the application of the person against whom it is made unless the chief constable of the area consents (clause 4(5)). This means that in principle there is a limitation on the ability of the sheriff who makes the order to ensure that it fits the needs of the case and the demands of proportionality. The same problem would seem to afflict the equivalent provision in section 123(5) of the Sexual Offences Act 2003, although the latter speaks of the order having effect ‘for a fixed period (not less that 2 years) specified in the order or until further order’ [italics added].

**ii) Discharging RSHOs:**

Furthermore, on an application to have the order discharged, the chief constable (one of the parties to the case) effectively has a veto under clause 4(5) of the Bill. That might violate both the principle of proportionality in relation to Article 8.2, and the requirements for determination of civil rights and obligations by an independent tribunal and for equality of arms between the parties under Article 6.1. The same potential problem afflicts section 125(5) of the Sexual Offences Act 2003, except that that Act would not be invalid by reason of an incompatibility with a Convention right, whereas the provision would be outside the competence of the Scottish Parliament under the Scotland Act 1998 if it were held to be incompatible with a Convention right or rights.

**Section 5 makes provision for an interim RSHO.** Unlike the full order, there is no “test” for the making of such an order other than that the sheriff thinks it is “just to do so”. Could you comment on this?

**Applicability of Article 6 of the ECHR—interim RSHOs:**

Experience of interim anti-social behaviour orders suggests that the making of an interim RSHO would not be regarded as a determination of either a criminal charge or a civil right or obligation, because of the essentially temporary effect of an interim RSHO pending a full hearing. Accordingly it would not violate ECHR Article 6.1 to make an interim RSHO in the absence of the person subject to it: *R (M) v. Secretary of State for Constitutional Affairs and others* [2004] EWCA Civ 312, [2004] 1 WLR 2298, CA.

The position would be probably be different if there were to be a long delay between the making of the interim order and the hearing of the application for a full order: *Markass Car Hire Ltd. v. Cyprus* App. No. 51591/99, admissibility decision of 23 October 1997, European Commission of Human Rights. Furthermore, the decision in *R (M) v. Secretary of State for Constitutional Affairs and others* [2004] EWCA Civ 312, [2004] 1 WLR 2298, CA, may not be properly applicable to interim RSHOs, because the court was influenced by the fact that interim ASBOs do not take effect until served on the person against whom they are made. This does not appear to be the case in relation to interim RSHOs under the Bill. As a result, the effect of the interim RSHO may be that the person is guilty of an offence without knowing that he or she is subject to the order. In such circumstances, it would appear that the making of the interim RSHO determined the person’s civil rights and obligations, bringing ECHR Article 6.1 into play.
Applicability of Article 8 of the ECHR—interim RSHOs:

An interim RSHO is a short-term measure, so the risk of the restrictions imposed by it being disproportionate is reduced. On the other hand, the risk of the interference not being ‘in accordance with the law’ is increased, because clause 5(3) lays down no substantive precondition to the making of an interim RSHO except that the sheriff must consider it just to do so. Presumably the sheriff in an individual case would be constrained by section 6 of the Human Rights Act 1998 to consider matters of necessity and proportionality (see R (M) v. Secretary of State for Constitutional Affairs and others [2004] EWCA Civ 312, [2004] 1 WLR 2298, CA). This might avoid the risk of failing to meet the requirement that an interference with the right to respect for private life must be necessary in a democratic society (i.e. a proportionate response to a pressing social need to advance a legitimate aim). However, in my view there is a serious risk that the conditions for imposing potentially draconian restrictions on a person’s private and family life (albeit for a relatively short period) are laid down insufficiently clearly in the Bill to meet the ‘in accordance with the law’ test in Article 8.2. In that event, the provision would be in danger of being held to be outside the competence of the Scottish Parliament under the Scotland Act 1998.

The possibility that this provision is incompatible with Article 8 applies equally to the equivalent provision in the Sexual Offences Act 2003, but of course provisions in the Westminster statute would not be invalid by reason of the incompatibility (Human Rights Act 1998, section 3(2)).

Proposed Executive amendments

The law presently makes it an offence to create, possess or distribute indecent photographs of children under 16. The Scottish Executive has indicated its intention to raise this limit to 18 (as has been done for England and Wales). Are there any human rights implications here of which the Committee should be aware?

Much will depend on how the offence is framed. If it criminalises possession by a person or persons aged 16 but under 18 of photographs of himself or herself engaging in sexual activity, it would engage the right to respect for private life under ECHR Article 8.1. In my view, it would be hard to justify under Article 8.2, because it seems to me to be disproportionate to treat someone as a criminal for keeping a photograph of himself or herself doing something he or she is fully entitled to do as a matter of law.

If the legislation covers pseudo-photographs of children (pictures of adults combined or adapted in such a way as to make it appear that they are photographs of children), I would have serious concerns on other grounds. The rationale for outlawing the possession of pseudo-photographs is unclear. Does it protect anyone from harm, and if so whom, and what harm? Children are not harmed by the making of the pseudo-photograph, as no child is involved in the process. It seems to me that it could be difficult to show that criminalising the private possession of such photographs is proportionate to a legitimate aim. The aim would, presumably, be to protect morals, but nobody’s morals would be adversely affected by mere possession (as opposed to distribution or display) of the pseudo-photographs. It might be argued that the pseudo-photographs encourage those who possess them to abuse children. However, the empirical evidence for this is not strong. See Katherine S. Williams, ‘Child-pornography and regulation of the internet in the United Kingdom: the impact on fundamental rights and international relations’ 41(3) Brandeis Law Journal 463-501 (2003); Katherine S. Williams, ‘Child pornography law: does it protect children?’ 26(3) Journal of Social Welfare and Family Law 245-261 (2004); D. Feldman, Civil Liberties and Human Rights in England and Wales 2nd edn. (Oxford: Oxford University Press, 2002), pp. 948-949. This could make it difficult to justify such legislation as a necessary and proportionate interference with the right to respect for the private life of the person who possesses the pseudo-photographs, despite the leeway often allowed by courts when evaluating measures to protect public morals.
It is presently not an offence to pay a person for sexual services – irrespective of the age of the provider of those services. The Executive, however, proposes to create an offence relating to child prostitution and for these purposes a child will be defined as a person under the age of 18. Are there any human rights implications here of which the Committee should be aware?

There is no human rights implication that should discourage the Parliament from enacting such legislation. The proposed provisions would help to protect the rights of children, and to allow the state more effectively to discharge its international obligations. For example, the steps would be an appropriate step towards meeting the United Kingdom’s obligation to ‘take all appropriate legislative…measures to protect the child from all forms of physical or mental violence, injury or neglect…or exploitation, including sexual abuse…’ under Article 19.1 of the Convention on the Rights of the Child (1989). In that Convention, Article 1 defines a child as any ‘human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.’ The human rights implications therefore support the proposed provisions. They are particularly welcome in that the activities of the children themselves would not be criminalised by the legislation (although child prostitutes may be breaking other laws if they pursue their activities in certain ways).

Other matters

3. Meaning of sexual communication or image: difference between the Bill and the Sexual Offences Act 2003

Clause 3(e) and (f) of the Bill provides that a communication or image is sexual if ‘(i) any part of it relates to sexual activity (construed at large), or (ii) a reasonable person would, in all the circumstances but regardless of any person’s purpose, consider any part of it to be sexual’ [italics added]. The words ‘construed at large’ seem to be designed to exclude the definition of sexual activity in clause 3(d), which limits it to ‘an activity that a reasonable person would, in all the circumstances but regardless of any person’s purpose, consider to be sexual’.

By contrast, section 124(6) and (7) of the Sexual Offences Act 2003, read with the definition of ‘sexual activity’ in section 124(5), defines sexual communication or image as limited to (i) communications or images any part of which relates to an activity which a reasonable person would, in all the circumstances but regardless of any person’s purpose, consider to be sexual, or (ii) communications or images any part of which a reasonable person would, in all the circumstances but regardless of any person’s purpose, consider to be sexual.

The difference is that the Bill would catch communications or images relating to activities which are sexual in a broad sense, even if a reasonable person would not consider them to be sexual in all the circumstances but disregarding any person’s purpose. In other words, a communication or image relating to an activity would fall within the scope of the Bill even if it is regarded as sexual only because of the purpose of one of the people. For example, a picture of a shoe would be sexual if any person involved (the one communicating or showing the image, or the recipient or viewer, or a third party who happens to be present) is a shoe-fetishist. This seems to me to allow RSHOs to be made in circumstances representing an unjustifiably wide interference with both freedom of expression and the right to respect for private life.

Professor David Feldman
Rouse Ball Professor of English Law and Fellow of Downing College, University of Cambridge; Judge of the Constitutional Court of Bosnia and Herzegovina
31 January 2005

SUBMISSION BY GENERAL TEACHING COUNCIL FOR SCOTLAND

Background

The General Teaching Council for Scotland (“the Council” or “GTC Scotland”) is the regulatory body for teachers in Scotland. Established by the Teaching Council (Scotland) Act 1965 (“the 1965 Act”) it is a legal requirement that a teacher is registered with the Council in order to teach in any of...
Scotland’s Local Authority schools. After due process the 1965 Act gives the Council powers to remove a teacher’s name from the register or refuse registration based on relevant criminal conviction and/or relevant misconduct.

The Council undertakes Enhanced Disclosure Scotland checks on all applicants for registration. As teaching is a notifiable occupation, SED Circular 5/1989 requires the Scottish Criminal Record Office (SCRO) to report criminal convictions of individuals known to be teachers to GTC Scotland.

The Council has a duty to investigate:

- Convictions received from SCRO;
- “other information” provided in a Disclosure Scotland enhanced certificate;
- a report from an employer/former employer that a teacher has been dismissed or resigned in circumstances of misconduct;
- a complaint from a member of the public;
- information received from an individual acting in a public capacity, for example a Chief Constable or a member of the Judiciary.

Section 4 of the Protection of Children (Scotland) Act 2003 gives the Council the right to refer the case of a teacher to Scottish Ministers for consideration in regard to the List established under section 1 (“the List”). Where a person is on the List Section 13 removes their entitlement to either remain on the register of teachers or apply to be included on the register.

Comments on General Principles of the Bill

Notwithstanding the Council’s support for a robust, joined-up approach to child protection, it is important that as a society we are always mindful of the rights of the individual and the presumption of innocence. The Law must keep up-to-date with the dangers for children associated with the ever-advancing capability of the Internet in particular and communications in general. It is equally important to re-affirm that the Council has strong concerns for a wrongly accused teacher made the subject of any of the Bill’s range of civil orders (or interim variants) and the devastating affect this would have upon his/her life and career.

How the Bill Might Affect GTC Scotland in the Discharge of its Statutory Duties Under the Teaching Council (Scotland) Act 1965?

As indicated above the Council has a duty to investigate issues which could call into question an individual’s…

Individual’s suitability to become or remain a registered teacher. Section 1 of the Bill seems to pull together many of the existing common law and statutory provisions associated with grooming. Much as the limitations of the common law offence of lewd and libidinous practices are recognised, there is a danger that on the one hand intention will be hard to prove or on the other result in unsafe and unfair conviction.

In spite of this, conviction under Sections 1 or 7 (meeting to commit a relevant offence and breach of an RHSO respectively) presumably SCRO would notify the Council of this (and SOPO breaches) in the normal way. This would also be supplied as part of the criminal record history on a Disclosure Scotland enhanced certificate.

However as an RHSO is a civil order granted by a Sheriff following application from a Chief Constable and accordingly poses some questions:
• How will RSHOs be reported to GTC Scotland other than what is contained in a Disclosure Scotland “other information” section as the SCRO only applies to criminal convictions?

• In order to allow GTC Scotland to discharge its functions under the 1965 Act, there will have to be clear protocols for sharing and using information between the Council, Courts and the Police?

• How will notifications of RSHOs interface in practice between paragraph 3 and annexes contained in Police (CC) Circular no 4/1989?

The Council would be pleased to discuss or amplify any of the issues raised in this submission.

John Anderson
Professional Officer (Conduct & Competence)
General Teaching Council for Scotland
21 December 2004

SUBMISSION FROM HIGHLAND CHRISTIAN SCHOOLS TRUST

Having read the proposed Protection of Children and Prevention of Sexual Offences (Scotland) Bill we are broadly supportive and would hope that if passed, it would help to prevent the abuse of children via the internet and other means.

We do feel that something could be done to stop pornographic images on the internet and that tighter controls could be bought to bear on this area. Children seem to be exposed to more and more videos of a sexual nature through the pop culture idols of today. We believe these also need to be tightened up. We do however commend the above proposed Bill as a move in the right direction to protect children.

Mr Tim Nixon
Chairman and Secretary
Highland Christian Schools Trust
12 December 2004

SUBMISSION FROM DONALD MACKINNON

I am prompted to write in regard to the above Bill, having read the submission by the Scottish Catholic Education Commission. I strongly support their submission that consideration should be given to protecting the reputation of those such as teachers who are accused but who are not subsequently charged. “Some arrangement should be considered to protect the anonymity of those under suspicion to avoid considerable adverse affects on their later careers and life.”

I write to request that the Committee also consider the other side of the same issue i.e. the risk of defamation action faced by any person reporting a concern or even co-operating with an inquiry when the investigating authority decides not to take any action. Currently, the position in Scotland appears to be that a vulnerable person reporting a concern about another person’s conduct or an event to a person in authority such as an education official or a social worker can be sued for defamation if the authority takes no action against the person about whose conduct the complaint was made. Reasons for such lack of action could include conflicts in evidence, lack or insufficiency of corroboration or lack of belief in the report made.

I strongly believe that any person making a report in private should be warned that they risk being sued for defamation and that legal aid is not available to defend defamation actions. This is a simple but fundamental point.

I urge members of the Committee, within the context of the Bill, to change the current situation and give vulnerable people the right to report abuse in private without fear of being hounded through the courts by malevolent and vindictive individuals whose conduct was the subject of concern or complaint.
The Parliament has previously considered the balance to be struck between the rights of children to report abuse and those of teachers and others to be protected from false accusation. The briefing paper SPICe 02/103 specifically refers to the "Child Protection Review" which was underway at the time of its publication. In that context, in paragraph 4 of its background, it commented:

"The publication of the child protection review report could cause some difficulty in terms of the focus of certain issues. For example, the recent Defamation case brought against Michael MacKinnon and Paul Kelly in Dumfries raises questions about whether increased protection should be provided to children to prevent such cases being brought. Being a Child Protection Bill, it could be argued that this would be an appropriate place to introduce such legislative measures. On the other hand, should this be considered more widely in the context of the child protection review?"

The Child Protection Review did nothing about lifting the risk of defamation actions from those reporting abuse.

The question was considered in the context of the Protection of Children (Scotland) Bill. The lead committee met on 3 December 2002, with the then Minister for Education and Young People, Cathy Jamieson, appearing as a witness. Among the amendments considered was Amendment 37 concerning absolute privilege:

"Information leading to referral to be absolutely privileged for the purposes of the law of defamation, any-

- complaint about an individual whose case is referred under section 2(1) or 4(1);
- information which is relevant to the determination of such a referral and is provided by a person to assist in that determination;
- or statement made in any proceedings leading to that determination, shall be absolutely privileged in those proceedings.
- In subsection (10), "statement" has the same meaning as in the Defamation Act 1996.

The amendment was withdrawn when the Minister stated undertook to take action

"I give the commitment that I will reconsider the issue in light of the comments that have been made to see whether an amendment to the bill can be lodged. If that is not possible, the Minister for Justice and I will continue to consider how we can deal with the issue."

She did introduce an amendment, clarifying that "qualified privilege" would apply to statements made.

The real difficulty with "qualified" as opposed to "absolute" privilege is that it is a defence to an action, which means that it has to be argued in court when no legal aid is available in defamation. A vindictive disgruntled person can raise a civil action against the person who made a report or answered questions from an investigating authority. In another context, the advice by the Scottish Executive is "Where information is potentially defamatory and a person intends to rely on qualified privilege, it is essential that they take appropriate legal advice." See: http://www.scotland.gov.uk/library3/law/sega-39.asp

I submitted comments about defamation law to the Justice 2 Committee when it was considering the Vulnerable Witnesses (Scotland) Bill. Childline (Scotland) supported my views "We would like to make clear our support for the issues raised by Donald McKinnon in his submission and express our continuing concern regarding the threat of defamation action, which affects every vulnerable person who reports a concern or an event to an appropriate authority and subsequently cooperates with such an authority in investigating such a report. This Bill would seem to offer an opportunity to address this outstanding issue and remove the threat"…‘ChildLine receive a
substantial number of calls every year from children experiencing ‘problems at school’. These include problems with teachers and other authority figures which children describe as ‘bullying’ and ‘harassment’ and include physical assault, name-calling and teasing. We know from these calls that it is extremely difficult for children to report their concerns but believe it vital that they should be encouraged to do so where the problems are serious. Our concern is that the threat of defamation will make it even more difficult for children to come forward to report such incidents. This issue could be addressed in the Vulnerable Witnesses (Scotland) Bill as it relates to children and young people as witnesses."

Children 1st NCH Scotland and ChildLine Scotland also submitted together to Justice 2 Committee as “Justice for Children”. Their evidence made clear that as regards defamation “We believe the Committee must explore the relationship of defamation law to this Bill and its declared principle which is to enable vulnerable witnesses to report instances of abuse by enabling better protection and assistance to be given to vulnerable witnesses.”

The Bill as passed, and consequently the Act, makes no reference to defamation.

Lord Hutton was one of the Law Lords who considered most recently the difference between absolute and qualified privilege in the context of a case involving an investigation, as opposed to publication of newspapers. In Taylor & Others v Director of the Serious Fraud Office 1998, Lord Hutton said

“In my opinion the argument should not prevail that the defence of qualified privilege would give adequate protection to investigators and those who spoke to them because I consider that there would be a real risk that an unfounded allegation of malice made by a plaintiff bringing an action for defamation would subject an investigator or informant to harassment to which he should not be subjected”.

His colleague Lord Hope of Craighead said: "It requires little imagination to appreciate the damaging effects on the supply of information if those who supply it are to be subjected to claims for damages for defamation arising from what they have said....Under the existing rules all those who participate in a criminal investigation in good faith are entitled to claim the protection of qualified privilege. But that is an imperfect protection, because qualified privilege requires to be pleaded and established as a defence. No action can be struck out on the ground of qualified privilege.”

However, the Scottish Executive insists that “Qualified privilege “ is sufficient protection. In a Parliamentary Answer in 2002, the then Deputy Minister, Nicol Stephen said

“The Scottish Executive is aware of the need for pupils to be able to raise matters of concern. This must be balanced with the need to protect individual teachers against malicious allegations. This balance would not be served if local authorities were inhibited from investigating or acting on allegations due to the fear of being sued for defamation.

The concept of qualified privilege operates when there is a duty on a person to speak openly. Qualified privilege means that a defamation action can only be successful if a court finds that the allegation was false and was made with malicious intent. We consider that this generally provides sufficient protection for pupils making allegations in good faith.”  (S1W-28532)

I disagree strongly as to its sufficiency. In Lord Hope’s words it is “an imperfect protection, because qualified privilege requires to be pleaded and established as a defence.” It is particularly imperfect because there is no legal aid available. I urge the Committee to give the issue full consideration within the context of the Protection of Children and Prevention of Sexual Offences (Scotland) Bill and urge you to grant statutory immunity from defamation action to any individual reporting a concern in private to an appropriate authority or co-operating with an investigation by an appropriate authority.
That is the purpose of my Petition PE 578 which has been subject to parliamentary consideration for two years and was last considered by Justice 2 Committee on 16 November 2004.

Donald MacKinnon
20 December 2004

SUBMISSION FROM MRS A.M. MASLIN

Thank you to Cathy Jamieson for introducing this Bill – which is an attempt to reduce the likelihood of harm to individuals in society (and society as a whole) by certain specific sexualised behaviour of adults towards children. It is an important signal in our society that we are moving further in the direction of addressing the complexities of inappropriate behaviour towards our developing young. Although it is a small step in the morass of change that needs to take place to protect and nourish our children, it is a significant one. It takes place in parallel with progress in other areas such as improving levels of pollution in the air we breathe – of which a ban on smoking in public places will play a part.

I am concerned about the protection of children who in their own homes may be groomed by family members or other relatives. A conversation I had with an experienced police officer included the distress of that officer on having to return to her home a female child who had disclosed to the police the sexual abuse she was suffering from her mother’s new partner. The child’s mother had said the child was lying. I learned that this kind of situation was not an isolated event. Please will the Committee consider this area very carefully while discussing the final provisions of the Bill?

I am concerned about the safety of people such as members of teaching staff in school, who may become the focus of a malicious complaint by a child or children under the age of sixteen. I have read several reports in the national press of cases where teachers’ careers have been ruined by wrongful accusations of sexualised behaviour or sexual harassment towards young people. Please will the Committee consider this aspect when discussing the final provisions of the Bill?

I am concerned to ensure that children are protected from grooming activities carried out by an adult member of the same sex or member of the opposite sex, or indeed any adult couple or group. (I refer to paragraph 15 of the policy memorandum, but am not clear if it covers the matter to which I refer.) Please will the Committee ensure that the Bill provides for this?

I am concerned about rehabilitation of offenders. In recent years I made attempts to identify schemes in prisons that were enabling prisoners to return to society with some confidence in all parties that such people would not re-offend. I understand that best results are obtained where offenders come to understand the roots of their problems (which are frequently to do with emotional deprivation, distress and isolation), are then able to understand the damage caused by their wrong actions, and are opened to being helped to relate to others in society in mutually supportive ways. I could not find any such schemes operating in Scotland. Please will the Committee consider this area very carefully?

I am concerned about measures that could be taken in society that are likely to lead to a reduction in the likelihood of adults seeking out children for contact that manifests as sexual gratification.

- In a society where much of the advertising is driven by sexualised postures, our citizens are bombarded daily by false links between sexual activity or seductive behaviour and other things. That in itself is a kind of grooming process. For example I enclose two advertisements that appeared in the national press, each of which are from what would be regarded as reputable organisations – BUPA and Stobo Castle.

- It appears to me that in our society girls are being encouraged to dress and behave like miniature adults at a younger and younger age. This can include behaviour that can be construed as seductive. For example, I refer to an article about the winning singer and the song lyrics of the recent Junior Eurovision Song Contest – copy attached. The title of the song is ‘I’d rather be dead than plain.’ The lyrics include the words ‘It helps to give me rhythm, I’m a real little mover’. The winner is 9 years old. It appears to me that the
song contest itself is a kind of grooming. Although this kind of contrived adult behaviour in children is not a reason for excusing the behaviour of offenders, it is something that we should look at very carefully. It is easy to see how ease of access to alcohol for those who are struggling with that particular addiction is an issue we require to address. The person who uses alcohol to attempt to numb a sense of inner deprivation has much in common with those who use sexual activity for the same purpose, and who are therefore vulnerable to ‘seduction’ by repeated sensory insults from a plethora of sources.

- I believe that it should be made mandatory that all schools provide not only sexual education but also relationship education. I notice that young people are struggling to understand the real meaning of relationship, and, aided by the media, are frequently confusing the excitement of sexual activity with real affection, understanding and commitment. Please will the Committee consider very seriously all parts of section 6 of my response?

I am deeply concerned that false attitudes about sexual impulses and sexual activity of adults towards children have become endemic in our society. At a conference on all kinds of abuse of children I overheard a group of men discussing the section on sexual abuse. ‘Let’s face it,’ said one to the others, ‘we all think our daughters look amazing, but you don’t do anything except let them know they are stunning.’ I admired this man for his honesty, correctness and directness of speech.

However, at a writers’ group, a male member wrote an interesting short story where a man encountered a homeless thirteen year old girl, who he then invited to a café for a hot drink. The male members of the group nudged each other, tittering, and one said, ‘We know what happens next!’ (Hee hee). Before I left I spoke to the author of the (incomplete) story, saying that I hoped that the main character would continue to behave appropriately towards the girl. He looked at his feet and did not reply. I have not attended the group since that time, and I still search my mind about what else I could have said and done.

These two examples demonstrate the difference between the approach of the safe and entirely appropriate attitude of a father (or person acting in that capacity) and the attitude of the potential offender (be it a stranger or a neighbour or a relative). Please will the Committee be aware of this important area.

For the secure development of a child, his or her primary emotional connection needs to be with a safe and trusted adult person – who is either the mother or someone who is in that position in relation to the child. I am concerned by the tendency in our society to encourage situations where a young child is required to trust relative strangers (e.g. while in nursery care), often with very little ‘bridging’ of the situation – i.e. where the child would experience warm and regular communication between his or her parent(s) and the nursery staff. This surely is creating the basis of vulnerability in children to the kind of grooming process to which the Bill refers, since it signals that significant intimate care can be provided at a location remote from the home base, both geographically and emotionally. Please will the Committee consider this serious matter very carefully?

With regard to the provisions of the Bill that would make it an offence to expose children to images of sexual or sexualised activity, I draw the Committee’s attention again to the gross sexualisations that appear in advertising. For example, I consider the image of David Beckham’s naked torso together with a razor that is being advertised on hoardings at the moment to involve sexual innuendo.

A news item in the Scotsman (26 November 2004) read as follows:

‘Pornographic images in magazines and newspapers, on public transport and on the internet have been blamed for violence against women in Scotland. Yesterday was a UN international day of action to eliminate such violence.’

I am also deeply concerned about the exposure of children to sexual and sexualised images on TV during the screening of advertising and various programmes. I am at a loss as to how the
provisions of the Bill can regulate that. Please will the Committee consider these matters very carefully?

I write not only as an adult who resides in Scotland, but also as a therapist who is concerned with the treatment of emotional problems and relationship problems, some of which stem directly from certain situations in childhood where sexually abusive behaviour has been involved. I do have personal experience of being sexually abused as a child.

As a published author I was approached to write a novel that would be helpful to girls in the age group 9-15 years. The book will be published early next year, and it contains much to help girls to maintain and develop good relationships with responsible adults and with one another. This is the basis from which they develop their own sense of self, which includes a growing sense of appropriate sexual attitudes. This area is fundamental to reducing the vulnerability of that age group to sexual seduction by disturbed adults, including those who use the media to groom our children. (I can make an electronic copy or an A4 hard copy of the book available to the Committee.)

AM Maslin
30 November 2004

SUBMISSION FROM THE NATIONAL ASSOCIATION FOR PEOPLE ABUSED IN CHILDHOOD (NAPAC)

Thank you for giving the National Association for People Abused in Childhood (NAPAC) the opportunity to comment about the proposed Bill mentioned above. We totally support it. Although NAPAC is not a charity which directly works with children we have heard from many people who were ‘groomed’ for abuse by perpetrators and we wholly support every and any means by which these vile offences are minimised and prosecuted. Once again, Scotland leads the way!

Offences against children of a sexual nature invariably follow a period of grooming. This can sometimes last for a considerable amount of time before the offences take place. Sometimes even years. Such is the determination of the adult offender to ensure that he or she is able to totally manipulate the child and thus ensure least risk of disclosure/detection and prosecution.

During the past two years NAPAC has heard from well over twenty thousand individuals who were abused as children. Every account of that abuse is horrendous and the lasting damage that is inflicted is immense. We hear from people of all ages, people in their teens, twenties, thirties, even people well beyond retirement age contact us to say how much they have been damaged by something that may have happened a very long time ago. I know therefore that we speak for those people when we encourage the passage of this Bill because it is their and our wish that such abuse should not be inflicted on today’s generation of children.

The Bill has our backing and we have no hesitation in saying so publicly.

Peter Saunders
Director and Founder
National Association of People Abused in Childhood (NAPAC)
13 December 2004

SUBMISSION FROM PROFESSIONAL ASSOCIATION OF TEACHERS SCOTLAND

This response is made on behalf of, and in consultation with, the Scottish Executive Committee (SEC) of the Professional Association of Teachers in Scotland (PAT). SEC determines Association Policy with regard to pay, conditions, and all other educational matters in Scotland.

PAT welcomes the opportunity to respond to the above consultation and is happy to amplify any of the points below if required.

We welcome the publication of the Protection of Children and Prevention of Sexual Offences (Scotland) Bill. This is an important part of the strategy for protection of children. The offence of
sexual grooming of a person under 16 by an adult aged 18 or over is an issue that the public at large is becoming increasingly aware of and naturally it is a matter of serious concern to the education profession.

This legislation is set out in clear and straightforward terms.

As in all matters involving the protection of children, it is of the greatest importance that the relevant agencies work together on a fully informed and consistent partnership basis. This will undoubtedly be the case in relation to this legislation.

Mrs K M Luker
Administration Officer
Professional Association of Teachers
21 December 2004

SUBMISSION FROM SCOTTISH CATHOLIC EDUCATION COMMISSION

Section 2(3) – Given the terms of the draft there may be a case for providing a specific exclusion from the legislation for teachers teaching sexual health in accordance with an approved syllabus. Of course, a Chief Constable would decide whether or not to proceed against any teacher but teachers should not be left vulnerable to malicious complaints by recalcitrant pupils or parents.

Consideration should also be given to an issue which has already been aired relating to protecting the reputation of those who are accused but who are not subsequently charged. Some arrangement should be considered to protect the anonymity of those under suspicion to avoid considerable adverse affects on their later careers and life. There have been a number of recent examples of teachers who were subject to accusations but subsequently exonerated.

Under draft Sections 1(5) and 1(6), Scottish Ministers may amend the list of offences by Statutory Instrument subject to negative resolution. It would be preferable if it was affirmative resolution in order to ensure a debate in parliament.

The legislation understandably deals with a person aged 18 over, but the offences listed could readily be committed by younger persons say 16 or 17 years olds. It is not clear whether corresponding legislation or guidance will be proposed for the children’s hearing system but it would seem to be desirable to close any potential loop holes.

The proposed Bill adds yet another strand to existing legislation governing sexual offences and protection of children. The legislation is becoming more and more complicated and overlapping and ideally there should be consolidation of the legislation as it affects children possibly in a new Childrens Bill. It would be very helpful to those involved with, working with or responsible for children if the Scottish Executive would issue a comprehensive memorandum of guidance drawing together the various pieces of relevant legislation affecting children. The memorandum would not of course constitute authority or legal interpretation or advice but would be useful to practitioners and also parents. Since the primary objective for the legislation is to protect children any administrative steps to achieve this should be considered.

The Scottish Catholic Education Commission thanks The Justice 1 Committee for providing an opportunity to comment on this proposed important piece of legislation.

The Scottish Ministers are to be congratulated in bringing forward this matter so promptly.

Michael McGrath
Director
Scottish Catholic Education Commission
17 December 2004
SCRA welcomes the opportunity to respond to the Justice 1 Committee’s call for evidence in respect of Stage One of this Bill. These comments on the Bill broadly reflect comments already made by SCRA in the Scottish Executive’s consultation process:

Meeting a child after contact

The offence of meeting a child after contact will require proof of three elements:

- meeting or communicating with the child on at least two occasions
- meeting or travelling to meet the child again
- for purpose of committing a relevant sexual offence

This attempt to criminalise grooming behaviour is timely and welcome, as is the alignment with the equivalent English legislation, s15 of Sexual Offences Act 2003. The apparent focus on prevention however may be more perceived than real. Grooming is a secret activity which exploits the vulnerability of the child. Realistically on most occasions it will only be apparent after the event. The offence may be difficult to prosecute successfully due to the need to infer intention from behaviour that may easily be shown to have alternative innocent explanations, particularly since the communications need not have an explicit sexual content. The offence may have value as a useful alternative charge where there is insufficient evidence for a more serious offence.

As currently framed, the prosecutor will require to prove two prior communications plus an event, involving travelling to meet or actually meeting, the targeted child, before the offence can be made out. Revision down to one prior communication, by amendment of s1(a), would widen the net and more accurately reflect the reality of some children’s vulnerability and some perpetrator’s skill in exploiting it.

The offence is completed by meeting or travelling to meet the child with the intention of committing (or attempting, conspiring or inciting another person to commit) one or more of the "relevant offences" listed in Pt 1 of the Schedule.

The offences listed in Part 1 of the Schedule include (though not exclusively) offences which also fall within the definition of “Schedule 1 offences” as set out in Schedule 1 of the Criminal Procedure (Scotland) Act 1995.

SCRA recommends that the new offence of communicating and meeting a child with the intention of committing a relevant offence is itself incorporated in the definition of a Schedule 1 offence, in order that the protection available to children via s52(2)(d) to (g) of the Children (Scotland) Act 1995 be extended to include the risk from perpetrators of this offence.

SCRA also recommends that the new offence be included in the offences listed in para. 2(1) of the Sex Offenders Act 1997 in order that the registration and notification provisions of that Act apply to those convicted of the new offence, and the additional protection secured.

Scope of the new offence

As presently framed the offence usefully defines the minimum activity which will trigger a prosecution; in this way the threshold is clearly stated and the prosecutor is not required to establish a lengthy course of conduct.

The second leg of the offence stated in s1(a)(i) & (ii) involving meeting or travelling to meet ensures the distinction is made which marks a perpetrator from a fantasist.
The provisions of Part 2 of the Schedule extends the offence to those intending to aid & abet, counsel or procure the commission of certain relevant offences and also extends it to attempts, conspiracy or incitement to commit all relevant offences. This appears to strike at art and part situations, but this requires clarification.

The proposed penalties

The proposed penalties appear sufficiently flexible to reflect different degrees of seriousness within the offence.

Minimum age of offenders

Grooming by 16 year olds is not unknown. Logically the remedy should be available wherever the risk arises. Unless the minimum age was reduced to 16, grooming by 16 and 17 year olds could not be dealt with. If the minimum age were reduced to 16 or below, those under 16, and those aged 16 or 17 years and subject to a supervision requirement, would be referred by the police to the Reporter in the usual way (including joint referral to the Reporter and Procurator Fiscal). Where there is prosecution of a child under 16 years of age, a young person aged 16 or 17 subject to a supervision requirement, or a young person aged 16 to 17½ not subject to a supervision requirement, the court has various powers and duties under section 49 of the Criminal Procedure (Scotland) Act 1995 to seek advice from the Children’s Hearing or remit to the Children’s Hearing for disposal. This means that a welfare and treatment approach rather than a punitive one would be available to most younger offenders.

Accordingly SCRA would support the reduction of the minimum age.

Scope of RSHOs

The chief constable can apply for an RSHO if satisfied that on at least two occasions a person has “done an act within subsection 2(3)”; and there is reasonable cause to believe an Order is necessary. It is for the sheriff to address the issue of why it may be necessary: i.e. “for the purpose of protecting children generally or any child from harm (physical or psychological) from that person”.

Subsection 2(3) is drawn in very wide terms, and strikes at activities ranging from “engaging in sexual activity involving a child” on the one hand to “giving a child anything that contains a reference to such activity” or “communicating with a child, where any part of the communication is sexual”. In general SCRA support the latitude in the definition, which reflects a serious intention to address a range of risky behaviours, but with the caveat that at its widest it could catch e.g letters from school about sex education classes.

SCRA has long had concerns about the risk posed to children in the community by parties implicated in Schedule One offences. The remit of the Reporter and Hearing is to secure the safety of the particular child. A successful prosecution may be impossible. The police continue to possess relevant information in respect of the perpetrator but may be unable to do anything further. The RSHO provides a solution and is to be welcomed.

How successfully the proposed RSHO will strike at the risks posed will depend in part on the effectiveness of information-sharing procedures across a range of agencies. The powers and duties of agencies to share information may need to be examined.

Since the RSHO places before the sheriff for consideration a wide range of behaviour - that which merely raises concerns in the mind of the chief constable; offences established on the balance of probabilities in children’s hearing proceedings; and criminal convictions - it will apply to potential abusers not currently attracting the attention of the courts. SCRA welcomes the intention of the Order and the fact that it reflects a serious attempt to focus effectively on prevention.

Consideration might be given to including the new grooming offence in the s2(3) list of acts which trigger a RSHO application.
Ewan McLeod
Policy Officer
Scottish Children’s Reporter Administration
21 December 2004

SUBMISSION FROM SCOTTISH DRUG ENFORCEMENT AGENCY – NATIONAL HI-TECH CRIME UNIT (SCOTLAND)

I write to thank you for extending an invitation to the SDEA National Hi-Tech Crime Unit (Scotland) to become involved in the consultation process relative to this proposed legislation. I understand that during a recent meeting with a number of members of your Committee, the SDEA expressed our concerns at certain aspects of the proposed Bill. This letter details the concerns that were verbally expressed at that meeting.

Internet Grooming

Contact via the Internet has long been recognised as the favoured method used by the paedophile to groom his/her victim(s). The Internet provides a degree of anonymity while carrying out this grooming activity and in a lot of cases I am sure that the paedophile really believes that he/she cannot be traced. Others who are more experienced or have had long associations with like minded individuals tend to be more careful in methods employed to protect their identity.

Paedophiles who groom on the Internet normally make initial contact with their potential victim(s) within chat based Internet applications. This type of facility can take many forms, but in essence it provides an Internet based facility where people meet and talk as a group or as individuals.

Paedophiles will identify chat facilities where they know children under the age of 16 will be present. Every individual within the chat facility will enter a username that others will see. Examples of this would be ‘emma12uk’, ‘ilovebusted’ or ‘seekingyoungstudent’. The first username would indicate a 12 year old girl in the UK, the second would more than likely be a teenager as they like the pop band Busted, and the third is the actual username used by a 47 year old paedophile in the United States who was caught grooming a 13 year old female. The usernames used by paedophiles are often less obvious than this one but many children will use names similar to the first two examples. This often acts as a factor when a paedophile decides to approach what they believe to be a child online.

The duration of contact between a paedophile and a child online can vary from a few minutes to contact over a number of days or weeks. This is no doubt dictated by the intent of the paedophile and at what stage they achieve their sexual gratification from the process. It is also important to say that not all paedophiles will necessarily get to the stage where they want to meet up with the child. A large number will achieve sexual gratification by simply speaking to children in an inappropriate manner online.

Considerations

Reviewing the content of Section 1 with regards to the necessity to have prior communication on at least two occasions it is apparent that this would leave a significant loophole in the system for paedophiles to avoid prosecution. There is no evidence to suggest that a paedophile will not carry out the grooming process during the first communication and arranged to meet up with a child. This is no doubt the case in many instances. The aim of the new legislation is the protection of children and this loophole may well be one that the paedophile would utilise to avoid prosecution. One element of the crime would be what is termed by a relationship and I would suggest that this essential part of the crime could be evidenced during the course of one online communication.

In furtherance of my previous comments, it is also likely that a paedophile may not necessarily reach the stage where they want to meet up with the child. Consideration must be given as to whether the legislation should create a new offence for this type of activity or whether a common law Breach of the Peace is appropriate in the circumstances. If the latter is deemed to be the appropriate offence then the legislation governing the Sex Offenders Register must be reviewed to
incorporate an offence of Breach of the Peace involving this type of activity. The whole essence of this amendment is the control of the offender after the fact.

The other area of concern in the initial draft is the inclusion that a person must be 18 years of age or over to commit the offence. It is well recognised by psychologists who have studied paedophiles and this whole area of sex offending, that the majority of paedophiles are aware of their interest in young children from a young age. Almost certainly by the age of 18 they have acknowledged this interest.

It is entirely feasible that a 15-year-old male could conduct the act of *grooming* a 12-year-old girl online and fulfill the criteria set out in Section 1 of the Bill. In such an instance there would be no legislative recourse via the new Act to prosecute the offender and, perhaps just as important, have a mechanism in place via the Sex Offenders Register to monitor their future conduct.

I would draw a parallel with a 15-year-old male being charged with having sexual intercourse with a 12-year-old girl. This would be reported to the Procurator Fiscal and dealt with accordingly. Similarly, a 16-year-old male would also be charged if he had sexual intercourse with a 15-year-old girl. The police have a duty to report such cases to Procurators Fiscal and at that stage all the circumstances are taken into account as to whether a prosecution is necessary and in the public interest. I would suggest that the same considerations should be applicable to the new Act.

As such it may be prevalent to remove any reference to the age of the offender and base the offence on the course of conduct carried out. Any consideration of criminal proceedings should be based upon the whole circumstances surrounding the case.

**Conclusion**

The introduction of the Protection of Children and Prevention of Sexual Offences (Scotland) Bill in its entirety is well founded and has recognised areas of weakness in existing legislation to tackle certain sexual offences where the protection of children is paramount. Not only has the *grooming* type offence been tackled but the proposed introduction of Risk of Sexual Harm orders is no doubt a positive step.

It is paramount that this legislative process provides the police with the means to respond to this type of paedophile conduct while maximising the protection of children who, unfortunately, are increasingly becoming subject to this type of criminal act.

Paedophiles who conduct their activities online are well practiced and there are areas of the Internet that they will meet to discuss and share their experiences. Any weaknesses in police procedures used to identify the paedophile are widely discussed. I have no doubt that paedophiles will take cognisance of conditions such as the need for at least two previous meetings or communications and will endeavour to achieve their aim in the first period of contact. This will offer a significant window for them to avoid prosecution under this Act.

I have no personal difficulty with the crime of Breach of the Peace being used to deal with offenders who do not go as far as arranging a meeting with the child but we must take cognisance of the significant threat these individuals may pose in the future and make attempts to exercise some element of control over them. This could be achieved by an amendment to the provisions for inclusion on the Sex Offenders Register or indeed may be facilitated by a Risk of Sexual Harm Order. If the latter was to be the desired outcome to this legislation then consideration must once again be given to removing the reference that the person must be 18 years of age or over.

I trust that the foregoing will be of assistance to you in the Committee’s ongoing considerations.

Graeme Pearson QPM MA
Scottish Drug Enforcement Agency
National High-Tech Crime Unit (Scotland)
23 February 2004
SUBMISSION FROM SCOTTISH POLICE COLLEGE

The following is offered by way of comment regarding the Scottish Parliament Justice 1 Committee’s call for evidence:

In terms of the general principles of the Bill, I would refer you to the response of the ACPOS Crime Business Area submitted on the earlier consultation document ‘Protecting Children from Sexual Harm’. This supported the legislation as a valuable and positive step forward in an operationally difficult and sensitive area of work.

The Scottish Police College scopes all Scottish and UK criminal legislative proposals in order to gauge implications for probationer, crime management, road policing, leadership and management or other specialist police training.

If enacted, the key aspects of this legislation will be compiled into a suitable training format for probationer training and would be submitted to ACPOS (Personnel and Training) to approve its inclusion in the course curriculum.

In terms of crime management training, the principal courses offered in this field of work are the monitoring of sex offenders’ course and the child protection course. In addition, sexual offences are covered in depth during the initial detective training course attended by all Scottish detective officers.

All of the above courses are currently subject of extensive re-design. The monitoring of sex offenders’ course has been amended to take account of the Sexual Offences Act 2003 and will shortly accommodate the introduction of the VISOR database and the Matrix 2000 risk assessment tool in place of Tayprep 30. Likewise, the child protection course will address probable changes to the recording of child witness interviews on conclusion of the visual recording pilot projects in the Tayside and Strathclyde police areas.

As such, the impact of the enactment of the Bill will be relatively light. Absorbing its provisions will form part of the routine duties of college divisions in updating the curricula of training courses and the training materials provided by the Scottish Police College to the service.

Margaret Barr
Assistant Chief Constable
Deputy Director
Scottish Police College
7 December 2004

SUBMISSION FROM THE SCOTTISH PRE-SCHOOL PLAY ASSOCIATION

Scottish Pre-school Play Association (SPPA) is the national voluntary umbrella group for early education and child care services in Scotland. It is pro-active in promoting and developing good practice guidelines with respect to child protection for early education and child care service providers and staff working in the voluntary sector.

SPPA welcomes any measures that will further strengthen and better protect children from sexual harm and abuse. The measure to make the sexual grooming of children an offence and the introduction of sexual harm orders will enable action to be taken to deter and prevent sex offenders from harming children. Both will help to ensure that those who would harm children are prevented and prohibited, as far as is possible, from exploiting situations that enable them to take advantage of the most vulnerable in society.

Legislation and debate, which raises public awareness of how sophisticated the process of paedophilia is, can only be of benefit to children and their welfare. It could be said that the most dangerous, most vulnerable area for playgroups and similar type settings in the whole arena of child protection, is where there is the possibility of the setting being used by those who would consider the timescale to actual abuse to be a long one, and who would be willing to spend a number of years establishing a ‘trusting’ relationship with a child before actual abuse took place.
In the recruitment and selection of staff we are assuming that individuals convicted of an offence would be Listed and a Disclosure check would elicit this information. It is not clear whether the ‘Risk of Sexual Harm Order’ would appear on a Standard or Enhanced Disclosure, as the order is made in respect of an adult who is deemed to be acting in such a way that they present a risk of sexual harm to children, for example by hanging around play areas.

Playgroups and other settings, which encourage parental involvement and contact with the children, might be particularly vulnerable because an individual who has been convicted or who has an order against them may be involved in the life of the group as a parent/carer. We are seeking guidance on whether the requirements of the Protection of Children (Scotland) Act are meant to apply to parents and carers of children attending the setting.

Earlier we noted that the timescale to actual abuse can be a long one. SPPA as an organisation will need to consider the robustness of the record-keeping in settings, as it would be possible that one of the ‘earlier occasions’ could be in a playgroup setting and evidence might be required at a later date to show that the child had attended the setting at the same time as the adult.

Margaret Brunton
Senior Development Officer
Scottish Pre-School Play Association
21 December 2004

SUBMISSION FROM STIRLING COUNCIL

The Bill could have a direct effect on the efforts of our service to keep children safe. This is in the context of direct work with families where there are child protection issues of a sexual nature. The offence of sexual grooming is yet another weapon in the arsenal of our colleagues in the criminal justice system. It may hopefully deter would be offenders or others with tendencies to sexually abuse children. Having made the attempts to abuse this is clearly also a crime before the abusive activity has occurred with a sentence or fine befitting the seriousness of this criminalised activity. The conviction, as with all convictions, would make the planning of what needs to be in place to protect a child or children clearer.

Part of the Child Protection Co-ordinators role is to attend the local Sex Offenders Liaison Group. This group reviews, advises and risk assesses sexual offenders but also discusses concerns raised about other potential offenders. The orders in the Bill again add to the ability of the criminal justice workers and police to curtail the activities of individuals where these concerns exist. The multi-agency nature of this group is a good forum to help assess the risks posed by sexual offenders and this should in turn inform any risk assessment that my be carried out by a Chief Constable in reaching the decision to apply for an order. It is also a forum to discuss the need for a SOPO at the stage of the Social Enquiry Report for the courts.

The main effect on the Bill on the day to day work of children and families social work, schools and nurseries will be in the potential, through the right channels, to raise concerns about individuals suspicious sexual behaviour. This implies that there needs to be strong links to the police and criminal justice workers. The police and criminal justice workers are less likely to have the same exposure to children and families as these groups of professionals and so the thrust to work closer together is again, as in all child protection, a necessity. There is also the question of who will police these orders and it is the professionals and people directly involved with the children how are must likely to have the knowledge of the possible contact between the convicted person or the individual on whom an order exists. They will need to know that these convictions or orders are in place to be able to make informed decisions about passing on relevant information to the police and others. This begs the question of disclosure and all the human rights implications that are attendant on this.

Attached for further information is the response to the Executive’s consultation earlier this year, which can be fully quoted, as can any other parts of this response.
Question 1: Does the new offence set out in Section 1 of the attached draft bill achieve the object of ensuring that potential sex offenders meeting or travelling to meet a child following grooming behaviour can be prosecuted.

The offence is only committed when the intention to commit a 'relevant offence' is determined to have taken place. Behaviour of a sexual nature need not have taken place. It appears to me that this may in practice be difficult to ascertain unless the initial communication, on at least two occasions, is highly explicit or the act of meeting in a certain place or way can have no other interpretation. I feel this may have to be tested in court. How are you to know that the communication has taken place? Has the child told someone this is the case or has it has been intercepted by an adult monitoring the child’s or the potential offender’s communication. This must have implications for human rights and the use of the technology to do this. Monitors of chat rooms and the like have a duty to pass on such information. Grooming by definition is a behaviour that is not obvious to the child being groomed. It seems there may be a restricted number of instances where this could be an effective safety measure.

Question 2: Does the new offence strike the balance in criminalising activity, which involves grooming and then meeting or travelling to meet a child? Or should other activities comprise the criminal offence.

I feel the balance is right. The Act is clear that giving a false identity and the indulging in fantasy, which does not lead to any other contact, is not an offence. It is hard to see how one could criminalise these aspects of the grooming process unless they are used to deceive the child into meeting. It would then of course be an aspect of this offence. One would have to prove that the false identity in itself was clearly a precursor to meeting or intending to offend which may not always be the case. It may be argued that the giving of a false identity to communicate with a child is always potentially abusive but it may not be.

Question 3: Is the proposed penalty set at the right level?

It seems that the penalty is set at the right level.

Question 4: Is 18 years the right minimum age for the offender or should it be, for example 16.

The age limit of 18 years seems arbitrary in that 16 years is the clear age at which most other offences would be automatically dealt with through the adult justice system. If this is to keep a clear distinction between children and adults it may have some logic. The reality is that a 16 or 17 year old can offend in this way with a much younger child. It could be argued that they are less likely to or that liaisons between 16 and 17 year olds and younger adolescents are not necessarily or inherently abusive. These are potentially all children of school age. If a school pupil who is 16/17 years has committed an offence of grooming how do you manage the consequent risk they may pose or are at from others. This being the case I would agree that the minimum age of 18 years would seem appropriate to keep a clearer distinction between adolescence and adulthood.

Question 5: Would Risk of Sexual Harm Orders be a useful measure in preventing sex offences against children?

Where there has been a good level of inter-agency consideration of the potential risk of certain individuals then I feel that this order would be a reasonable measure to prevent sex offences against children. There may need to be guidance on how this consideration is to be arrived at and the use of risk assessment tools. The suggestion in the consultation is that an independent assessment could be commissioned but I do not feel that this would be necessary if there were clear guidance on how best to use these orders. Although ultimately a police decision I feel this must be informed by the inter-agency forums already in place to monitor sex offenders. Using expertise that has already been built up. The ability to able to be more prescriptive about the prohibition of behaviours that a person on whom the order is imposed is welcomed. The RSHO would be very useful in the management of some individuals perceived as high risk of sexual offending and preventing such offending taking place.
Question 6: Does the proposed list of trigger behaviour cover all relevant activities that might prompt application for a RSHO.

It appears that the Part 2 section 3 of this Act is not clear in terms of what constitutes the basis of the need for a RSHO. 3(a) and (b) appear to have the status of offence already whereas 3(c) and (d) seem to be more in the spirit of the Order. It feels as if this is too restrictive a list and may need to include other behaviour that could be construed by reasonable people as being the precursor to sexual contact. I feel that the inter-agency aspect of the risk assessment required should not be hampered by the restrictive nature of this list and that a more open interpretation is required.

Where there is evidence or intelligence to suggest that an individual has the potential to sexually offend against children without indulging in any of these behaviours the RSHO would be very useful. Examples of this are abused persons with subsequent predatory behaviour (potentially young men with other mental health problems) or someone who has spent a long time in institutional care and has shown a propensity to offend in this way. Other examples may be individuals who have in the course of therapy shown a desire or need to sexually offend against children.

Question 7: Should the use of Sexual Offences Prevention Orders be extended to allow them to be imposed at the time of sentencing?

It would appear to be wholly sensible to allow the SOPO to be imposed at the point of sentencing. The fact this could be part of the arsenal of the Social Enquiry Report writer allows for it to be considered in relation to other social factors. The need for a SOPO would be assessed at the same time to give a clear view of the management of risks as well as any other proposed penalty for the offence.

Question 8: Are there any other issues in relation to grooming a child for sexual exploitation that should be taken into consideration in the proposed Bill?

What would be the case if the adult and child meet after only one previous communication and all the other conditions had been satisfied for an offence in terms of the Act. Could this then be used as the evidence for the application for a RSHO where the intent to offend could be evidenced by no relevant offence has been committed.

Steve Clark
Child Protection & Family Support Co-ordinator
Children’s Services
Social Work
Stirling Council
16 December 2004

SUBMISSION FROM SOUTH LANARKSHIRE COUNCIL

South Lanarkshire Council welcomes this Bill. Whilst we acknowledge that the grooming of children using the internet has widened opportunities for stranger abuse, children are still more likely to be harmed by a relative, friend or someone that they trust. The message that the risk is not only from strangers needs to be restated.

Section 1 – Meeting a child following certain preliminary contact

Age of the Offender

The Bill states that the offence would be committed by “a person aged 18”. Research has indicated that a significant number of sexual offences are committed by young people below the age of 18 years with their offending behaviour no different to that of adult sex offenders. Consideration needs to be given to the circumstance of a young person ‘grooming’ another young person. We would therefore consider the minimum age should be 16.
Age of the Child

The Bill states that child is a “person aged under 16”. However, the Children Scotland (Act) defines a child up to 18 yrs. Consideration needs to be given to extending the defining age of child. The Bill does not acknowledge those children of 16 to 18 yrs who are very vulnerable for a whole range of issues, and who would be likely targets for sex offenders. Looked after children and those with a disability are two particularly vulnerable groups.

The Offence

The Bill tries to distinguish between those individuals who use the internet to contact children with no intention to ever arrange to meet a child, and those who set out with the intention to meet the child / young person. The grooming behaviour is not sufficient in itself for the offence to be committed. We are concerned about those individuals who seek to engage in contact with children for their own sexual gratification. While they may never move on to arrange a meeting with a child, their behaviour is likely to be inappropriate and potentially abusive and may have significant impact on the child.

The requirement for having communicated with the child on two separate occasions is prohibitive. A meeting can be set up with just one communication.

Evidence

It is welcomed that the evidence of the adult’s intention to commit an offence can be drawn from a wide range of circumstances and information. It is essential that the legislation allows for close scrutiny of the contact and for a picture to be created as to how the adult offender has targeted, manipulated and groomed the child to the point where the child agrees to meet.

Sentence

It is noted that the sentence in Scotland -10 years - will be different from England where maximum sentence is 14 yrs. We would wish to see consistency of sentencing across the UK, as we know sex offenders will travel significant distances to sexually abuse and exploit children and young people. An individual could travel from England to commit an offence in the knowledge that if he/she were caught they could potentially receive a lesser sentence for the offence in Scotland than in England.

The Bill makes no reference to those individuals who set up and groom a child on behalf of someone else. An individual could groom and set up meeting on behalf of another person who goes to meet the child, or they take the child to meet another individual.

We would be naïve, given the knowledge we have about the way offenders operate, to assume that individuals will not continue to find ways of circumventing the legislation and undertaking grooming activity. Experienced abusers are manipulative and are often able to exploit loopholes. This means that the law constantly requires to be kept up to date.

Sections 2 Risk of sexual harm orders: applications, grounds and effects

The Risk of Sexual Harm Order is a useful additional item and, as part of the preventative strategy, has the potential to assist in managing a range of concerning behaviour. Such an order will provide a clear marker to individuals and highlight concern about their behaviour. However the orders will be limited in what they will achieve given that it does not require the individual to undertake any activity to try to get them to tackle their behaviour.

Our view is that the Police should carry out the assessment along with other relevant statutory agencies who may both have information about the individual child and their circumstances, the alleged perpetrator and their circumstances and have the expertise in order to provide information that can help the Police decide whether or not to make an application.
Section 7

Offence: breach of RSHO or interim RSHO
While the Sexual Harm Order may potentially be useful to assist in defining and recording an individual’s behaviour, again it is unclear how such orders would be monitored.

Section 9

Prevention of sexual offences: further provision
The Sexual Offences Protection Order will also be useful. Grounds for the other two may be difficult to establish and therefore few people eligible for such an order.

Financial Implications: Costs on Local Authorities

The section outlining the financial implications of this Bill seems only to consider the impact on criminal justice social work. There will be implications for child protection work too. This Bill may identify a number of sex offenders not known to the criminal justice system – and children who may be vulnerable but who are not known to children and family teams.

The costs to criminal justice social work will indeed be that of social enquiry reports and risk assessments. However, there are also the costs of voluntary work with offenders not covered by Throughcare arrangements. If Social Work are going to do the level of work required with these individuals it must have properly identified funding. It does seem, however, that there has been no proper assessment of the cost of working with these sex offenders. Most authorities are already inadequately funded for this work and the system would struggle to accommodate additional pressures.

The legislation may also lead to subsequent child protection investigations and assessment regarding children who may be at risk. The successful conviction of the offender may not necessarily mean that the child will therefore be safe: they may continue to be vulnerable. For those who are then placed on the Child Protection Register, or require support further though not on the Register, Social Work may be required to carry out a range of interventions and support with the child and his/her parents or carers. This may also include assessments and reports for the Children’s Hearings System. Again, these extra burdens may be difficult to meet, given the pressures currently on staff, and may require further financial resources.

Sandy Cameron
Executive Director
South Lanarkshire Council
24 December 2004

SUBMISSION FROM YOUTHLINK SCOTLAND

YouthLink Scotland is the national youth work organisation for Scotland. We support the development of accessible, high quality youth work services which promote the well-being and development of young people. We are a national voluntary organisation working with both statutory and voluntary bodies. YouthLink Scotland welcomes the opportunity to submit evidence to the Justice 1 Committee’s Stage 1 inquiry into the general principles of the Protection of Children and Prevention of Sexual Offences (Scotland) Bill (“the Bill”). YouthLink Scotland, and our member organisations, work directly with young people, and child protection is a key aspect of our work. YouthLink Scotland’s evidence draws on our own experience of working with young people through our project work at Polmont Young Offenders’ Institution and in projects such as Route 98, Young Roots and YouthBank, and on the wide ranging experience of our member organisations of working with young people, including vulnerable young people and those most at risk of harm. YouthLink Scotland’s evidence raises a number of general issues which we believe are central to protecting children and young people from sexual harm, as well as addressing some issues relating to specific aspects of the Bill.
General

YouthLink Scotland believes that protecting children and young people from sexual harm is of paramount importance. We, therefore, welcome the introduction of the Bill, which will make it an offence for an adult aged 18 or over to sexually groom a child under the age of 16. YouthLink Scotland further welcomes the Scottish Executive’s commitment to ensure that the provisions of the proposed Protection of Children from Sexual Harm (Scotland) Bill will be similar to those adopted in England and Wales under the Sexual Offences Act 2003. This will help to make a significant contribution to tackling child abuse on a UK wide basis.

The need for such legislation is underlined by recent statistics which reveal the growing problem of Internet abuse and child pornography. Figures produced by BT, for example, confirm that it is blocking up to 10,000 attempts each day to access child pornography; BBC Internet News, 21/9/04. There is also significant evidence that paedophiles are adopting false identities to access Internet chat rooms for young people in order to ‘groom’ young people, and to sexually abuse them. The dangers of paedophiles using the Internet to abuse children is underlined by a survey conducted by NCH Scotland which suggests that nearly half (46%) of parents in Scotland do not believe that the Internet is dangerous for their children, while 52% admit they allow their children to surf the Internet unsupervised; BBC Internet News, 9/6/04. This lack of awareness could place more children at risk of abuse by paedophiles. Against this background, Barnardo’s Scotland, one of YouthLink Scotland’s member organisations, and organisations such as NCH Scotland, have been at the forefront of recent attempts to promote the safety of children online. YouthLink Scotland believes that the implementation of the Bill should be accompanied by measures to increase the safeguards for children online, and to raise parents’ awareness of the sort of dangers which can arise from unrestricted Internet access.

The criminal offence

YouthLink Scotland considers that the new offence strikes the right balance in criminalising “sexual grooming of a person under 16 by an adult aged 18 or over”; Protection of Children and Prevention of Sexual Offences (Scotland) Bill, Explanatory Notes. We also support the proposal that the proposed new offence can be prosecuted before any actual physical or other offence takes place. YouthLink Scotland takes the view that this will provide an important safeguard to protect children from sexual harm.

Penalties

We note that anyone found guilty of the offence is liable to punishment of six months’ imprisonment and/or the statutory maximum fine under summary procedure, or to an unlimited fine and/or 10 years imprisonment on indictment. YouthLink Scotland takes the view that anyone convicted of this offence should be treated with the utmost severity by the Courts, given the high degree of premeditation, and breach of trust, which characterises paedophiles’ grooming of children for sexual abuse. The Courts should take the same considerations into account where Risk of Sexual Harm Orders (“RSHOs”) or Sexual Offences Prevention Orders (“SOPOS”) have been breached, and reflect this in their sentencing.

Minimum age for the offender

YouthLink Scotland takes the view that this is a complex issue, particularly as it raises a number of issues around the age at which a young person will be treated as an adult under Scots law. The age of sexual consent is 16 in Scotland, and the Bill proposes that an offence will be committed where an ‘adult’ aged 18 years of age or over grooms a child who is under 16 for the purpose of sexually abusing that child. Against this background, it would be useful to have clarification of how the Bill will consider the position of a person aged 16 or 17 who has been groomed for sexual abuse by an adult over a number of years, and where the offender is only arrested after the victim reaches the age of 16 or 17. YouthLink Scotland believes that this significant issue merits further consideration by the Justice 1 Committee.
The role of Risk of Sexual Harm Orders (“RSHOs”)

YouthLink Scotland notes it is anticipated that RSHOs will assist the police to impose early restrictions on those persons believed to be a risk to the safety of our children. We further note that it is not intended RSHOs should act as a substitute for a criminal offence. We would, however, welcome further clarification through the Justice 1 Committee’s Stage 1 consideration of the Bill of the type of situations in which a Chief Constable is likely to apply for an RSHO. In particular, it would be helpful to clarify the circumstances in which a Chief Constable will apply for an RSHO against someone who has groomed a child for sexual abuse, instead of seeking the commencement of criminal proceedings to convict the offender? Given the premeditation and breach of trust by paedophiles involved in the grooming of children for sexual abuse, and the pain and suffering experienced by the victims and by the victims’ families, the concern is that RSHOs should not simply be used as an inadequate alternative to seeking the conviction in the Courts of someone who is a risk to children. This could cause the victims further pain and distress, as well as placing other children at risk.

Furthermore, if an RSHO is to be applied for, instead of seeking the conviction of the offender by the Courts, YouthLink Scotland considers that the Chief Constable should be required, as part of any application for an RSHO, to specify the resources which will be made available to ‘police’ the offender’s compliance with the RSHO. Failure to ‘police’ these orders effectively could place more children at risk of sexual harm.

YouthLink Scotland also suggests that further thought must be given to requiring applications for an RSHO to include an outline of the type of lies and deceit, including the adoption of a false identity and age, used by the offenders to deceive their victims, and to perpetrate the offences. We believe that these factors are significant evidence of the offenders’ premeditation, and should be taken into account by the Court in determining whether an RSHO, rather than commencing criminal proceedings, would be an appropriate remedy against the offender.

The use of Sexual Offences Prevention Orders (SOPOs)

YouthLink Scotland believes that Courts should be allowed to impose SOPOs at the time of imposing sentences. As with RSHOs, we believe that adequate resources must be put in place to ‘police’ offenders’ compliance with SOPOs.

Support for victims

YouthLink Scotland welcomes the emphasis in the Bill on punishing those who are guilty of grooming and sexually abusing children and young people. We believe, however, that the proposed legislation must also be accompanied by effective support measures for those who have been sexually abused. The victims of these dreadful crimes must not be forgotten.

Robert McGeachy
Senior Development Officer (Policy & Parliamentary)
YouthLink Scotland
21 December 2004

SUBMISSION FROM YOUTHLINK SCOTLAND

I am writing to thank you for inviting YouthLink Scotland to attend the Justice 1 Committee’s recent seminar focusing on the Protection of Children and Prevention of Sexual Offences (Scotland) Bill. YouthLink Scotland staff attending the seminar found it very helpful in clarifying the key issues around the Bill, and in providing an opportunity to exchange information with colleagues from other agencies.

During the seminar you mentioned that the Justice 1 Committee would welcome further written representations on any of the issues arising out of the seminar. In this respect, YouthLink Scotland would like to provide the Justice 1 Committee with the following additional information, which complements the evidence we have already submitted to the committee. YouthLink Scotland hopes
that the Justice 1 Committee will find our comments helpful. We would, of course, be willing to provide the Committee with further information or input upon request.

The Interface between key Legislation

YouthLink Scotland, and our member organisations, work directly with young people, and child protection is a key aspect of our work. One of YouthLink Scotland’s concerns is the need for specific recognition within the Protection of Children and Prevention of Sexual Offences (Scotland) Bill (“the Bill”) of the interface between its provisions, and those of the Protection of Children (Scotland) Act 2003 (“POCSA”). This interface was not apparent from the seminar, and YouthLink Scotland believes it would be helpful if the committee’s Stage 1 scrutiny of the Bill’s general principles could address this issue. YouthLink Scotland’s concern is that, unless there is a proper fit between the two pieces of legislation, there is a real risk of loopholes being created which could result in children and young people being harmed, or placed at risk of harm.

Under POCSA, Scottish Ministers are responsible for creating and maintaining the List of Those Disqualified from Working with Children List (“the Disqualified from Working with Children List”). Employers who discipline or move a person from a child care position because they have harmed a child, or placed a child at risk of harm, must refer that person to the Disqualified from Working with Children List. It will be an offence for an organisation or agency working with children to allow someone on this list to work in a child care position. In effect, to avoid committing an offence under POCSA, organisations must obtain Disclosures for all staff (paid and unpaid) working in child care positions. It will also be an offence for a person on the Disqualified from Working with Children List to seek work in a child care position. YouthLink Scotland considers that the interface between the Bill and POCSA will be particularly important in relation to the Courts’ granting of Restriction of Sexual Harm Orders (“RSHOs”).

YouthLink Scotland believes it is vital that the Disqualified from Working with Children List, and the judicial process, should adopt a consistent approach towards those who have harmed a child, or placed a child at risk of harm. A key issue in this respect is the definition of “harm” to a child under POCSA requiring a person’s referral to the Disqualified from Working with Children List, and the offending behaviour where a child has been harmed or placed at risk of harm which triggers an application for an RSHO under the Bill.

Section 18 of POCSA provides that “harm includes harm which is not physical harm”. Furthermore, the guide and training and guidance pack on POCSA which was commissioned by the Scottish Executive and prepared by a consortium, including YouthLink Scotland, for the voluntary sector clearly states:

“This means that “harm” would not only cover the deliberate infliction of physical or mental harm but also where harm resulted, or might have resulted, from a degree of carelessness or neglect which amounted to misconduct”; Protecting Children and Young People, A Guide and Training Pack for the Voluntary Sector.

Significantly, Section 2(3) of the Bill provides that the following acts will trigger an application for an RSHO:

- engaging in sexual activity involving a child or in the presence of a child;
- causing or inciting a child to watch a person engaging in sexual activity or to look at a moving or still image that is sexual;
- giving a child anything that relates to sexual activity or contains a reference to such activity;
- communicating with a child, where any part of the communication is sexual"

The triggers for a referral to the Disqualified from Working with Children List under POCSA, and for an application for an RSHO under the Bill, would appear to be closely aligned.
Reflecting this, under POCSA a person who has harmed a child, or placed a child at risk of harm and removed from their child care post, must be referred to the Disqualified from Working with Children List. This would be likely to cover the sort of offending behaviour triggering an application for a Restriction of Sexual Harm Orders (“RSHOs”).

Under POCSA referral to this list can be made by employers who have disciplined a person, or moved them from a childcare position, or by the Courts at the time of sentencing. This raises the issue of whether a person subject to an RSHO would automatically be referred to this list, or if other processes would apply. Will, for example, such a referral be made by the Sheriff as a matter of course when granting the RSHO, or would the referral only occur when the person has been placed upon the Sex Offenders’ Register? Specifying the procedures which will apply in the Bill, would provide useful clarity for agencies working in the area of child protection, as well as adding further safeguards to protect the welfare of children. We believe that the interface between POCSA and the Bill, and in particular between the granting of an RSHO or an interim RSHO against a person, and their referral to the Disqualified from Working with Children List, should be clearly stated on the face of the Bill.

Applications for RSHOs

We note that Section 2(3) of the Bill provides that the offending behaviour which can trigger an application for an RSHO includes “(a) engaging in sexual activity involving a child or in the presence of a child”. YouthLink Scotland is aware that an RSHO will be a civil order. We would, therefore, welcome clarification by the Scottish Executive and by the Justice 1 Committee of the approach which will be taken by the courts against someone who has engaged in sexual activity involving a child, or in the presence of a child. In particular, when will a Chief Constable seek an RSHO, rather than a criminal conviction against such a person? Given the gravity of such offending behaviour, and the pain and suffering caused to the victims, it is unclear how imposing a civil order on the offender could afford greater protection to safeguard the welfare of children and young people, than seeking a criminal conviction against that person.

Furthermore, if the courts do decide to impose an RSHO, rather than seeking a criminal conviction, in the case of someone accused of the sort of offending behaviour identified in Section 2(3)(a), the issue then arises of what resources will be available to help the police monitor and enforce the RSHO. The provision of sufficient resources will be essential if RSHOs are to protect children and young people from harm or the risk of harm. In this respect, YouthLink Scotland would like to reiterate the point made in our evidence that a Sheriff, when deciding whether an RSHO would be more appropriate than commencing criminal proceedings, should consider the level of resources which will be available to ‘police’ the RSHO.

The Provision of Sexual Health and Wellbeing Education

A key issue raised by one of our member organisations, Fairbridge in Scotland, is that youth workers and other professionals involved in promoting education on sexual health and wellbeing could innocently fall foul of the Bill. Fairbridge in Scotland’s concern focuses on the fact that some staff members working with young people may, in conducting workshops on sexual health and wellbeing, take condoms to such meetings. YouthLink Scotland takes the view that the Scottish Executive must produce clear statutory guidance focusing on the “intent” required to convict someone for an offence under the Bill. Such guidance should also address situations where, for example, youth workers are providing sexual health and well being education or advice. Ensuring that any such guidance cross-refers to the Scottish Executive’s Sexual Health and Wellbeing Strategy would greatly assist this process.

Support for the victims

YouthLink Scotland wishes to underline the issue raised in our evidence, and by our staff at the seminar, that the enactment of the Bill should be accompanied by the introduction of a package of measures to support the victims of sexual abuse.
Internet Safety

YouthLink Scotland also wishes to reiterate the issue we have raised previously with the Justice 1 Committee that the Scottish Executive should continue to highlight the importance of Internet Safety as a priority. This would help to raise awareness amongst children and young people and their parents about the potential dangers of unrestricted Internet access. It would also increase the safeguards against ‘grooming’ behaviour by paedophiles through the Internet.

Please do not hesitate to contract if you require more information, or would like to discuss this matter further.

Joan Fraser
Chief Executive
Youthlink Scotland
2 February 2005
I have now had a chance to read the comprehensive stage 1 report your Committee has produced on this Bill. Clearly there are a number of issues where the Report makes valuable and constructive points and where we will need some time to consider before making a response. I am though writing now in an endeavour to address those issues where you have specifically asked for a response from the Scottish Executive before the stage 1 debate next Thursday, 17 March. I hope we can be helpful in this response, but given the shortness of the time available before the debate, I should say that the answers in this letter may not represent our concluded views and may require some further consideration.

I will deal with the issues where you specifically ask for a response, in the order in which they appear in the Report.

**Exemption for married couples in relation to the section 1 offence**

We remain of the view that there is no ECHR requirement for a marriage exemption in section 1. As we have stated previously, the Crown will always take the circumstances of individual cases into account and consider whether it is in the public interest to prosecute. The Committee have rightly emphasised the importance of ensuring that there are no loopholes in the offence. We believe that the insertion of a marriage exemption would have the potential to create a loophole that could be exploited by persons grooming children from Scotland who claim that their ultimate intention is to marry the child whom they are grooming. It would also weaken the protection offered in Scotland compared to that provided in England and Wales (c.f section 15 of the Sexual Offences Act 2003).

**Sex offenders acting in concert to avoid any one individual carrying out all the required elements of the section 1 offence**

The Report expresses concern that would-be perpetrators could act together in order to avoid any one individual carrying out all the required elements of the section 1 grooming offence. The Report suggests that the formulation of s14 of the Sexual Offences Act 2003 (SOA) might be a useful model. Our view is that attempts to commit the section 1 offence, conspiracy to commit the offence and aiding and abetting the commission of the offence will all themselves be offences. I cannot envisage any circumstances where people act together in the way suggested which will not fall within one of these categories. I should also point out that s14 SOA does not cover the equivalent grooming offence in England and Wales.

**The section 1 offence should include situations where child does the travelling**

In my view it is important that the elements of the offence are actions for which the accused has responsibility. It would not be right for the offence to become complete when a child decided to travel, possibly without any knowledge on the part of the accused. I am sympathetic however to the proposition that we could include situations where the accused had made arrangements for the child to travel to meet him or her, and will consider this further.
**Burden of proof re reasonable belief of age of child should be on accused**

We have consulted Crown Office on this matter. They are satisfied with the existing provisions relating to belief as to age. They consider it important that, in the interests of justice, persons are not convic ted of the section 1 offence if they believed, *on reasonable grounds*, that the child was over the age of 16. It should be noted that the belief of the accused regarding the age of the child must be reasonable. In other words, a reasonable person would have reached the same view as the accused regarding age.

**Representation at hearing for interim RSHO**

The Report asks the Executive to clarify the position on whether a person who is the subject of an application for an RSHO would always have the right to representation at any hearing for an interim order. As we have already made clear, as matters stand this would be an issue for the sheriff before whom the hearing was held. The sheriff would require to ensure that the proceedings were compatible with the ECHR. He or she could allow an interim order to be heard without representation on the part of the person against whom the order was sought, but this would need to be justifiable in terms of the urgency of the application and is likely to be an extremely rare situation. I will consider the position on this further.

**Primacy of criminal proceedings should be made explicit on the face of the Bill, so that criminal proceedings are not contaminated by civil proceedings.**

We are quite clear that where, according to normal Crown Office procedures, there is sufficient evidence that a criminal offence has been committed, then a criminal prosecution is the proper way to proceed. However, there may be risks in the approach proposed by the Committee. For example, the sort of provision proposed could have the effect of preventing criminal proceedings after an application for an RSHO had been made. This would be an unwarranted fettering of prosecutorial discretion. We prefer an approach where all the relevant agencies, including the police and the Procurator Fiscal, together decide the best approach in the light of the evidence. It may well however be useful for protocols to be produced to reduce the risk of contamination of evidence.

**Executive to review its position re Disclosure of RSHOs as part of its examination of wider issues relating to disclosure in light of the Bichard recommendations.**

The handling of RSHOs with regard to release through Enhanced Disclosure has already been made clear in evidence submitted to the Committee. We have also indicated that the Executive is currently reviewing disclosure generally and will be taking this forward as part of the work in following up the Bichard recommendations. This work on Bichard will necessarily include consideration of what is released in disclosure checks including RSHOs.

**Publication of the intended amendments to the Bill on child pornography and child prostitution**

I regret to say that we will not be ready before stage 1 to publish the text of the amendments we intend to lodge at stage 2. These are important provisions and so, as I am sure you will agree, it is important that we get them right. I appreciate the difficulties the lack of actual provisions has caused you in collecting evidence, and can assure you that we will provide the text of these amendments as soon as possible, and do our best to work with the Committee during the course of stage 2 to help in the collection of evidence.
Parliamentary procedure in relation to section 1(5)

I note your comments on the Parliamentary procedure in relation to the subordinate legislation power at section 1(5). We have carefully considered the comments of the SLC on this matter, but we remain of the view that this is a routine use of subordinate legislation and that the negative procedure is appropriate. This power enables Ministers to add or subtract from the list of offences in the schedule to the Bill in order that the grooming offence continues to take account of the range of sexual offences in Scots law. The use of this power would not allow substantive changes to the grooming offence. Under section 1(1)(b) it will still be necessary for the person committing the grooming offence to intend to do something to or in respect of the child which will constitute an offence.

Hugh Henry MSP
Deputy Minister for Justice
16 March 2005
Note: (DT) signifies a decision taken at Decision Time.

**Protection of Children and Prevention of Sexual Offences (Scotland) Bill:** The Minister for Justice (Cathy Jamieson) moved S2M-2353—That the Parliament agrees to the general principles of the Protection of Children and Prevention of Sexual Offences (Scotland) Bill.

After debate, the motion was agreed to ((DT)).

**Protection of Children and Prevention of Sexual Offences (Scotland) Bill: Financial Resolution:** The Deputy Minister for Justice (Hugh Henry) moved S2M-2227—That the Parliament, for the purposes of any Act of the Scottish Parliament resulting from the Protection of Children and Prevention of Sexual Offences (Scotland) Bill, agrees to any increase in expenditure of a kind referred to in Rule 9.12.3(b)(iii) of the Parliament’s Standing Orders arising in consequence of the Act.

The motion was agreed to (DT).
Protection of Children and Prevention of Sexual Offences (Scotland) Bill: Stage 1

The Deputy Presiding Officer (Murray Tosh): The next item of business is a debate on motion S2M-2353, in the name of Cathy Jamieson, on the Protection of Children and Prevention of Sexual Offences (Scotland) Bill.

15:35

The Minister for Justice (Cathy Jamieson): There is no doubt that any offence that involves harm being done to a child is despicable, but it is hard to imagine anything more despicable than sexual offences that are committed against children. Such offences are particularly horrific and, as well as resulting in physical harm, they can inflict emotional damage that lasts a lifetime. Every time that parents or carers who are trying to help young victims to rebuild their lives after sexual abuse find out through the media that another offence has been reported, they experience renewed horror. Sadly, in those tragic situations in which children have been murdered by sex offenders, families often feel that they are the ones who are serving the life sentence, in that they are reminded of their loss every day.

I have met many children and young people who have survived abuse, as well as parents whose children have been abused or abused and murdered. I pay tribute to all of them for their courage, because that courage has helped us to learn lessons about the need to introduce legislation. In inviting the Parliament to agree to the general principles of the Protection of Children and Prevention of Sexual Offences (Scotland) Bill, I want every member to remember the experiences of those parents, to resolve to do everything that they can to ensure that we make it harder for the people who seek to abuse our children and to continue to put the protection of innocent children first.

I will say a few words about the bill’s content. Section 1 deals with grooming. Members will be aware that an act of grooming occurs when an adult befriends a child and uses various methods to gain their trust so that they can persuade the child to get involved in a situation in which he or she can be sexually assaulted. Sometimes that grooming is done face to face—the adult might make friends with the child and spend time with them to win their confidence—but, increasingly, sex offenders make use of internet chat rooms to groom their victims so that they can carry out their despicable acts. We must protect our children from that threat, regardless of how it is intended that the offence will be committed.

It is important to record the fact that Scots law is already capable of dealing with many instances of so-called grooming behaviour. However, as we know that sex offenders are extremely adept at avoiding detection and skilled in creating situations and manipulating them to their advantage, we need to ensure that there are no gaps in the law that can be exploited by predatory sex offenders. Our proposed provisions mean that anyone who uses grooming techniques to take certain steps towards sexually assaulting a child will be committing a serious offence that carries a penalty of up to 10 years’ imprisonment. Someone will be guilty of that offence before they have caused any physical harm and possibly even before they have met their intended victim. That is the new offence.

The bill goes even further than that in an effort to protect our children. Child protection professionals know of cases in which it is reasonable to suspect that someone is a risk, in that their behaviour is likely to lead to their sexually harming children or a particular child. I well recall that from my time in social work. Such people may not be committing an offence, but they may well be acting in a sexually inappropriate way—a way that suggests that the commission of a sexual offence might be just round the corner. For example, if there was evidence that an adult was encouraging a child to watch pornographic videos, although—depending on the circumstances—that might not amount to a criminal offence, it would undoubtedly give rise to genuine concern about that adult’s motives and potential future behaviour. The fact that such a person is not committing a sexual offence cannot mean that we should simply wait until such an offence is committed before we intervene.

In such cases, once a chief constable has made an application, the courts will be able to impose a risk of sexual harm order, which will place restrictions on the adult concerned in order to protect a particular child—or children in general—from being sexually harmed by that adult. The restrictions could be used to prevent the adult from having contact with a particular child or from hanging around outside schools or sports centres. The court will be able to place any restriction on the adult that it considers to be necessary to protect the child or children from sexual harm. Again, we are taking action to use the law in a proactive way to prevent real and lasting damage from being done to our children.

Christine Grahame (South of Scotland) (SNP): Evidence from the Association of Scottish Police Superintendents, or possibly it was from the Association of Chief Police Officers in Scotland, raised the concern that, although a 15-year-old could be predatory on a younger child, the older child would not fall within the remit of the bill. I see nothing in the deputy minister’s letter of 16 March
to the Justice 1 Committee that deals with that issue.

Cathy Jamieson: A number of issues are involved, including the definitions of a child and an adult. We will come to those issues during the debate and when we examine the bill in more detail at stage 2. The important thing to recognise in that respect is that the Executive wants to put in place a number of measures that have the potential to complement the existing legislation and allow us to fill some of the gaps.

The bill will extend the use of sexual offences prevention orders so that children, and adults, can be better protected. At the moment, sexual offences prevention orders can be imposed on people who have previously been convicted of an offence with a sexual element and who continue to demonstrate sexually risky behaviour to children or to adults. The orders have been used successfully in Scotland, but the need to wait for further evidence of sexually risky behaviour after the conviction of the offender is clearly a limitation on their use. Under the new provisions in the bill, when the court is sentencing an offender for a sexual offence and it considers that the offender remains a risk of sexual harm, it will be able to impose a sexual offences prevention order there and then, without having to wait for the offender to demonstrate further risky behaviour.

Margaret Mitchell (Central Scotland) (Con): Will the minister give way?

Cathy Jamieson: I am sorry, but I must move on.

The order will require the offender to stay away from the people or places that are associated with previous offending or, for example, from the internet if they used that method to access victims or unlawful pornography.

The time that remains to me is short, but I want to mention one further issue. As the Justice 1 Committee is aware, we propose to lodge amendments to the bill that will further extend the protection of our children from the risk of sexual harm. We propose that the current statutory offences in relation to indecent photographs of children under the age of 16 are extended so that they cover teenagers up to the age of 18.

Although we recognise that 16 and 17-year-olds have the right to carry on sexual relationships, we are also aware that at that age young people are vulnerable to exploitation. We are determined to do all that we can to protect our young people from those who would seek to abuse and exploit them.

For those reasons, we propose new offences in relation to purchasing sexual services from children under 18. That will mean that those who use or seek to use child prostitutes, or who otherwise seek to exploit young people by paying for or rewarding sexual acts, will be committing an offence. Those proposals are part of a package of measures that the Executive is putting in place to protect our children more generally. Our proposed amendments will also bring us into line with the United Nations Convention on the Rights of the Child and with the requirements of European law.

I commend the members of the Justice 1 Committee for their work in gathering evidence and getting to grips with some of the difficult issues in the bill. I know that we all share the objective of strengthening the law in accordance with the principles of fairness and justice that are associated with Scots law, while at the same time providing the strongest protection for our children. I believe that the bill will achieve that objective.

I move,

That the Parliament agrees to the general principles of the Protection of Children and Prevention of Sexual Offences (Scotland) Bill.

15:44

Stewart Stevenson (Banff and Buchan) (SNP): The Scottish National Party will support the general principles of the bill at decision time. A reading of the introduction to the bill leads me to say that it would be a very brave person who would seek to oppose the general principles of the bill.

The SNP will work hard to improve the bill as it progresses through the Parliament. We believe that the bill misses the mark in a number of important ways and we are not alone in thinking that that is the case. The Justice 1 Committee report highlighted many issues, and I hope that the Executive will work with the committee and individual members in dealing with them. I commend Hugh Henry, the Deputy Minister for Justice, for writing to the committee last night in response to its various requests for information, although he had to acknowledge that a number of points continue to be considered. That was a proper response from the minister—let us hope that that spirit of co-operation and collaboration will continue.

I share with members the alarm that I felt—I think that “alarm” is the correct word, and I believe that my committee colleagues felt the same—when officers of the national hi-tech crime unit gave us some insight into their work to protect children in internet chatrooms. I had never visited an internet chatroom before, so it was all a new experience to me.

The officer who showed us what goes on there was definitely not participating in a set-up. He went on to Google, asked for “teen chat” and
picked the first chatroom that came up. We went into that chatroom with the officer who, for the purposes of the interaction, had the handle, if I recall correctly, of “Linda13” to suggest that he was female and 13 years old. He joined the online conversation, playing the role of the tethered goat for the internet jackals. Within about four minutes—shorter even than the speech that I am making—sexually explicit responses were being received. Clearly, there is an issue to be addressed—of that there is no question.

It was disappointing that the drafters of the bill did not ensure the earlier involvement of the national hi-tech crime unit. However, the unit is involved now; it is fully engaged and its contribution will be very valuable.

One of the things that looking at that chatroom showed us was that there is scope for harm in the grooming process itself, even if it goes no further. We heard that there are people out there whose gratification comes from the grooming process. I will be open and honest and say that I do not have a suggestion on how we legislate for that, but we should try, as the bill progresses, to find a way of doing so, because the bill does not quite go far enough. Furthermore, the police and others tell us that the bill’s complexities may well severely limit its effectiveness.

In his recent letter, the deputy minister appeared to think that the committee’s concerns about paedophiles operating in concert may have been misplaced. The English legislation, in many ways, is drafted in a superior way to the bill that is before us. The Sexual Offences Act 2003 says:

“A person commits an offence if ... he intentionally arranges or facilitates something that he intends to do, intends another person to do, or believes that another person will do”.

The interoperation of these very cunning people is caught by the 2003 act, and our eventual act would be better if it included something similar. Conspiracy there might be, and there might well be societal offence, but legal recourse under the bill as drafted seems doubtful. The offence does not exist unless all the components exist. Even though there might be a conspiracy to undertake all the bits of the offence, unless they are committed together, I am doubtful that an offence would be committed under the bill.

I will talk briefly about the matter of age. Line 6 of page 1 of the bill says that an adult is “abduction of girl under 18 for purposes of unlawful intercourse”.

The bill does not add a new offence unless the girl is under 16 and the offender is over 18. The opportunity to get defence from the bill is not provided by what is currently written in it.

The imposition of 18 as the age at which the offence can be committed risks excluding dangerous sexual predators who might, from the age of puberty, be committing the sort of behaviours that we are seeking to deal with. I am not saying that such people should go anywhere other than the children’s panel, but we should try to amend the bill to provide the support that victims of young sexual predators might need.

I ask the minister to examine section 14 of the Sexual Offences Act 2003, which has much to commend it. Police forces south of the border believe that that section is of more use to them than section 15 of that act, which is similar to section 1 of our bill. I hope that the minister will pay close attention to that.

15:50

Margaret Mitchell (Central Scotland) (Con): A number of times when a bill has been introduced, I have questioned its value or opposed it outright on the grounds that it is unnecessary or counterproductive, but I am happy to say that that is not the case today. I warmly welcome the principles of the bill, which is divided into three distinct elements.

Section 1 creates a new offence of meeting or travelling to meet a child with the intention of committing a criminal offence. Its introduction fills a crucial gap in Scots law, in that it covers the act of grooming with the intention to meet a child for an illegal sexual purpose that is not covered by either lewd, indecent and libidinous practice or fraud. I have argued for that measure for a long time and therefore very much welcome the fact that the Executive has changed its position and taken the decision to introduce the measures in section 1, despite having earlier deemed them unnecessary. I consider that to be a sign not of weakness, but of strength; it is indicative of a legislature that is growing in maturity, which can only be good for devolution.

However, although section 1 will raise awareness of the disturbing problem of sexual grooming as well as sending out a strong message that that kind of behaviour will not be tolerated—the value of those actions should not be underestimated—the section does not criminalise grooming per se, so it may not result in the prosecution of many of those who present a serious threat to our children. The prevalence of the threat is not in doubt, as the evidence of
Rachel O’Connell and the national hi-tech crime unit all too alarmingly testified. In order that our children have every possible protection, I urge the minister to reconsider again the committee’s recommendation that an offence of breach of the peace be included in the schedule. That would allow charges to be brought against a person who grooms a child via the internet when the communication is clearly of a sexual and inappropriate nature. Crucially, it would eliminate the necessity to prove that the person was travelling with intent to meet their victim.

I urge the minister to revisit other issues. First, on the requirement to have communicated on at least two occasions, evidence from the Law Society of Scotland, ACPOS and others points out that grooming could occur during one session. Secondly, on the onus of proof in respect of reasonable belief, I ask the minister to clarify whether she favours the onus of proof lying with the Crown or, as the committee favours, with the accused.

I welcome the fact that the minister has indicated that she will re-examine the issue of the offender’s age. The majority of those who gave evidence favoured 16 as the minimum age for the offender. That was the position in my proposal for a member’s bill, but, having listened to the evidence and arguments in favour of not specifying an age limit, I have been persuaded that that would be preferable, as it would cover the situation in which, for example, a 15-year-old groomed a 10 or 12-year-old.

Section 2 will introduce risk of sexual harm orders, the implementation of which will involve complex legal issues. The minister has addressed some of those issues, but I invite her to reconsider the following points. First, the standard of proof that will be required for an RSHO is the civil standard—that is, the balance of probabilities—as opposed to the higher criminal standard of beyond reasonable doubt. The rationale that lies behind that measure is, I believe, that the higher standard is used only with criminal offences, or when the accused might directly lose their liberty. However, that does not take into account the fact that a breach of the RSHO will lead to a loss of liberty as part of the process. In the light of the Constanda case, I urge the minister to reconsider that issue.

Secondly, I ask the minister to consider the test for interim RSHOs, which, given the potential consequences of such an order’s imposition, should be the same as the test for full orders—an interim order should be given on the basis of necessity and not on the basis of the lesser test of its being just so to do. Thirdly, I would welcome clarification of exactly when and where RSHOs would be used. For example, I seek confirmation that they might be used following a not guilty or not proven verdict, as was suggested in evidence to the committee. Last, I would like more information about how the orders will be monitored.

There is limited time available, which is regrettable; as a result, it is not possible for me to cover the many issues that I would have liked to highlight, including those surrounding disclosure, admissibility of evidence and stigma. I will say merely that the bill has many worthwhile aspects, which have the potential to make a difference to the protection of children. I look forward to hearing the deputy minister’s response to the issues that I have raised.

15:56

Mr Jamie Stone (Caithness, Sutherland and Easter Ross) (LD): As I joined the Justice 1 Committee only recently, my comments will be largely from my viewpoint.

It is, first and foremost, in the interests of society to care for our children and keep them safe. Children are vulnerable individuals who are not yet fully developed and childhood is a fragile stage of life that is fundamental to personal development and to future society. Young people are a reflection of the previous generation, so to allow harm to come to them is self-harm and is criminal. Therefore, it is right that the issue dominates contemporary society. All members accept that the increased risk of sexual harm to children must be addressed and resolved, which is why members from all parties support the bill.

Internet chatrooms provide an ideal hunting ground for sexual predators and paedophiles. As technology has developed rapidly, no existing laws adequately prevent criminal activity from being committed on the internet. Unfortunately, sex criminals can manipulate the internet and use it to target children, which is potentially extremely damaging to the many children who use chatrooms and internet diaries. It is the Parliament’s job to address social needs and to protect and care for young people consistently, in all matters, but especially in the matter that we are discussing.

As we have heard, children are constantly at risk from paedophiles on the internet. As Stewart Stevenson said, it is easy for predators to deceive children and convince them to meet. A need has been expressed for new legislation on the process of grooming, because the current legislation does not deal adequately with the problem and its effects. Too often, children are abused and sex predators go free to offend again, which is utterly unacceptable and demonstrates the need for new legislation. Adults often exhibit inappropriate behaviour towards children that causes law
enforcement agencies to fear the possibility of predatory criminal tendencies in that person. However, under current law, nothing can be done until a crime has been committed and proven, by which time the harm will probably have been done. In this instance, the law as it stands does not allow us to protect our children.

Concern has been expressed from several quarters that the effects of section 1 will be minimal at best. The current stipulations may make conviction unlikely, as the offender must meet or plan to meet a child before a case can be made and the state must then prove intent to commit a crime. However, the point is that if just one child is protected or one paedophile is deterred from using the internet to hunt for victims, the bill will be a success, because one tragedy will have been averted.

My main concern, which is shared by other members, concerns the damage that a risk of sexual harm order could do to an innocent adult, especially as the level of evidence that will be required for such orders is significantly less than that which is required in standard criminal proceedings. We must, at all costs, ensure that a desire to protect our children does not cause us to infringe on the rights of other citizens. That aspect of the bill must be examined still more closely, with a strong focus on preserving the rights of individuals. As long as that is kept in mind, I can see no reason why a balance between the two cannot be reached.

The point that I am making is crucial. I am sure that, in our constituencies, all of us have heard a rumour being put around that someone is a paedophile. Often, of course, that rumour is not true but it could be damaging; it could destroy an innocent adult’s life just as much as an innocent child’s life can be ruined for ever by a paedophile.

The current law in Scotland does not recognise all the potential dangers to children. What is more, the law enforcement agencies have little room to work within the law while trying to protect children from paedophiles. Our job is to try to remedy the deficiencies of Scots law. The Protection of Children and Prevention of Sexual Offences (Scotland) Bill provides us with the opportunity to do that.

I acknowledge that the Justice 1 Committee—before my time on it—highlighted some concerns about the bill that will have to be addressed at a later stage. However, every member of the committee fully supports the intention behind the bill and its justifications. This bill is in everyone’s interest, most of all that of the children of Scotland.
them all, but I will comment on risk of sexual harm orders. I understand that the aim of the introduction of RSHOs is to prevent acts that would cause sexual harm to children. Having promoted the use of antisocial behaviour orders, I am signed up to the principle that there is a role for orders that prevent action. However, I want to ensure that we all realise that there is a significant difference between ASBOs and RSHOs, namely the stigma that is associated with sexual offences. I am concerned that that might make the police more reluctant to use RSHOs and that that would therefore reduce their effectiveness.

I support the bill. The important point, as with any bill, is how it will be implemented. Issues around resources and monitoring were raised at stage 1 and I know that we will return to them. There is particular concern that resources should be available for the support and treatment of perpetrators, and I am sure that we will return to that too. For now, I am content to give the bill my support.

16:06

Christine Grahame (South of Scotland) (SNP): This is tricky legislation to get right. The definition in section 1 uses the phrase “having met or communicated”, but it seems to me that the debate is circling around electronic communications, such as the internet and mobile phones. I wonder whether it would have been appropriate to use the phrase “for example, but not necessarily” or “inter alia” in relation to such communication. The Solicitor General for Scotland is disagreeing, but we are not talking about somebody posting letters; we are talking about people using the electronic communications that exist nowadays, which make people much more vulnerable.

I note that the Justice 1 Committee would have liked the act of grooming—I use that term loosely, not in a legalistic sense—to be referred to in the bill. It is possible that someone could groom a young person via a chatroom but leave it at that. A second person could then come along, not necessarily from the same paedophile ring, and engage in the same behaviour with the young person. The contact that the young person has already had might make them vulnerable to making a journey to meet the second person. There are difficulties with not stating in the bill that grooming is in itself an offence. I understand that the committee’s view was that a breach of the peace charge would not necessarily be sufficient to cover that, so there might be a gap in the legislation.

On the age issue, I note that the committee’s report states: “the Association of Scottish Police Superintendents pointed out that, as currently drafted, the legislation ‘suggests that grooming can only be downwards—an older person grooming a younger person’.” However, the ASPS suggests that “it can be the other way round.”

Any vulnerable person, including an adult, can be groomed. That is not recognised in the bill, so an opportunity has been lost. The bill could have referred to “a child or other vulnerable person”. I appreciate that we are now too far down the road to put that in the bill, but the matter should be considered by the Executive.

I move on to the evidential difficulties with the standard of proof. I understand where the Executive is coming from; if I am correct, risk of sexual harm orders are rather like interdicts in that the standard of proof is the balance of probabilities, whereas in the case of the other criminal offences and breaches of RSHOs the standard of proof would be that the evidence was beyond reasonable doubt. The matter is difficult and I do not have solutions, but there are human rights issues in that Disclosure Scotland might be contacted. Somebody might not have committed a criminal offence but be on Disclosure Scotland’s list, but the standard of proof for prohibiting them from an area would simply be based on the balance of probabilities. There are concerns about that. As I said, it is a difficult issue and I have not come down firmly on one side or the other about the standard of proof, although I know that because it is a civil matter the principle that operates in Scots law is that it should be on the balance of probabilities. There are also difficulties with the four tests that have to be met. It seems to me that issues are involved. I think that the committee saw the proposed legislation as being preventive legislation. Establishment of proof will be extremely difficult.

I have a final point to make. In a letter from the minister on the evidence test, she acknowledges that it may well be useful for protocols to be produced to reduce the risk of contamination of evidence—that is, contamination between the criminal offences and the civil offences. I do not know what that means. It would be useful, if there are to be successful prosecutions, for the Solicitor General for Scotland or the minister, who is now entering the chamber, to explain exactly what that means.

The Deputy Presiding Officer (Trish Godman): I call Pauline McNeill, who will be followed by Jeremy Purvis. I apologise. I call Annabel Goldie, who will be followed by Pauline McNeill.
I turn briefly to the serious offence that section 1 of the bill will create. My reaction is that it will be difficult for the Crown to cover all the steps that are envisaged by section 1, which is all the more reason why we should consider the communication stage of contact.

On risk of sexual harm orders, much attention has already been focused on the onus of proof and the balance of evidence and on whether the criminal or civil evidence test be used; the clear intention is that civil procedure be used. The committee has signalled concerns about the appropriateness of civil procedure; I echo those concerns.

I will pose some questions about the procedure for an RSHO and the evidence requirement. If I read the section correctly, there is no provision for serving the application on the respondent and it creates no right of response to, or justifies appearance by, the respondent. Is the application to be in the form of an initial writ, for example? Will that mean that it will then follow standard sheriff court procedure? It seems to me that if there are parties with malign intent who are anxious to discredit an individual, they could present fictitious information that the respondent would be powerless to question. Under the bill as it stands, the respondent’s rights are restricted to appeal of the order. If section 2 does not require appearance by the defenders, will cases proceed as undefended civil processes and could the chief constable produce his evidence by affidavit? Those are important questions because the chief constable has to produce evidence that on at least two occasions the individual has—to quote section 2(1)(a)—“done an act”. Does the chief constable simply say by affidavit that he is satisfied that on two occasions the individual has “done an act”? Is that to be the evidence? If it is, it is very frail.

I have genuine concerns about what section 2 of the bill means in terms of the technicalities of communication and to secure a conviction. Members are interested in creating law that allows the Crown a reasonable prospect of conviction when prosecuting cases.

I have a suggestion to make, which is that it may be possible to draft a simple statutory offence that is constituted by a person’s sending to a young person a communication that contains material that is likely to corrupt or deprave. That would allow objective assessment of the circumstances by the courts and it would present simpler cases for prosecutions to prove. The obvious attraction is that, whether by common law or statute, such communications would constitute criminal activity, which would mean that on conviction the offender could be placed on the sexual offenders register and the offence would be constituted without there having been a meeting or series of events.

Miss Annabel Goldie (West of Scotland) (Con): Pauline McNeill’s fright was nothing compared to mine.

It has been said that the Conservative party welcomes the general principles of the bill. In an increasingly complex technological age, the law must develop to meet new challenges. I read the bill before I read the Justice 1 Committee’s report, which is a very good piece of work. My first realisation was that section 1 of the bill does not deal with what I would describe as questionable communications; rather, it defines an offence that is constituted by a series of events. Therefore, I was comforted by the committee’s sensible observations in paragraphs 81 and 82 of its report, which recognise that gap.

A political decision is needed about striking at communications to a young person that would, if they were known about, cause concern to the young person’s parent or guardian. The question is whether we should strike at any communications between an individual and a young person or only at communications that contain sexual allusions that are likely to corrupt and deprave. The first option is impractical, but the second is not. Most parents and guardians would be deeply concerned if a young person was receiving such material. Stewart Stevenson graphically described how quickly such communications can materialise through the internet. In such situations, a parent or guardian would—not unreasonably—think that criminal law would intervene before completion of the series of events that is required to satisfy section 1. We know that communication on at least two occasions, a meeting with the child with criminal intent and unreasonable belief that the child was over 16 would be required. There is an argument that the existing criminal law covers such communications; indeed, lewd and libidinous conduct has been invoked as a charge that has led to conviction and the committee’s report refers to such an instance. However, the legitimate question that the Executive must answer is whether the common law is sufficiently robust. If it is not, statutory support would seem to be necessary.

The committee proposed that one option would be to include breach of the peace in the list of sexual offences in part 1 of the Sexual Offences Act 2003 where the nature or circumstances of the offence are clearly sexual. A number of members have referred to that. I agree that the option is worth considering, but my concern is that there may be difficulty in that the basic common-law crime of breach of the peace was not intended to cover such situations. It could be more difficult to prove the charge in the context of a sexual
production of evidence and the rights of respondents to question legitimately what evidence might amount to.

16:16

Pauline McNeill (Glasgow Kelvin) (Lab): I begin by thanking the Justice 1 Committee, the clerks, the bill team and the Deputy Minister for Justice for the work that they have all done in putting together a constructive report.

As other members have said, there are few priorities higher than to protect children from harm. We already have good law in Scotland that can deal with prosecuting crime against children and the bill is designed to be an addition to that law, to plug its gaps and to update it to take account of circumstances that we face in the 21st century. The Justice 1 Committee believes that, as it stands, the bill needs to be changed, but we support the general principles.

It is important to note that the new offence that will be created by section 1 of the bill is designed to criminalise preparation for commission of a more serious crime. In itself, the crime is committed where it can be inferred that one of a number of sexual offences would be committed by an adult’s travelling to meet a child. It is very important to know that that is the act that must be criminalised.

The committee has made it clear that it thinks that the earlier aspect of that criminal behaviour needs to be addressed. It is important to note that the offence, which is not termed as grooming—I suggest that it is grooming-plus—is the more important of the offences, although there is a gap that needs to be plugged.

One of the most striking aspects of the evidence on exploitation of children on the internet is that it is more colossal than any of us imagined. The nature of the internet is such that it invites children to give out a great deal of personal information. If members ever use MSN Messenger they will see that it asks children to say who they are and where they gather. That information is on the internet and dangerous adults are using it to exploit children in ways that we do not want to imagine.

It is important to note that the national hi-tech crime unit that was recently formed under the Scottish Drug Enforcement Agency has three officers who are authorised to go on the internet and pose as children to get the required intelligence. The most important thing that we would all like to know is that we have the resources to intercept adults before a crime is committed. It is vital that we get resources to that unit as well as ensure that the law is right.

The committee is concerned that the bill catches only part of the criminal behaviour, so it is important for us to consider how to properly criminalise inappropriate sexual conduct, or the actual grooming of a child. Our solution is to ask the Executive to consider whether an adult who is prosecuted under the breach of the peace law—which is the law that is currently used to prosecute such adults—could be clearly specified as an offender on the sex offenders register. As a result of the Cosgrove report, sheriffs and judges have the discretion to use the existing law where there is a sexual element to a crime. There has been no response from the minister on that, so I wonder what the initial view is.

The Deputy Presiding Officer: You have one minute.

Pauline McNeill: The age question was a very difficult issue for the committee. As it stands, the bill will apply to persons aged 18 and over. The committee recommended that the bill should not refer to any age in order simply that the normal rules of the criminal justice system would apply. Our problem was that we received too much evidence that signs of predatory behaviour can start much earlier, during a person’s teenage years. We would not want the bill to fail to catch a case in which a 17-year-old was grooming a 13-year-old. Our suggestion is that the bill should not specify any age.

In conclusion, the risk of sexual harm order is a far-reaching provision, which the committee has said it will support only with caution. I am running out of time, but I want to make this point. Know this: when we accept such a provision by agreeing to the general principles, we will be agreeing to a major shift in policy on how we deal with criminal behaviour, because RSHOs will be dealt with in the civil courts. I want changes to the bill and I want clarity about which cases we are trying to capture by the provision. I want to know how chief constables will use the power.

The Deputy Presiding Officer: You must wind up now, Ms McNeill.

Pauline McNeill: As Mary Mulligan said, it is not helpful to compare an RSHO with an ASBO, given the massive stigma that will be attached to the former. We must get right the balance between protecting the rights and safety of children and the rights of the accused.

16:21

Jeremy Purvis (Tweeddale, Ettrick and Lauderdale) (LD): As my colleague Jamie Stone said, the Liberal Democrats will support the general principles of the bill. In my view, the sober nature of this afternoon’s debate reflects the seriousness of the issue.

I commend the Executive, the Justice 1 Committee and members from all parties for their
hard work, but I wish to raise some issues about the bill that cause me general unease. I feel that my unease is also reflected in some of the evidence that was provided to the Justice 1 Committee during its consideration of the bill’s general principles. The committee seeks solutions during later stages to problems that it foresees for when the legislation is implemented. The committee has sought to ensure that the bill provides legislative protection for those whom it seeks to protect without inadvertently casting the net wider. That is the scope within which I will address my brief remarks this afternoon.

In its submission to MSPs, the Law Society of Scotland asserts:

“there are a range of common law and statutory offences, which may currently be used to prosecute ... those ... who seek to groom children ... with the ... intention of committing a sexual offence’.

However, as we have heard, the common law may not offer sufficient protection in a small number of incidents. The number of such incidents is small as, thankfully, sexual offences are rare. However, the Law Society’s submission states:

“It is important that those adults who seek to groom children and meet or travel to meet them with the clear intention of committing a sexual offence can be prosecuted, before any sexual offence takes place.”

I emphasise the need for clarity on two elements in that statement: adults and clear intention.

During its detailed consideration of the bill, the committee rightly gave thought to how the bill’s complexity could impact on the number of prosecutions, and to the concern that some people might be inadvertently criminalised or, rather, stigmatised by being the subject of a risk of sexual harm order. I will deal with those points in turn but, before doing so, I stress that I believe that criminal law should always be measured, considered and commensurate with the problem that it seeks to solve. The bill should not be rushed. We have to live with the negative consequences of bad law, so we should take our time to get it right.

On the age definition that should apply both to offenders and to victims, the evidence that Children in Scotland provided to the committee is valuable. I know that the Executive and the committee will consider the issue in more detail, but I am concerned that, unless we get a resolution, we might end up with legislation that is inconsistent with the approach in England and Wales—which, in itself, would be an unwelcome development—and, more important, which lacks clarity in how it applies to 16 and 17-year-olds. The bill also lacks clarity about the role of the hearings system.

The age definition is a complex issue. Barnardo’s and others indicated that offenders can be young. The committee considered an age differential as a possible criterion but—wisely, I believe—rejected that. However, the committee’s recommendation that the bill specify no age limit for offenders leaves some uncertainty. I stress that I am not suggesting that the committee and the Executive will not return to the issue, but the evidence that the committee received was important. I am still concerned that the bill might inadvertently criminalise absolutely normal behaviour among some teenagers. If we get this wrong, Parliament will send out an unwelcome signal that we do not understand young people.

Children in Scotland highlighted examples of a 16-year-old boy having a consensual relationship with a 15-year-old girl, which could be criminalised, as well as legitimate boyfriend-girlfriend meetings and contacts by phone, text, internet or some other means. It is important to ensure that there is a clear distinction within the law, so that even if there is behaviour of which some members would disapprove, it is not criminal.

There is one other issue that needs further attention—the teaching of sexual health or sex education. Concerns have been raised that civil, not criminal, orders can use hearsay evidence without corroboration and that, as such, there is arguably an insufficiently high threshold of evidence to safeguard the rights of the accused. I appreciate the Executive’s reluctance to have block exemptions with regard to the teaching of sex education and instead its desire to provide robust guidance to ensure that those who are doing good work are not inadvertently affected by the orders. However, rather than exclude teachers or those who work within the formal curriculum for sex education, the guidance should be extended to include voluntary sector and peer-to-peer education.

The proposed offences are complex. The bill stands, but there is a requirement to prove four separate elements in order to secure a conviction, and the committee found that it might be particularly resource intensive for the police to investigate and obtain the evidence that would be necessary to bring a charge, and that it might also present difficulties for the Crown to prove a charge in court.

Although we support the general principles of the bill, the committee has much work to do. I wish committee members well in their scrutiny at stage 2.

Mr Stewart Maxwell (West of Scotland) (SNP):

I welcome the bill. The legislation is overdue and the SNP will certainly support the bill’s general
principles this evening. Although other members have covered many of the points that I wish to cover, I do not think that it does any harm to cover them again, so I make no apology for doing so.

My understanding was that the bill was intended to deal with the problem of grooming, so I was quite disappointed when I read the committee report and found that grooming, in and of itself, would not be covered. I agree with committee members’ concerns about the omission from the bill of specific reference to grooming. I am equally disappointed by the minister’s refusal thus far to change her mind on that point.

In paragraph 17 of its report, the committee states that it is “extremely concerned about the response from the Minister”.

That is a pertinent comment, because the failure to criminalise grooming per se is, I believe, a mistake. To target the actions subsequent to grooming, although it is a welcome step in the right direction, does not go far enough. We must outlaw the act of grooming, not only the subsequent actions. As the minister said in her opening remarks, the issue is not just about the physical damage that can be done to children when such acts take place; even if a physical act does not take place, emotional and psychological damage can often occur before any meeting or any sexual act takes place.

Although I understand the difficulties in legislating in this area and in properly defining how we deal with offences, I fail to understand—as I believe most people will fail to understand—the Executive’s reluctance on the matter. The act of grooming children in and of itself cannot have an innocent purpose and should therefore be deemed to be an offence, without the need to travel, the intention to travel or the possession of condoms while travelling being used as evidence. The committee was quite correct to point out that section 1 of the bill will make at best only a marginal difference in tackling the threat from paedophiles.

I turn to age limits. I agree with the Executive and with the committee on the definition of a child as a person under 16, but I do not agree with the Executive on the definition in section 1 of who can commit the offence—it seems entirely likely that a person between the ages of 16 and 18 could commit such an offence. Unfortunately, there have been cases of persons in that age range and below who have been involved in such activity. I believe that, at the very least, the age limit for an alleged offender should be lowered from 18 to 16. However, the committee’s suggestion that no age limit be set and that it be left to the discretion of the Crown Office and other agencies to decide on the correct action to take in each case is attractive. That would provide maximum flexibility in dealing with young people who are alleged to have committed such offences, but would not set artificial age barriers to prosecuting someone who is young, if their acts or behaviour are clearly shown to have been predatory.

On the number of times that a person has to communicate with a child before an offence is committed, I believe that the Executive has got that wrong. I whole-heartedly agree with the committee and other members who have stated that it is the content and context of communications that is the key to proving the offence, rather than the number of communications. That loophole must be closed to ensure that no child is endangered as a result of a technicality about the number, as opposed to the intent of communications.

Frankly, I have little sympathy for the argument that the Executive seems to suggest, which is that it does not want the offence to catch people who engaged in grooming activity once but decided to take no further action. The minister is quoted as suggesting that in paragraph 68 of the committee’s report. Does that mean that if someone engages in grooming with different children, but never more than once with each child, they should not be prosecuted? Is the emotional and psychological damage that can be caused by grooming in and of itself not reason enough for prosecution? The question is at the heart of why I believe that grooming, and not only the subsequent actions, should be an offence. Another reason for my belief in making grooming itself the offence is that the person who grooms may not be the person who travels. Therefore, the section 1 offence would seem not to apply to such people.

I certainly support the Executive’s position on opposing a blanket marriage exemption; it made very good points to the committee on that.

In conclusion, all parts of the activity should be caught by the bill, which is about protecting children. That means that grooming, travelling or even persuading a child to travel should all be covered. Although I support the intent of the bill and its general principles, I believe that it will need to be amended at stage 2 if it is to be an effective tool against people in our society who intend to harm children in this way.

16:31

Helen Eadie (Dunfermline East) (Lab): I welcome the debate on the general principles of the Protection of Children and Prevention of Sexual Offences (Scotland) Bill. Like members who have spoken already, I believe that all children and young people have a right to be
protected from sexual harm. I therefore support the overall principle of the bill, which is to better protect children and young people from sex offenders.

The bill is warmly welcomed as it will strengthen the measures that are available to protect children and young people from sexual harm and abuse. The Executive and the committee are to be applauded for their dedication and commitment in undertaking such vital work.

However, I am concerned that we should listen to some of the advice that we have received from other people in Scotland who have highlighted in briefings to MSPs concerns that I believe the committee and the Executive should be urged to take on board. They should give further consideration to the points that are raised.

I will focus on age, which Pauline McNeill mentioned. The bill defines an adult, or offender, as a person who is 18 or over and it defines a child, or victim, as being a person under 16. I believe that further consideration must be given to the complex issue of the age of the adult, or offender, as defined in the bill. Clarity is required about the position of 16 and 17-year-olds and consideration must be given to the role of the children's hearings system in relation to the new offence that is set out in section 1 of the bill. On the recommendations on the age of the offender in the Justice 1 Committee's stage 1 report, I believe that careful consideration must be given to its recommendation that no age be specified in respect of the section 1 offence.

The children's hearings system should remain central to decisions for under-16s and people up to the age of 18 who are on supervision orders. The children's reporter should be consulted to determine the route in the case of a young person who is accused of committing the offence. An amendment to the Children (Scotland) Act 1995 to apply in the case of a person who is not already on supervision, referral to the children's hearings system within six months of his or her 18th birthday should be supported. I also believe that any order must be accompanied by a package of support or treatment.

The bill currently defines the age of an adult, or the offender, as being 18 or over. There has been much discussion of whether the age of the offender in relation to the offence at section 1 should be lowered to 16. Analysis of the responses to the initial consultation on the proposals shows that 69 per cent of respondents thought that 16 should be defined as the age at which one could be charged with an offence. The most common argument for that was that doing so would be consistent with the age of sexual consent for females in Scotland. It is also argued that there is evidence that young people below the age of 18 display the type of sexually inappropriate behaviour or grooming behaviour that is defined in the bill. To set the age limit at 16 would clarify the position of 16 and 17-year-olds in relation to the new offence.

I understand that people have argued in submissions to the committee that they are particularly wary of any measure that could lead to criminalisation of young adolescents; for example, a 16-year-old boy could be in a consensual relationship with a 15-year-old girl. It is therefore important that we draw a distinction between legitimate boyfriend-girlfriend meetings and what could be criminalised.

Moreover, it is felt by many people that in Scotland, 16 and 17-year-olds should not be dealt with through the adult criminal system. Inconsistencies in the definition of a child in Scots law have also been highlighted. It is recognised that defining an adult as a person of 18 or over is in line with the United Nations Convention on the Rights of the Child and with the Protection of Children (Scotland) Act 2003. Young people up to the age of 18 should be protected from sexual harm.

Finally, given the definition of an adult in the bill, it is unclear what the implications are for 16 and 17-year-olds. Currently, they are defined neither as victims nor offenders. Clarity is required where a young person under the age of 18 commits the offence that is set out in section 1. It must be made explicit.

16:35

Patrick Harvie (Glasgow) (Green): All of us in the chamber recognise the importance of getting child protection right. The minister used the word "despicable" earlier in the debate to describe the sexual abuse of children. I am sure that none of us would disagree with that description.

I will raise two areas of concern that have been touched on by other members: the impact of the bill on sex education; and its potential impact on non-abusive consensual behaviour between people who are over the age of consent.

Sensitivities around sex education are such that a piece of legislation need not be used, or even be usable, against teachers to have an impact on the delivery of sex education. Section 28 showed us that clearly. It was never once used in court; according to senior legal figures, it never could have been successfully used in court. However, it was used in school boards, parent-teacher associations, the media and elsewhere as a weapon of fear by those whose agenda was one of bigotry and prejudice. Given the importance that the Executive has attached to the sexual health strategy, it is essential that it takes seriously the
possibility that risk of sexual harm orders could be used in the same way as section 28 by those who oppose meaningful and comprehensive sex education.

I emphasise that I am suggesting not that such orders will themselves be used against teachers, youth workers or others who provide education and advice, but that those who seek to undermine or detract from sex education or to cause fear among professionals could use the fear of such orders to deter professionals from continuing in their work or from volunteering for organisations and so on. I commend the written evidence from East Lothian Council, which suggested that the provision of education and advice, rather than categories of individuals such as teachers or youth workers, could be ruled out. That would send the right message about the importance of sex education while addressing the Executive's concern about the dangers of excluding categories of people from the offence in section 1.

The Executive has made clear its intention to lodge amendments at stage 2 to make it illegal to possess certain images of people aged under 18, as opposed to under 16 as the bill stands. That is highly problematic. It risks criminalising young people who are over the age of consent, their friends or their sexual partners for possessing images that have been created with consent for completely harmless purposes. The suggestion that the Justice 1 Committee heard that married couples and civil partners should be exempted reinforces the notion that all other sexual relationships are in some way inferior or are to be frowned on, and that the law should be less tolerant of people who have a sex life without a piece of paper from the state.

Similar concerns exist over the perfectly innocent use of chat rooms, websites, weblogs and online profiles by people who have no abusive intentions or history and who merely use such facilities either as part of their sex lives or to communicate with other consenting adults. I ask the minister whether it is possible to ensure that consent is referred to in the Executive's forthcoming amendments to ensure that young people who are over the age of consent are able fully to exercise their right to consent.

The protection of children from abuse is a serious matter—it can be a deadly serious matter—but if the Executive wants to ensure that its measures to address the need for protection are effective and gain the credibility that they need, it must take care to ensure that the provisions in the bill are relevant to real people's lives in the modern age, are not open to misuse or misunderstanding and focus on the real problem. I would not be able to support the bill if it was presented in this form at stage 3. However, I give my support to it at stage 1 in the hope that it will be improved significantly before we get to stage 3.

The Deputy Presiding Officer: We move to winding-up speeches and I call Jamie Stone. Mr Stone, you have a tight four minutes.

16:40

Mr Stone: I rise to speak for the second time this afternoon. The minister rightly pointed to the emotional damage that is done to children and, correctly, flagged up the courage of the parents of children who are involved in incidents of sexual abuse or, indeed, murder.

In a thoroughly heavyweight contribution, Stewart Stevenson very nicely drew out the nature of the problem. His description of the fake person—Linda, aged 13—and of how people went online as quickly as they did should be a lesson to us all. That point was well made. He also made the point that gratification can be gained from the grooming process. That, too, we shall bear in mind as we move to stage 2.

I thank Margaret Mitchell both for her warm welcome for the bill and for the fact that she echoed my remarks about the possible impact of risk of sexual harm orders on innocent people. I will return to that subject in due course.

Mary Mulligan, correctly, referred to grooming. In a thoughtful contribution, Annabel Goldie, who is still in the chamber, talked about the writ and the technicalities of the production of evidence. I am no legal expert, but I think that what she said was crucial. We must get the mechanics of the bill right. If we do not, we could enact fundamentally flawed legislation. Let us face it—on an issue as grave as this, the legislation must be copper-bottomed and cast iron. It has to work all the way.

There was a good speech from Pauline McNeill, and Jeremy Purvis's reference to the age issue was absolutely correct. There were also thoughtful contributions from Stewart Maxwell, Helen Eadie and Patrick Harvie.

We have just heard Patrick Harvie's speech. I am not quite sure that I follow his argument about sex education and the ramifications of the risk of sexual harm orders; however, I am sure that we will hear more from him at stages 2 and 3. I have been impressed by my colleagues on the Justice 1 Committee, who are all more able than I am, and I am sure that we will all have open minds. Mindful of what I have just said about it being crucial that we get the legislation right, we should consider every point, including that which Patrick Harvie made. Nevertheless, he will have to do some slight legwork to persuade me of the connection that he referred to. I hope that all right-thinking people will see the importance of sex education;
I am keeping tight to time, as you requested, Presiding Officer.

I am fortunate because my childhood was a happy one. Those of us who had none of the experiences that we have heard about have everything to be grateful for. We could all, however, put ourselves in the position of people to whom something happened that blighted their life and left them with a memory of the experience. Constituents in their 60s and 70s who were abused as children have come to see me, and their stories are harrowing. I get down and thank the good Lord that what happened to them did not happen to me and does not happen often to other children—nonetheless, it does happen.

Members have talked about the accidental blackening of an innocent person’s name, and there is a risk that that could happen. As a child, I was warned not to get into a stranger’s car—as kids, we were all told not to do that. When I was a kid, we did not have a car but, eventually, we had a van, when my father had made enough of a profit. I remember, as a wee boy, sitting in our battered old van when, suddenly and to my alarm, a strange man got in and started the engine. I screamed with fright. He was a man from Tain—where the minister’s cousin and I live—who was just moving the van while my dad was in the shop, but I was really scared. How terribly easy it would be to blacken the name of somebody who is completely innocent in a way that would mark them for the rest of their life. Nevertheless, as I said in my earlier speech, I believe that we can strike the right balance.

In concluding my speech, I thank the clerks and my colleagues.

16:44

Bill Aitken (Glasgow) (Con): The debate is predicated—as, indeed, is the legislation—on the basic concept that the abuse and exploitation of children for sexual purposes are abhorrent to every right-thinking person. It is also predicated on the fact that technology has not come with benefits alone. There has to be some recognition of that through a change in the legislation.

It has become evident in this afternoon’s debate that the bill is defective in certain aspects and requires to be looked at. I really think that we should go for the simple solution. Why is grooming not being made an offence per se? Although I accept that there are evidential difficulties in that respect, we need to exercise some common sense. It is quite clear that, if a 40-year-old invites a 14-year-old girl, in full knowledge of her age, to visit him in his flat when no one else is present, there could be a problem. The Executive has to reconsider the matter. It is simply not sufficient to wait until things have gone that little bit further down the road; attempting to set up the contact should be the offence.

I found Stewart Stevenson’s speech quite disturbing. It is not the first time that I have heard about what happens on some internet sites and, in the circumstances, the Executive would be advised to take further evidence from the national hi-tech crime unit before it lodges any final amendments to the bill. I also note that the Scottish Police Federation believes that grooming in itself should be an offence.

If the Executive is not prepared to take that route, perhaps the answer is the common-law approach. For example, the type of behaviour that I have described could constitute a breach of the peace. The introduction of a breach of the peace offence similar to that for sectarian aggravation might also deal with Mary Mulligan’s concern that, as with any breach of the peace, the record of conviction would not mention that the offence had a sexual element.

The committee report expressed concerns about setting the age limit at 18. I think, frankly, that such a limit is a nonsense. After all, people mature much earlier nowadays and, as Christine Grahame pointed out, a 15-year-old could be in a position to entice a 14-year-old. We are not looking at the matter carefully enough—I certainly hope that the Executive takes these points on board.

I am also concerned about RSHOs. Of course, there are evidential difficulties in everything that we are attempting to do in this bill; however, there must be a presumption of innocence. I realise that RSHOs are not a criminal sanction, but an individual could be profoundly affected by being wrongly accused of such an offence. If there is such a narrow degree of difference between the evidence that is necessary to obtain an RSHO and that which is necessary to secure a successful criminal prosecution, we should take the route of criminal prosecution if there is any possibility that a child is at risk.

I can see what the Executive is trying to do, but I think that an awful lot of tidying up has to be done before the bill can be enacted.

16:48

Mr Bruce McFee (West of Scotland) (SNP): The debate has shown that, although the bill is
relatively short, it impacts on a wide and complex range of issues. As the stage 1 report points out, the committee broadly supports the bill’s intent; however, we have major concerns about its ability to deliver the level of protection that we all want. Indeed, there are even concerns about the bill’s ability to deliver its own provisions. I am concerned that the procedures for granting and the standard of proof attached to RSHOs could result in people being wrongly accused of acting in an inappropriate way towards children. Such a stigma can mark someone for life.

I agree with Mary Mulligan’s point that there is a lack of clarity about grooming; I also agree with the many speakers who said that we need a specific grooming offence per se.

Pauline McNeill referred to the evidence of Dr Rachel O’Connell when she spoke about the information that children are encouraged to provide online. Dr O’Connell’s evidence was most persuasive. She has conducted extensive research into the structure and organisation of paedophile activity on the internet. The committee considered that the lack of measures to deal with what we have come to know as cyberexploitation is a serious gap in the protection of children. That was alluded to by Margaret Mitchell, Annabel Goldie and, of course, more graphically, Stewart Stevenson.

We heard from Margaret Mitchell and others about the possibility of making changes to breach of the peace legislation and incorporating breach of the peace in the list of sexual offences in part 1 of the Sexual Offences Act 2003. That would allow anyone convicted of a breach of the peace offence that is of a clear, sexual nature to be incorporated in the list of sexual offenders. The committee strongly recommends that the Executive introduce measures to tackle grooming—which is in itself damaging to children—head on.

It is difficult to prove an offence under section 1 of the bill and it might prove exceedingly hard to bring together the four strands of behaviour that constitute the proposed offence, not least because of the activities of paedophile rings. In her opening speech, Cathy Jamieson referred to the ability of paedophiles to create and manipulate situations and said that it was important that we leave no loopholes, but there are loopholes all over the bill. The committee was correct to say that we should not insist on proving that there were two previous communications or meetings with the victim in order to make the offence stand up. We see no good reason for not reducing the number of communications to one.

The bill states that the offence would be complete only once the adult travelled with the intention of meeting the child to carry out an act that would otherwise be a relevant offence. However, in the bill as drafted, the offence would not be complete if the child were to travel to meet the adult, even if the adult prearranged the meeting or paid the child’s expenses to get to the meeting.

There is also the question of resources. I was encouraged by the deputy minister’s response and I look forward to his amendments because, as the bill stands, one could drive a coach and horses through it.

The age of the offender was touched on by many. I will not go through all the remarks, but Jeremy Purvis and Helen Eadie raised the situation of a 16-year-old boy in a consensual relationship with a 15-year-old girl. Such a relationship already constitutes a criminal offence. My question is about the discretion that can be applied by the prosecuting authorities.

Although the SNP supports the general principles of the bill—who could not?—we have a number of reservations. We are disappointed that the Executive has not produced its promised amendments, although we have sympathy for the reasons behind that. We have serious doubts about the effectiveness of the proposals as they stand and we question whether the bill will achieve its stated objectives in its present form. The bill can be made to work and can make a difference, but only if the Executive properly addresses the many serious issues that were raised in the Justice 1 Committee’s report.

16:53

The Deputy Minister for Justice (Hugh Henry): The encouraging part of today’s debate was the will that exists across Parliament for further measures to be taken to give added protection to young people, and to children in particular.

In her opening remarks, the minister graphically and eloquently stated the case for why we need to act. The point was made in a number of contributions that the type of person with whom we are dealing is not just malign in their motivations, not just malicious in their intentions, but can be extremely unscrupulous and devious in the way in which they act in order to manipulate certain circumstances. They are intent on harming children and they will go to any lengths to carry out that harm.

It is right that we should update our law to reflect the changes that take place in society and which happen around us, but it would be foolish to minimise some of the difficulties with which the advent of the internet has presented us. Although it would be noble to have the intention of trying to do as much as we could, the technology and the way in which it can be used are moving on at
speed, as members have clearly indicated. However, that is no excuse for us not to try to do everything that we can to introduce sufficient protection.

A number of concerns have been raised during the debate. Although I will not have time to deal with each of them, they will all be considered carefully. I have already said that we will reflect further on a number of issues, because we need to get the legislation right. Although it would be right for us to reflect on the points that have been made and perhaps shift in an effort to improve the bill, it would also be right for us to take a firm view and to resist proposals that would have poor or adverse legal implications, even if they were made with the best of intentions. In seeking to help children, the last thing that we want to do is to create more problems further down the line, so we need to proceed with caution.

Stewart Stevenson talked about some of the benefits of English legislation in comparison with Scottish legislation, but some of those benefits are implied under Scots law; we do not have to be as specific as English law must be. He referred to section 14 of the Sexual Offences Act 2003, but that provision is ancillary to a number of sexual offences in England and Wales and, as it stands, it would not work in Scotland. That said, it is proper that we consider further whether there is any equivalence that might be helpful.

Margaret Mitchell made a number of points that were echoed by other members. She talked about the age of the victim and asked for clarification of whether the burden of proof should lie with the Crown or the accused. We have consulted with the Crown Office and Procurator Fiscal Service and it is content that the burden of proof should rest with the Crown, but we will consider that further to determine whether any improvements can be made.

Another issue that was mentioned by a number of speakers, including Mary Mulligan, was breach of the peace and the question whether that should become an offence that could trigger inclusion in the sex offenders register. However, the fact that someone has been involved in a breach of the peace scenario could already trigger inclusion in the register. Under paragraph 60 of schedule 3 to the Sexual Offences Act 2003, the judge can direct that a person who has been convicted of any offence should be subject to the sex offenders registration scheme if

"there was a significant sexual aspect to the offender's behaviour in committing the offence."

Other issues to do with the use of breach of the peace in common law have been raised. There are circumstances in which breach of the peace can lead to action. We are talking not about replacing breach of the peace, but about adding to it and still using it when it is necessary to do so.

A number of speakers dealt with RSHOs, about which I think there are some misconceptions. It is right to worry about the potential for stigmatisation, but I do not accept Patrick Harvie's arguments, which apply to different circumstances. The proposal in the bill is highly specific. It is right for us to consider giving protection to children to prevent certain acts from happening. I would argue that action is imperative when a child or a group of children are at imminent risk.

Issues have been raised about the difference between full and interim risk of sexual harm orders. In some cases, there will be no time to go through the normal process for obtaining a full order. In those cases, it will be absolutely essential that action is taken to protect the child by means of an interim order. In either case, the sheriff must be satisfied that there is a prima facie case for making the order.

Annabel Goldie raised—

The Presiding Officer (Mr George Reid): Briefly, please. You have about another minute, minister.

Hugh Henry: Thank you, Presiding Officer.

Annabel Goldie asked whether there was flexibility in bringing charges under the offence of breach of the peace, but one of the benefits of the offence of breach of the peace is its flexibility. She also raised the issue of sending material that is likely to corrupt or deprave. That issue is worthy of further consideration and we will look into it. Other members raised the issue of age limits, which we will have to look at again.

The debate was interesting; it properly focused on the issue of protecting children and some useful suggestions were made. The members who said that more work needs to be done are right and it is right and proper that we take the issues back for further reflection. Equally, I pose a challenge to members. The last thing that the Executive wants to do is to act with the best of intentions only to find that we have created further complications. The measures in the bill need detailed and careful consideration, and I look forward to a thorough stage 2 consideration.
Thank you for copying me your letter of 6 April to the Minister for Parliamentary Business. Your letter expresses concern that the Justice 1 Committee has not yet received the Executive amendments to the Protection of Children and Prevention of Sexual Offences (Scotland) Bill in relation to child prostitution and pornography.

I very much regret that it has not been possible to send these amendments to you thus far. It had certainly been our intention to send them to the Committee well in advance of next week’s evidence session, and indeed, until the last few days, this had remained our hope.

However, while our basic policy intent of extending and strengthening the protection available to children and young adults is clear, there are complexities as to how we achieve this aim. A particular issue arises, for example, with the criminalisation of indecent pictures of people under 18. As you will understand, a balance has to be struck between protecting young adults who may be vulnerable to exploitative and abusive relationships and to making decisions about these matters which they might later come to regret, while ensuring that any limitation of the civil liberties of those who are above the age of sexual consent is justifiable. The European Framework Decision allows for such a balance to be achieved in that exemptions to the criminalisation of the possession, making or distribution of indecent pictures are allowed. It is however important that we ensure that our proposed amendments give effect to the careful balance we are seeking to achieve.

I think it is more important that we get the text of these amendments right rather than bringing forward amendments that may not yet be fully worked through. We are however pressing on with this and I will endeavour to send the amendments to the Committee as soon as I possibly can.

In the meantime, I suggest that it might be sensible for us to re-arrange my evidence session with the Committee to discuss the detail of these amendments. I would of course be happy to give evidence to the Committee on these amendments as soon as they are available.

I am copying this letter to the Minister for Parliamentary Business, who will respond to you in relation to the timetable for stage 2.

Hugh Henry MSP
Deputy Minister for Justice
Present:
Marlyn Glen Pauline McNeill (Convener)
Margaret Mitchell Mrs Mary Mulligan
Stewart Stevenson Mr Jamie Stone

Apologies were received from Bruce McFee.

**Protection of Children and Prevention of Sexual Offences (Scotland) Bill:** The Committee considered correspondence received from Hugh Henry MSP, Deputy Minister for Justice.
Scottish Parliament
Justice 1 Committee
Tuesday 12 April 2005

[THE CONVENER opened the meeting at 15:09]

Protection of Children and Prevention of Sexual Offences (Scotland) Bill

The Convener (Pauline McNeill): Good afternoon. Welcome to the 10th meeting of the Justice 1 Committee in 2005. We have received apologies from Bruce McFee, but otherwise we have a full attendance. As usual, I ask everybody to switch off their mobile phones.

Item 1 is the Protection of Children and Prevention of Sexual Offences (Scotland) Bill. I invite members to comment on the record, if they so wish, on the correspondence from the Deputy Minister for Justice, which is the late paper that was circulated to members. Members will be aware that we had hoped to have the Deputy Minister for Justice before the committee to talk about the amendments to the bill. I agreed to postpone the session as the amendments are not ready for consideration. Members have before them an explanation for that in the minister's letter. If members wish to comment, I invite them to do so.

Stewart Stevenson (Banff and Buchan) (SNP): I suspect that I speak very much as we all feel. Given the difficulties that are involved and the time that it is taking for the Executive and its officials to bring forward the amendments, it will be difficult for us to understand the amendments and confirm to ourselves whether they are satisfactory in the couple of days—perhaps a week if we are very lucky—that the timetable appears to suggest that we will have. The Executive must think carefully about the implications of that for its likelihood of success in having the amendments accepted at stage 2. I certainly would not be comfortable with supporting an amendment at stage 2 that I am not fully satisfied with, given that there are clearly difficulties. Ministers and officials ought to note that point. The committee has long been promised the details and it is difficult to expect us to understand what is clearly a complex issue in such a short space of time.

Margaret Mitchell (Central Scotland) (Con): I agree. We have been promised the amendments and were aware of them as early as stage 1, but to date nothing has been forthcoming. Other members of the committee and I have a grave concern that if the amendments are complex, we should have sufficient time properly to look into the various issues that surround them, on the basis that we are here to make good law as opposed to doing what is expedient. That is worth recording and conveying to the minister.

The Convener: Okay. I anticipated the feelings of the committee and wrote to the Minister for Parliamentary Business to make the point that the issue for us is time. We want to ensure that we are able to do a job by having enough time to consider changes to the bill. As other members have stated, the difficulty for us is that although we can shift things about, we will have only a short space of time at stage 2 in which to consider the amendments.

Initially, when we were advised in December that the Executive would make amendments to the bill, members thought that those would be reasonably straightforward because they were related to European Union obligations, but now they appear to be more complex. From the letter that the minister has sent to the committee, it seems that the issue centres on the question of setting the age at 18 when we have a general age of criminality of 16.

One of the lessons that the Parliament must learn from this—it relates to the meeting that we have just had with the Justice 2 Committee—is that although some of the provisions will be set in tablets of stone and we will not be able to alter the basis of the framework decision, it is important for us to get in earlier on such issues. I would like to have seen the Parliament not being tied to a specific age. That ties our hands in relation to principles that we have already determined in the bill. The lesson that needs to be learned is that we must engage at another level in relation to decisions that we are expected to enforce. If there are no other comments, we can do nothing other than leave that on the record. We have asked the bill team whether we can see the amendments as soon as possible.
CORRESPONDENCE FROM HUGH HENRY MSP, DEPUTY MINISTER FOR JUSTICE TO THE CONVENER OF THE JUSTICE 1 COMMITTEE, 15 APRIL 2005

The purpose of this letter is to provide you with some information about our proposed amendments to the Protection of Children and Prevention of Sexual Offences Bill in relation to child prostitution and pornography. I am sorry that I have not been in a position to send you the amendments themselves yet, and I am afraid that I am still not in a position to send you the child pornography amendments as we are still considering the detailed policy in relation to those sections. However, I hope that the information I have set out below will allow the Committee to begin its consideration of the proposals.

In addition, I am pleased to be able to enclose the draft child prostitution amendments with this letter and would be content to give evidence on these amendments at our meeting next Wednesday.

Background to child prostitution and pornography amendments

As you know, the purpose of these amendments is to criminalise prostitution and pornography in relation to people under 18 in order to provide additional protection to young people. This will bring Scots law into line with the 2nd Optional Protocol to the UN Convention on the Rights of the Child (UNCRC) which the UK signed up to in 2000, and EU Council Framework Decision 2003/681/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography. The Framework Decision is enclosed with this letter.

Child Pornography

Article 3 of the Framework Decision (FD) sets out that each Member State must make the following activities punishable, whether undertaken by means of a computer system or not:

- production of child pornography;
- distribution, dissemination or transmission of child pornography;
- supplying or making available child pornography;
- acquisition or possession of child pornography.

Article 1 of the FD defines “child pornography” as pornographic material that visually depicts or represents:

- a real child involved or engaged in sexually explicit conduct, including lascivious exhibition of the genitals or the pubic area of a child; or
- a real person appearing to be a child involved or engaged in the conduct mentioned above; or
- realistic images of a non-existent child involved or engaged in the conduct mentioned above.

The activities referred to in the FD are already prohibited in Scotland by sections 52 and 52A of the Civic Government (Scotland) Act 1982. These provisions make reference to
“indecent photographs” and related terms. They do not refer explicitly to “child pornography”. However, at common law, whether or not material is indecent is determined by enquiring whether it is likely to deprave or corrupt. Having regard to the case law that has built up around sections 52 and 52A of the 1982 Act, I think it is clear that the provisions will catch all of the material that falls within the definition of “child pornography” in the FD. However, for the purposes of the 1982 Act, a “child” is defined as a person under 16. Article 1(a) of the FD provides that a “child” shall mean a person below the age of 18 years. It is therefore our proposal that section 52(2) should be amended to redefine a “child” as a person under 18.

**Exclusions**

The FD allows certain types of conduct to be excluded from liability, although these exclusions are not mandatory. At present, the 1982 Act contains a defence for persons who can establish that they had a legitimate reason for possessing, distributing or showing an indecent image or that they had not seen the image and did not have any reason for suspecting it to be indecent. No further defences or exceptions are expressly set out in the existing provisions. In view of the changes in the definition of “child”, some further exceptions may have to be considered.

The FD provides that photographic material that depicts a real person who appears to be a child but who was in fact over 18 at the time of the depiction may be excluded from provisions dealing with child pornography. Section 52(2) of the 1982 Act provides that a person is taken as having been a child at any material time if it appears from the evidence as a whole that he was then under the age of 16 [which will be changed to 18]. It is considered that this provision provides sufficient flexibility to deal with situations where a person appears to be a child but is actually an adult, since the age of the person in an indecent photograph will be assessed by considering all of the available evidence in any given case. There is therefore no need to provide an explicit exception for this matter.

The FD allows for the exclusion of material depicting realistic images of non-existent children where the material is produced and possessed by the producer solely for his private use, no children have been involved in the production of the material and there is no risk that the material will be disseminated. It is considered that the existence of prosecutorial discretion allows sufficient flexibility in deciding whether or not activities such as these should be prosecuted, and that there is therefore no need to provide an explicit exception.

Finally, the FD also allows for the exclusion of pornographic material depicting a child, or a person appearing to be a child, who has reached the age of consent, and where the images have been produced and possessed with the consent of the child and solely for their own private use. We are currently considering this situation. There are potentially three different ways of dealing with it.

- Option 1 is to have no exceptions at all. Production or possession of any indecent images of any person under the age of 18 would be an offence. The fact that those over the age of 16 could lawfully engage in sexual activity would not be a defence. If this activity were photographed, that would be an offence. As always, it would be for the Crown to decide whether bringing a prosecution was in the public interest.

- Option 2 is to provide an exception for photographs of 16 and 17 year olds, if the person in the photograph gave consent for the photograph to be taken and (if relevant) for the photograph to be in the other person’s possession. The exception
would not extend to allowing a third person to see or have possession of the photograph, as the FD holds that the photograph must still only be for private use. Furthermore, the photograph would require to depict only the child, or the child and the accused.

- Option 3 builds on option 2. It contains all of the conditions set out in option 2, but goes further in order to provide a greater degree of protection to 16 and 17 year olds. This option would except photographs of 16 and 17 year olds if the person in the photograph gave consent for the photograph to be taken and possessed by the other person and was in a relationship with that other person. The type of relationship would also have to be considered. Would the couple have to be married or living together? Or would it be sufficient that they were in some kind of established relationship? But how could that established relationship be defined?

These are issues which we are still deliberating, and which the Committee will also wish to consider.

It will be noted that section 45 of the Sexual Offences Act 2003 (the provision for England and Wales which was designed to give effect to the requirements of the FD) requires the defendant to prove, among other things, that he and the child were married or “lived together as partners in an enduring family relationship”. This phrase is not defined, and it will be for courts to interpret.

**Prostitution**

Article 2 of the FD sets out that Member States must make the following activities punishable:

- coercing a child into prostitution or participating in pornographic performances, or profiting from or otherwise exploiting a child for such purposes;
- recruiting a child into prostitution or into participating in pornographic performances;
- engaging in sexual activities with a child, where:
  - use is made of coercion, force or threats;
  - money or other forms of remuneration of consideration is given as payment in exchange for the child engaging in sexual activities; or
  - abuse is made of a recognised position of trust, authority or influence over the child.

The offences of engaging in sexual activities with a child where use is made of coercion, force or threats above are already covered by the common law offences of rape; indecent assault; sodomy; and lewd, indecent or libidinous behaviour or practices. Engaging in sexual activities with a child where abuse is made of a recognised position of trust, authority or influence over the child is covered by provisions in the Sexual Offences (Amendment) Act 2000. It is not therefore necessary to create new provisions to cover these activities.

It is therefore proposed that the following new offences be created in order to cover the remaining activities set out above:
• Paying for sexual services of a child;
• Causing or inciting child prostitution or pornography;
• Controlling a child prostitute or a child involved in pornography;
• Arranging or facilitating child prostitution or pornography.

I enclose a draft set of amendments which will create these new offences.

I hope that you find the above information helpful, and that this will allow the Committee to make progress on considering the amendments and perhaps take evidence on them.

I apologise again for not being in a position to provide the draft amendments in relation to child pornography yet. However, I am sure that you will appreciate from what I have set out above that the policy in relation to these amendments requires careful consideration. We will continue to consider the policy further, and will have a final set of amendments with you later in stage 2.

Hugh Henry MSP
Deputy Minister for Justice
COUNCIL FRAMEWORK DECISION 2004/68/JHA
of 22 December 2003
on combating the sexual exploitation of children and child pornography

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Article 29, Article 31(1)(e) and Article 34(2)(b) thereof,

Having regard to the proposal from the Commission (1),

Having regard to the opinion of the European Parliament (2),

Whereas:

(1) The Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice (3), the conclusions of the Tampere European Council and the Resolution of the European Parliament of 11 April 2000 include or call for legislative action against sexual exploitation of children and child pornography, including common definitions, charges and penalties.

(2) Council Joint Action 97/154/JHA of 24 February 1997 concerning action to combat trafficking in human beings and sexual exploitation of children (4) and Council Decision 2000/375/JHA of 29 May 2000 to combat child pornography on the Internet (5) need to be followed by further legislative action addressing the divergence of legal approaches in the Member States and contributing to the development of efficient judicial and law enforcement cooperation against sexual exploitation of children and child pornography.

(3) The European Parliament, in its Resolution of 30 March 2000 on the Commission Communication on the implementation of measures to combat child sex tourism, reiterates that child sex tourism is a criminal act closely linked to those of sexual exploitation of children and of child pornography, and requests the Commission to submit to the Council a proposal for a framework Decision establishing minimum rules relating to the constituent elements of these criminal acts.

(4) Sexual exploitation of children and child pornography constitute serious violations of human rights and of the fundamental right of a child to a harmonious upbringing and development.

(5) Child pornography, a particularly serious form of sexual exploitation of children, is increasing and spreading through the use of new technologies and the Internet.

(6) The important work performed by international organisations must be complemented by that of the European Union.

(7) It is necessary that serious criminal offences such as the sexual exploitation of children and child pornography be addressed by a comprehensive approach in which the constituent elements of criminal law common to all Member States, including effective, proportionate and dissuasive sanctions, form an integral part together with the widest possible judicial cooperation.

(8) In accordance with the principles of subsidiarity and proportionality, this framework Decision confines itself to the minimum required in order to achieve those objectives at European level and does not go beyond what is necessary for that purpose.

(9) Penalties must be introduced against the perpetrators of such offences which are sufficiently stringent to bring sexual exploitation of children and child pornography within the scope of instruments already adopted for the purpose of combating organised crime, such as Council Joint Action 98/699/JHA of 3 December 1998 on money laundering, the identification, tracing, freezing, seizing and confiscation of the instrumentalities and the proceeds from crime (6) and Council Joint Action 98/733/JHA of 21 December 1998 on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union (7).

(10) The specific characteristics of the combat against the sexual exploitation of children must lead Member States to lay down effective, proportionate and dissuasive sanctions in national law. Such sanctions should also be adjusted in line with the activity carried on by legal persons.

(11) Victims who are children should be questioned according to their age and stage of development for the purpose of investigation and prosecution of offences falling under this framework Decision.

(12) This framework Decision is without prejudice to the powers of the Community.


HAS ADOPTED THIS FRAMEWORK DECISION:

Article 1

Definitions

For the purposes of this framework Decision:

(a) ‘child’ shall mean any person below the age of 18 years;

(b) ‘child pornography’ shall mean pornographic material that visually depicts or represents:
   (i) a real child involved or engaged in sexually explicit conduct, including lascivious exhibition of the genitals or the pubic area of a child; or
   (ii) a real person appearing to be a child involved or engaged in the conduct mentioned in (i); or
   (iii) realistic images of a non-existent child involved or engaged in the conduct mentioned in (i);

(c) ‘computer system’ shall mean any device or group of interconnected or related devices, one or more of which, pursuant to a programme, perform automatic processing of data;

(d) ‘legal person’ shall mean any entity having such status under the applicable law, except for States or other public bodies in the exercise of State authority and for public international organisations.

Article 2

Offences concerning sexual exploitation of children

Each Member State shall take the necessary measures to ensure that the following intentional conduct is punishable:

(a) coercing a child into prostitution or into participating in pornographic performances, or profiting from or otherwise exploiting a child for such purposes;

(b) recruiting a child into prostitution or into participating in pornographic performances;

(c) engaging in sexual activities with a child, where
   (i) use is made of coercion, force or threats;
   (ii) money or other forms of remuneration or consideration is given as payment in exchange for the child engaging in sexual activities; or
   (iii) abuse is made of a recognised position of trust, authority or influence over the child.

Article 3

Offences concerning child pornography

1. Each Member State shall take the necessary measures to ensure that the following intentional conduct whether undertaken by means of a computer system or not, when committed without right is punishable:

(a) production of child pornography;

(b) distribution, dissemination or transmission of child pornography;

(c) supplying or making available child pornography;

(d) acquisition or possession of child pornography.
2. A Member State may exclude from criminal liability conduct relating to child pornography:

(a) referred to in Article 1(b)(ii) where a real person appearing to be a child was in fact 18 years of age or older at the time of the depiction;

(b) referred to in Article 1(b)(i) and (ii) where, in the case of production and possession, images of children having reached the age of sexual consent are produced and possessed with their consent and solely for their own private use. Even where the existence of consent has been established, it shall not be considered valid, if for example superior age, maturity, position, status, experience or the victim's dependency on the perpetrator has been abused in achieving the consent;

(c) referred to in Article 1(b)(iii), where it is established that the pornographic material is produced and possessed by the producer solely for his or her own private use, as far as no pornographic material as referred to in Article 1(b)(i) and (ii) has been used for the purpose of its production, and provided that the act involves no risk for the dissemination of the material.

Article 4

Instigation, aiding, abetting and attempt

1. Each Member State shall take the necessary measures to ensure that the instigation of, or aiding or abetting in the commission of an offence referred to in Articles 2 and 3 is punishable.

2. Each Member State shall take the necessary measures to ensure that attempts to commit the conduct referred to in Article 2 and Article 3(1)(a) and (b), are punishable.

Article 5

Penalties and aggravating circumstances

1. Subject to paragraph 4, each Member State shall take the necessary measures to ensure that the offences referred to in Articles 2, 3 and 4 are punishable by criminal penalties of a maximum of at least between one and three years of imprisonment.

2. Subject to paragraph 4, each Member State shall take the necessary measures to ensure that the following offences are punishable with criminal penalties of a maximum of at least between five and ten years of imprisonment:

(a) the offences referred to in Article 2(a), consisting in ‘coercing a child into prostitution or into participating in pornographic performances’, and the offences referred to in Article 2(c)(i);

(b) the offences referred to in Article 2(a), consisting in ‘profiting from or otherwise exploiting a child for such purposes’, and the offences referred to in Article 2(b), in both cases as far as they refer to prostitution, where at least one of the following circumstances may apply:

— the victim is a child below the age of sexual consent under national law;

— the offender has deliberately or by recklessness endangered the life of the child;

— the offences involve serious violence or caused serious harm to the child;

— the offences are committed within the framework of a criminal organisation within the meaning of Joint Action 98/733/JHA, irrespective of the level of the penalty referred to in that Joint Action;

(c) the offences referred to in Article 2(a), consisting in ‘profiting from or otherwise exploiting a child for such purposes’, and the offences referred to in Article 2(b), in both cases as far as they refer to pornographic performances, Article 2(c)(ii) and (iii), Article 3(1)(a), (b) and (c), where the victim is a child below the age of sexual consent under national law and at least one of the circumstances referred to under the second, third and fourth indent under point (b) of this paragraph may apply.

3. Each Member State shall take the necessary measures to ensure that a natural person, who has been convicted of one of the offences referred to in Articles 2, 3 or 4, may, if appropriate, be temporarily or permanently prevented from exercising professional activities related to the supervision of children.

4. Each Member State may provide for other sanctions, including non-criminal sanctions or measures, concerning conduct relating to child pornography referred to in Article 1(b)(iii).

Article 6

Liability of legal persons

1. Each Member State shall take the necessary measures to ensure that legal persons can be held liable for an offence referred to in Articles 2, 3 and 4 committed for their benefit by any person, acting either individually or as part of an organ of the legal person, based on:

(a) a power of representation of the legal person;

(b) an authority to take decisions on behalf of the legal person; or
(c) an authority to exercise control within the legal person.

2. Apart from the cases provided for in paragraph 1, each Member State shall take the necessary measures to ensure that legal persons can be held liable where the lack of supervision or control by a person referred to in paragraph 1 have rendered possible the commission of an offence referred to in Articles 2, 3 and 4 for the benefit of that legal person by a person under its authority.

3. Liability of legal persons under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators, instigators or accessories in an offence referred to in Articles 2, 3 and 4.

Article 7

Sanctions on legal persons

1. Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 6(1) is punishable by effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and may include other sanctions such as:

(a) exclusion from entitlement to public benefits or aid;

(b) temporary or permanent disqualification from the practice of commercial activities;

(c) placing under judicial supervision;

(d) a judicial winding-up order; or

(e) temporary or permanent closure of establishments which have been used for committing the offence.

2. Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 6(2) is punishable by effective, proportionate and dissuasive sanctions or measures.

Article 8

Jurisdiction and prosecution

1. Each Member State shall take the necessary measures to establish its jurisdiction over the offences referred to in Articles 2, 3 and 4 where:

(a) the offence is committed in whole or in part within its territory;

(b) the offender is one of its nationals; or

(c) the offence is committed for the benefit of a legal person established in the territory of that Member State.

2. A Member State may decide that it will not apply, or that it will apply only in specific cases or circumstances, the jurisdiction rules set out in paragraphs 1(b) and 1(c) where the offence is committed outside its territory.

3. A Member State which, under its laws, does not extradite its own nationals shall take the necessary measures to establish its jurisdiction over and to prosecute, where appropriate, an offence referred to in Articles 2, 3 and 4 when it is committed by one of its own nationals outside its territory.

4. Member States shall inform the General Secretariat of the Council and the Commission accordingly where they decide to apply paragraph 2, where appropriate with an indication of the specific cases or circumstances in which the decision applies.

5. Each Member State shall ensure that its jurisdiction includes situations where an offence under Article 3 and, insofar as it is relevant, under Article 4, is committed by means of a computer system accessed from its territory, whether or not the computer system is on its territory.

6. Each Member State shall take the necessary measures to enable the prosecution, in accordance with national law, of at least the most serious of the offences referred to in Article 2 after the victim has reached the age of majority.

Article 9

Protection of and assistance to victims

1. Member States shall establish that investigations into or prosecution of offences covered by this framework Decision shall not be dependent on the report or accusation made by a person subjected to the offence, at least in cases where Article 8(1)(a) applies.

2. Victims of an offence referred to in Article 2 should be considered as particularly vulnerable victims pursuant to Article 2(2), Article 8(4) and Article 14(1) of Council framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings (*)

3. Each Member State shall take all measures possible to ensure appropriate assistance for the victim's family. In particular, each Member State shall, where appropriate and possible, apply Article 4 of that framework Decision to the family referred therein.

Article 10

Territorial scope

This framework Decision shall apply to Gibraltar.

Article 11

Repeal of Joint Action 97/154/JHA

Joint Action 97/154/JHA is hereby repealed.

Article 12

Implementation

1. Member States shall take the necessary measures to comply with this framework Decision by 20 January 2006 at the latest.

2. By 20 January 2006 the Member States shall transmit to the General Secretariat of the Council and to the Commission the text of the provisions transposing into their national legislation the obligations imposed on them under this framework Decision. By 20 January 2008 on the basis of a report established using this information and a written report from the Commission, the Council shall assess the extent to which the Member States have complied with the provisions of this framework Decision.

Article 13

Entry into force

This framework Decision shall enter into force on the day of its publication in the Official Journal of the European Union.

Done at Brussels, 22 December 2003.

For the Council

The President

A. MATTEOLI
After section 8

Cathy Jamieson

1 After section 8, insert—

<Abuse of children through prostitution and pornography

Paying for sexual services of a child

(1) A person (‘A’) commits an offence if—

(a) A intentionally obtains for himself or herself the sexual services of another person (‘B’);
(b) before obtaining those services, A—
   (i) makes or promises payment for those services to B or to a third person; or
   (ii) knows that another person has made or promised such a payment; and
(c) either—
   (i) B is aged under 18, and A does not reasonably believe that B is aged 18 or over; or
   (ii) B is aged under 13.

(2) In subsection (1)(b) above, “payment” means any financial advantage, including the discharge of an obligation to pay or the provision of goods or services (including sexual services) gratuitously or at a discount.

(3) For the purposes of subsections (1) and (2) above, services are sexual if a reasonable person would, in all the circumstances but regardless of any person’s purpose, consider them to be sexual.

(4) A person guilty of an offence under this section in respect of a person aged 16 or over is liable—

(a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;
(b) on conviction on indictment, to imprisonment for a term not exceeding 7 years.

(5) A person guilty of an offence under this section in respect of a person aged under 16 is liable—

(a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;
(b) on conviction on indictment, to imprisonment for a term not exceeding 14 years.>

Cathy Jamieson

2 After section 8, insert—

<Causing or inciting child prostitution or pornography

(1) A person (“A”) commits an offence if—
(a) A intentionally causes or incites another person (“B”) to become a prostitute, or to be involved in pornography, in any part of the world; and

(b) either—

(i) B is aged under 18, and A does not reasonably believe that B is aged 18 or over; or

(ii) B is aged under 13.

(2) A person guilty of an offence under this section is liable—

(a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;

(b) on conviction on indictment, to imprisonment for a term not exceeding 14 years.

Cathy Jamieson

3 After section 8, insert—

<Controlling a child prostitute or a child involved in pornography

(1) A person (“A”) commits an offence if—

(a) A intentionally controls any of the activities of another person (“B”) relating to B’s prostitution or involvement in pornography in any part of the world; and

(b) either—

(i) B is aged under 18, and A does not reasonably believe that B is aged 18 or over; or

(ii) B is aged under 13.

(2) A person guilty of an offence under this section is liable—

(a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;

(b) on conviction on indictment, to imprisonment for a term not exceeding 14 years.

Cathy Jamieson

4 After section 8, insert—

<Arranging or facilitating child prostitution or pornography

(1) A person (“A”) commits an offence if—

(a) A intentionally arranges or facilitates the prostitution or involvement in pornography in any part of the world of another person (“B”); and

(b) either—

(i) B is aged under 18, and A does not reasonably believe that B is aged 18 or over; or

(ii) B is aged under 13.

(2) A person guilty of an offence under this section is liable—

(a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;

(b) on conviction on indictment, to imprisonment for a term not exceeding 14 years.>
After section 8, insert—

Sections (Causing or inciting child prostitution or pornography) to (Arranging or facilitating child prostitution or pornography): meaning of “involved in pornography” and related expressions

For the purpose of sections (Causing or inciting child prostitution or pornography) to (Arranging or facilitating child prostitution or pornography) above, a person is involved in pornography if an indecent image of that person is recorded; and similar expressions, and “pornography”, are to be construed accordingly.

Extension of sections (Paying for sexual services of a child) to (Arranging or facilitating child prostitution or pornography) to conduct outside the United Kingdom

In section 16B of the Criminal Law (Consolidation) (Scotland) Act 1995 (c.39) (commission of certain sexual acts outside the United Kingdom), in subsection (7)—

(a) the word “and” immediately before paragraph (j) is repealed; and

(b) after that paragraph there is added—

“(k) an offence under section (Paying for sexual services of a child) of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (asp 00) (paying for sexual services of a child);

(l) an offence under section (Causing or inciting child prostitution or pornography) of that Act (causing or inciting child prostitution or pornography);

(m) an offence under section (Controlling a child prostitute or a child involved in pornography) of that Act (controlling a child prostitute or a child involved in pornography); and

(n) an offence under section (Arranging or facilitating child prostitution or pornography) of that Act (arranging or facilitating child prostitution or pornography).”.

Liability to other criminal proceedings

(1) Sections (Paying for sexual services of a child) to (Extension of sections (Paying for sexual services of a child) to (Arranging or facilitating child prostitution or pornography) to conduct outside the United Kingdom) do not exempt any person from any proceedings for an offence which is punishable at common law or under any enactment other than those sections.

(2) But nothing in those sections or this section enables a person to be punished twice for the same offence.
After section 8, insert—

<Sections (Paying for sexual services of a child) to (Arranging or facilitating child prostitution or pornography): notification requirements under Part 2 of 2003 Act

In Schedule 3 to the 2003 Act (which lists the offences which make a person subject to the notification requirements of Part 2 of that Act)—

(a) after paragraph 59 there is inserted—

“59A An offence under section 1 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (asp 00) (meeting a child following certain preliminary contact) if the offender—

(a) was 18 or over; or

(b) is or has been sentenced in respect of the offence to imprisonment for a term of at least 12 months.

59B An offence under section (Paying for the sexual services of a child) of that Act (paying for the sexual services of a child), if the victim or (as the case may be) other party was under 16, and the offender—

(a) was 18 or over; or

(b) is or has been sentenced in respect of the offence to imprisonment for a term of at least 12 months.

59C An offence under any of sections (Causing or inciting child prostitution or pornography) to (Arranging or facilitating child prostitution or pornography) of that Act, if the prostitute or (as the case may be) person involved in pornography was under 16, and the offender—

(a) was 18 or over; or

(b) is or has been sentenced in respect of the offence to imprisonment for a term of at least 12 months.”; and

(b) In paragraph 60, for “59” there is substituted “59C”.

Long Title

In the long title, page 1, line 4, after <nature> insert <, including provision for implementing in part Council Framework Decision 2004/68/JHA>
Protection of Children and Prevention of Sexual Offences (Scotland) Bill

1st Marshalled List of Amendments for Stage 2

The Bill will be considered in the following order—

Section 1 
Schedule
Sections 2 to 11 
Long Title

Amendments marked * are new (including manuscript amendments) or have been altered.

Section 1

Pauline McNeill
1 In section 1, page 1, line 6, leave out <aged 18 or over (“the adult”)>

Cathy Jamieson
12 In section 1, page 1, line 6, leave out <aged 18 or over (the “adult”)> and insert <(“A”)> 

Cathy Jamieson
13 In section 1, page 1, line 7, leave out <a person aged under 16 (the “child”)> and insert <another person (“B”)> 

Pauline McNeill
2 In section 1, page 1, line 8, leave out <two earlier occasions> and insert <one earlier occasion>

Cathy Jamieson
14 In section 1, page 1, line 8, leave out <the adult> and insert <A>

Pauline McNeill
3 In section 1, page 1, line 8, leave out <adult> and insert <person>

Cathy Jamieson
15 In section 1, page 1, line 9, leave out <the child> and insert <B>

Cathy Jamieson
16 In section 1, page 1, line 10, leave out <the child> and insert <B>

Mrs Mary Mulligan
17 In section 1, page 1, line 11, at end insert <or
(iii) makes arrangements, in any part of the world, with the intention of meeting B in any part of the world, for B to travel in any part of the world;

- **Cathy Jamieson**
  18 In section 1, page 1, line 12, leave out <the adult> and insert <A>

- **Pauline McNeill**
  4 In section 1, page 1, line 12, leave out <adult> and insert <person>

- **Cathy Jamieson**
  19 In section 1, page 1, line 12, leave out <the child> and insert <B>

- **Cathy Jamieson**
  20 In section 1, page 1, line 15, leave out <the adult> and insert <A>

- **Pauline McNeill**
  5 In section 1, page 1, line 15, leave out <adult> and insert <person>

- **Cathy Jamieson**
  21 In section 1, page 1, line 15, at end insert—
    <( ) B is—
    (i) aged under 16; or
    (ii) a constable;>

- **Cathy Jamieson**
  22 In section 1, page 1, line 16, leave out <the adult> and insert <A>

- **Pauline McNeill**
  6 In section 1, page 1, line 16, leave out <adult> and insert <person>

- **Cathy Jamieson**
  23 In section 1, page 1, line 16, leave out <the child> and insert <B>

- **Pauline McNeill**
  7 In section 1, page 1, line 18, leave out <one of the meetings or communications on earlier occasions> and insert <the meeting or communication on an earlier occasion>

- **Pauline McNeill**
  24 In section 1, page 1, line 19, after <(a)> insert <(or, if there is more than one, one of them)>
Mrs Mary Mulligan
25 In section 1, page 1, line 21, after <paragraph> insert <or the making of arrangements referred to in sub-paragraph (iii) of that paragraph>

Cathy Jamieson
26 In section 1, page 1, line 23, leave out <the adult> and insert <A>

Pauline McNeill
8 In section 1, page 1, line 23, leave out <adult> and insert <person>

Cathy Jamieson
27 In section 1, page 2, line 1, leave out <the adult’s> and insert <A’s>

Pauline McNeill
9 In section 1, page 2, line 1, leave out <adult’s> and insert <person’s>

Cathy Jamieson
28 In section 1, page 2, line 1, leave out <the child> and insert <B>

Cathy Jamieson
29 In section 1, page 2, line 2, leave out <the adult’s> and insert <A’s>

Pauline McNeill
10 In section 1, page 2, line 2, leave out <adult’s> and insert <person’s>

Cathy Jamieson
30 In section 1, page 2, line 2, leave out <the child> and insert <B>

Cathy Jamieson
31 In section 1, page 2, line 3, leave out <the child> and insert <B>

Cathy Jamieson
32 In section 1, page 2, line 4, leave out <the child> and insert <B>

Mrs Mary Mulligan
33 In section 1, page 2, line 9, after <travelling> insert <or making of arrangements>

After section 1

Pauline McNeill
11 After section 1, insert—
Sexual offences for purposes of Part 2 of Sexual Offences Act 2003

In Schedule 3 to the 2003 Act (sexual offences for purposes of Part 2) after paragraph 43 there is inserted—

“43A Breach of the peace if—

(a) the offence was committed against a child; and

(b) the court determines that there was a significant sexual aspect to the offender’s behaviour in committing the offence.”.
Groupings of Amendments for Stage 2 (Day 1)

Offence: definition of offender and victim
1, 12, 13, 14, 3, 15, 16, 18, 4, 19, 20, 5, 21, 22, 6, 23, 26, 8, 27, 9, 28, 29, 10, 30, 31, 32

Notes on amendments in this group
Amendment 14 pre-empts 3
Amendment 18 pre-empts 4
Amendment 20 pre-empts 5
Amendment 22 pre-empts 6
Amendment 26 pre-empts 8
Amendment 27 pre-empts 9
Amendment 29 pre-empts 10

Offence: preliminary contact
2, 7, 24

Offence: making of arrangements
17, 25, 33

Sexual offences for purposes of Part 2 of Sexual Offences Act 2003
11
Correspondence on Protection of Children and Prevention of Sexual Offences (Scotland) Bill: The Committee took evidence on correspondence received from the Deputy Minister for Justice in relation to the Protection of Children and Prevention of Sexual Offences (Scotland) Bill at Stage 2 from—

Hugh Henry MSP, Deputy Minister for Justice;
Hugh Dignon, Criminal Justice Division, Scottish Executive;
Kirsten Davidson, Criminal Justice Division, Scottish Executive; and
Paul Johnston, Legal and Parliamentary Services Solicitors, Scottish Executive.

Protection of Children and Prevention of Sexual Offences (Scotland) Bill: The Committee considered the Bill at Stage 2 (Day 1).

The following amendments were agreed to (without division): 12, 13, 2, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 7, 24, 25, 26, 27, 28, 29, 30, 31, 32 and 33.

Amendment 1 was moved and, with the agreement of the Committee, withdrawn.

Amendments 3, 4, 5, 6, 8, 9 and 10 were pre-empted.

Section 1 was agreed to as amended.

The Schedule was agreed to without amendment.

The Committee ended consideration for the day, the schedule having been disposed of.
Protection of Children and Prevention of Sexual Offences (Scotland) Bill

10:26

The Convener: Item 2 is on the Protection of Children and Prevention of Sexual Offences (Scotland) Bill. I welcome Hugh Henry, the Deputy Minister for Justice, and his team from the Scottish Executive: Hugh Dignon, Kirsten Davidson and Paul Johnston.

I refer members to the correspondence from the minister that has been circulated. I clarify that because of the Executive’s delay in lodging amendments on child prostitution and child pornography, the timetable for stage 2 will be slightly different from the timetable that was previously intimated to the committee. So that we are all clear, I put it on the record that the committee will consider sections 2 to 8 of the bill at its next meeting, on 27 April, and amendments to the remaining sections on 4 May. That represents a slight rejigging of the order to ensure that we have enough time to consider the bill.

Minister, I invite you to make an opening statement and speak to your letter to the committee.

The Deputy Minister for Justice (Hugh Henry): Thank you for this opportunity. I apologise for the delay in providing these amendments and for the non-availability of the other amendments.

The purpose of our proposals is to protect young people from sexual exploitation. Of course, children under 16 are already protected from those who would wish to engage in any form of sexual activity with them, but when they reach what is for us the age of consent, it is a different matter. In Scots law there is no offence of purchasing sex. Whether our laws on prostitution should be changed so that the purchase of sex is an offence is another issue and, as the committee knows, it is one that we are considering separately through the work of the expert group on prostitution.

Notwithstanding that consideration, I am sure that the committee would agree that where sexual activity is concerned it is right to treat young people as a separate case and give them additional protection. The amendments that the committee is considering today therefore create new offences in relation to the purchase of sexual services from young people who are under 18. They criminalise the purchase of sex from young people and they criminalise those who arrange for young people to become involved in prostitution or pornography. By doing that, we are introducing added protection for our young people.
As I indicated previously, we are still considering our amendments on the taking, possession and distribution of indecent pictures. I explained some of the background to that in my letter to the committee and we hope to get the amendments to you as soon as we can. I realise that the committee is interested in the detail of the amendments, but I hope that my letter highlights the principal issues that we are considering.

The Convener: Thank you. I appreciate that you have attempted to give us as much information as possible, albeit that we do not have the amendments. Given that the detail of amendments is sometimes different from the general principles, that causes difficulty for the committee in consulting others, but we are certainly alive to getting our heads round that. We may have to consult or take advice once we see the amendments.

10:30

Hugh Henry: The line of thought that is followed will influence the number of amendments that will be required. Some amendments are more extensive than others. Essentially, the committee will be right to take evidence on the general principles in order to try to work out whether a particular line of thought is the right one to pursue.

The Convener: We will explore matters with you now.

Margaret Mitchell (Central Scotland) (Con): I have a general question about the drafting technique. The drafting looks fine on paper, but it becomes very cumbersome and confusing when it is read. For example, saying in the proposed new section that

"(1) A person (‘A’) commits an offence if—
(a) A intentionally obtains"

is confusing. Given that quite a lot of time has been spent considering the proposed new section, why was that approach adopted? I am surprised by the format.

Hugh Henry: You will see that we use a similar procedure in defining “A” and “B” in the amendments that we will consider later. In a sense, we want to avoid using the words “adult” and “child” because we think that there could be unintended consequences in defining categories as “adult” and “child”. Someone who would otherwise be defined as a child could be engaged in criminal activity but might not be able to be pursued as a result of the definitions in the bill. Using “A” and “B” for shorthand purposes when we are talking about a person who commits an offence against another person—irrespective of who those persons are—leaves the position flexible enough for those who are engaged in a particular activity to be pursued.

Margaret Mitchell: Do you agree that such things are a little confusing when they are read out loud? I agree that things look fine and are clear on paper, but there will be situations in which a judge is directing a jury and will have to read the act out loud. Bearing in mind such circumstances, there does not seem to be any particularly good reason for adopting the format, other than that it can be taken straight out of the English version. As I said, we have waited many months for the proposed new section and I would have thought that a little more attention could have been paid to the matter.

Hugh Henry: I do not agree with you at all. We considered different formulations, including being more specific, which you seem to be suggesting that we should be, but none of the other formulations worked as well as the one in question. The main aim is to have law that is precise, that meets the intended objectives as far as is humanly possible, and that is capable of delivering the required results. We would make a mistake if we were to go back and construct something that sounds good when it is read out but leaves us vulnerable in how it can be interpreted.

Margaret Mitchell: Rather than being more specific, I suggest that “E” or another bland term could be used. That is not impossible. The bill does not need to be specific—it simply needs to be not confusing when it is read out.

Hugh Henry: Are you suggesting that “E” rather than “A” should be used?

Margaret Mitchell: Something else, such as “X”, could be used.

Hugh Henry: I am willing to go away and deliberate on whether “E” and “F” rather than “A” and “B” should be used. That is certainly worthy of further thought.

Margaret Mitchell: That would be helpful. Given that judges and sheriffs will read this out, if it is indeed your intention that the law should be clear and unambiguous, as you say that it is, it would be good if you were prepared to take this opportunity to improve the wording.

The Convener: Minister, could I have further clarification on the drafting technique? You said that you wanted to avoid using the terms “adult” and “child” and would use “A” and “B” instead. Is that because you are worried about defining in the legislation the age of a child or what a child is?

Hugh Henry: The issue is not so much about defining the age of a child but more concerned with the amendments on grooming. We are trying to avoid a situation where someone capable of committing an offence might otherwise be defined
as a child. This is a matter that I know the committee looked at.

As I explained to Margaret Mitchell, we looked at a number of formulations. It is possibly not as much of an issue at this stage as it is later on but, nevertheless, the principle is still the same. We are trying to leave the legislation open enough so that we are able clearly to define someone as committing an offence against a victim, while excluding people from being either an offender or a victim simply because a certain form of words has been used.

The Convener: I understand. You are saying that because someone is a child does not mean that they cannot be an offender.

Hugh Henry: That is correct.

The Convener: That is helpful.

Stewart Stevenson (Banff and Buchan) (SNP): I will take this in little bites to make sure that I understand as we go along. My questions are on Council framework decision 2004/68/JHA, which the minister attached to his letter to the committee. In relation to the United Kingdom and, hence, to Scots law, what is the status of that framework decision? Is it one that we are required to place into Scots law or are we doing so voluntarily?

Hugh Henry: We are required to bring that decision into Scots law. The member will note that article 12.1 of the framework decision reads:

“Member States shall take the necessary measures to comply with this framework Decision by 20 January 2006 at the latest.”

The potential to introduce certain exemptions is also available and that is an option that we are looking at. However, the framework decision must be applied here.

Stewart Stevenson: Thank you. I wanted to get that on the record so that we know exactly where we are coming from.

Before addressing the framework decision itself, I note that the last sentence of the 13th paragraph of the preamble refers to fighting violence against

“children, young persons and women”.

What does the term “young persons” mean in that context as distinct from “children” and “women”?

Hugh Henry: We are specifically concerned with children. To continue on from that paragraph, article 1 of the framework decision reads:

“For the purposes of this framework Decision:

(a) ‘child’ shall mean any person below the age of 18 years”.

For the purposes of constructing our legislation, we are focusing very much on that definition. I am not sure that the issue about a young person being beyond the age of 18, or a different age, has any legal significance as far as I can see, although I am prepared to be corrected on that.

Stewart Stevenson: I accept that the decision itself does not refer to young persons but, before starting to engage in some of the issues involved and how they are translated into Scots law, I wanted to see—without any particular side to the question—whether the reference in the preamble meant anything that we should be taking into consideration. What you have said is basically that the answer to that question is no, so I shall move on.

Other colleagues will look at other parts of the Protection of Children and Prevention of Sexual Offences (Scotland) Bill in relation to the framework decision, but I am particularly interested in article 2, on the offences concerning sexual exploitation of children. I think that it is relatively clear, but I just want to be absolutely sure about how that relates to people who have a relationship that we recognise in law or in practice—in common law or in statute law—as a relationship of marriage or a relationship having the characteristics of marriage. Article 2(c), refers to

“engaging in sexual activities with a child, where … money or other forms of remuneration or consideration is given as payment in exchange for the child engaging in sexual activities”.

How does that exclude the situation of a married couple who are a 19-year-old and a 17-year-old? The 19-year-old male, for example, may be the only breadwinner in the house. How can they avoid being caught in the first instance by the European framework decision, and in the second instance by the translation of that into law as expressed in your amendments?

Hugh Henry: From what I understand of your description, a 19-year-old being a breadwinner in a marriage does not constitute buying sex.

Stewart Stevenson: Are you quite certain about, and prepared to put on the record, the fact that the provision of food, bed and lodging to a 17-year-old within a normal relationship—whether it is a marriage or a relationship having the general characteristics of marriage—does not, and under no circumstances could, constitute remuneration or consideration as payment in exchange for sex?

Hugh Henry: Yes. Within the context of a marriage or relationship, someone sharing the money that they earn and making a contribution to a household is an entirely different proposition from someone selling sex as a commercial or other activity. We are not saying that there can never be circumstances within a marriage where coercion, force or threats are used. We know that
there have been cases in this country where that has been an issue. Equally, I would not anticipate that, in a marriage, as we understand the term, in which only one party is earning, the party who does not work will be considered to be selling sex. That is not the intention and I do not think that it could be construed as such.

Stewart Stevenson: To build further on that example, let us suppose that the same couple are neither married nor in a relationship having the characteristics of marriage. On a one-night stand or a blind date, the man buys a meal for the 17-year-old girl, and that is followed by sexual activity. Is that covered? If that is not intended to be covered—I hope that it is not necessarily intended to be covered—how do we ensure that it is not caught by the law as drafted, both in the European framework decision and in the amendments that you are lodging?

10:45

Hugh Henry: Whatever happens in the construction of the European framework decision or in what we put into law, we have other safeguards in the application of our law. Activity needs to be deemed worthy of a charge by the police, who would have to approach the procurator fiscal, who would determine whether to pursue action. Therefore, all the circumstances of a case would be examined before it reached court.

In each case, analysis and determination would be needed of whether a payment was made—whether remuneration changed hands—directly in return for sex. The fact that the one-night stand, the purchase of a meal and the consensual activity that you described took place would not by definition mean that sex had been bought. That would depend on what occurred in the course of that brief relationship and of that contact and what was said. Determining whether an offence took place would be a matter for the proper authorities.

Stewart Stevenson: Do you accept that whether the sexual activity is consensual is no longer an issue in the legislation that we are considering?

Hugh Henry: That is correct. However, I tried to explain the other matter, which is the wider nature of that brief relationship. Did the availability of sex depend on the remuneration? The provisions would not make it an offence for someone aged 16 or 17 to have sex, but if that person sold sex or someone had bought the sex, whether with cash or other forms of remuneration—if the appropriate authorities deemed an action to be a purchase—that would be an offence. However, that does not mean that someone who went out for a meal or a few drinks and decided to have sex later would necessarily commit an offence in the circumstances that you described. The decision would depend entirely on the circumstances.

Stewart Stevenson: I will make clear where I am coming from. I would be happy for an offence to be created and I would prefer it to become an offence for a person of whatever age to pay for sex. However, we are leaving that matter for another time. If I pursue the issue, it is not because I resist what you are trying to achieve—on the contrary, I am trying to ensure that what you are doing delivers what you want.

Given that the relationship is consensual, I still have difficulty. You say that simply the process of prosecution will protect people from being prosecuted in some circumstances. However, that appears to leave open the question that an offence has prima facie been committed.

Hugh Henry: Subsection (2) in the first draft amendment says:

“In subsection (1)(b) above, ‘payment’ means any financial advantage, including the discharge of an obligation to pay or the provision of goods or services”.

That comes down to the notion of a contract—albeit one with a weak and vague set of conditions. The notion is that to obtain sex, someone has had to pay or provide remuneration or financial advantage. If one element was not conditional on the other, no offence would be committed. However, if one was conditional on the other—if the availability of sex was conditional on that financial advantage—then, yes, there would be an offence.

Stewart Stevenson: So, you are saying that, in the example that I have given, the expenditure by the 19-year-old male, which creates the circumstance that leads to sexual activity taking place between the 19-year-old and the 17-year-old, is not, in itself, a contractual or quasi-contractual arrangement that inevitably leads to sex, although that expenditure creates the circumstances in which that sex happens.

Hugh Henry: That is correct. It would not necessarily lead to an offence. It would be for the relevant authorities to determine whether the circumstances were appropriate. However, I presume that if someone said at the beginning, “If I buy you a meal, will you engage in sexual activity?” and there was an agreement, that would be an entirely different proposition from someone going out for a meal, having a few drinks and deciding, later in the evening, to engage in sexual activity. For an offence to be committed, there must be an element of commercial activity—an element of payment by whatever means—that provides a financial advantage and the provision of sex as a result of an agreement to provide that financial advantage.
Stewart Stevenson: Therefore, a young man should be very careful, in inviting a young lady out to dinner, not to suggest that the outcome of that social activity might be sexual activity.

Hugh Henry: If it was in relation to a person of 16 or 17 years of age, I think that that would be responsible. It would be reprehensible of someone to try to induce someone of that age to have sex in return for some financial advantage, and I hope that the law will protect young people. It must be remembered that other considerations would apply, which the prosecution authorities and the procurator fiscal would look closely at. However, it is right that we apply the law in this way, not just so that we implement the framework decision but so that we protect young people.

Stewart Stevenson: I have a final, slightly different point to raise under the same heading before I surrender the baton to someone else. Paragraph 1 of article 5 of the framework decision requires that the offences “are punishable by criminal penalties of a maximum of at least between one and three years of imprisonment.”

However, in relation to summary conviction, your amendment provides only “for a term not exceeding 6 months”.

Would you care to comment?

Hugh Henry: There is a difference between a minimum range and a maximum range of sentences, and article 5 relates to a maximum range. What we propose is entirely consistent with the framework decision. Subsection (5) in amendment 1 states:

“A person guilty of an offence under this section in respect of a person aged under 16 is liable—

(a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;

(b) on conviction on indictment, to imprisonment for a term not exceeding 14 years.”

The way in which we are constructing the offence is entirely consistent with the framework decision.

Stewart Stevenson: It is based on the ability of the sheriff court to refer a case for sentencing to the High Court, where the sentence that can be passed falls within the range that is required by the framework decision.

Hugh Henry: Yes. I think that alternative court procedures are being outlined.

The Convener: Let me ask you in a bit more detail about the construction of the crime. You say that the key test is whether the payment or financial advantage is conditional on the provision of sexual services. Is there a requirement to have that in the drafting?

Hugh Henry: Subsection (2) of the new section that would be inserted by the draft amendment in the name of Cathy Jamieson states:

“In subsection (1)(b) above, “payment” means any financial advantage, including the discharge of an obligation to pay or the provision of goods or services (including sexual services) gratuitously or at a discount.”

That should cover the issue that you raise.

The Convener: I thought that the draft provision was quite broad, because it refers to “any financial advantage”. I did not think that it was clear that the Crown must prove that the goods, services or payment were in exchange for sexual services. If it cannot prove that there was such an exchange, there is no crime. You talked about the commercial context.

Hugh Henry: It comes back to some of the issues that Stewart Stevenson raised. We are not saying that, if sex takes place after a person has bought a meal for a girl of 16 or 17, that will ultimately lead to the person being convicted of a crime. A crime will have been committed if it was made very clear that the intention was for sexual services to be exchanged for something that has a financial connection.

The Convener: I am clear about what you are saying. However, proposed subsection (2) states:

“In subsection (1)(b) above, “payment” means any financial advantage”—

that could be payment for a meal—

“including the discharge of an obligation to pay or the provision of goods or services (including sexual services) gratuitously or at a discount.”

I can see the scenario that you have described coming under that provision, but it needs to be clearer that the financial advantage is conditional on the provision of sexual services. If not, it does not fit the definition of the crime.

Hugh Henry: We have time to consider that issue. However, if proposed subsection (2) is examined with reference to proposed subsection (1)(b), it is clear that, before obtaining the services, A, E, F, G or H would have to promise the other party payment for them. There must be some indication that an agreement, promise or quasi-contract has been made before the financial advantage is delivered.

The Convener: What would the Crown have to prove in such a case? I presume that it would have to prove that the person involved was a child as defined in the bill.

Hugh Henry: That is correct.

The Convener: Would there be the usual defence against that charge—namely, that the accused could not reasonably have known that the person was a child? The Crown would also have
to prove that sexual services were provided in exchange for a payment or financial advantage.

Hugh Henry: Broadly speaking, that is correct. Proposed subsection 1(c)(i) refers to the issue of reasonable belief, which the convener mentioned. The issue of payment being made in return for a sexual service has been covered in my answers to questions from both the convener and Stewart Stevenson.

The Convener: Presumably, you would have to show not only that payment took place, but that it was a condition.

Hugh Henry: Yes.

The Convener: Those are the elements that the Crown would be required to prove.

Hugh Henry: Yes. Before obtaining the services, a person would have to make or promise payment for them or to know “that another person has made or promised such a payment”.

11:00

Mr Bruce McFee (West of Scotland) (SNP): Picking up again on the point that Stewart Stevenson made, I am concerned about how explicit the contract needs to be before an offence is committed. The minister gave an example of a chap saying to a girl, “If I buy you dinner, will you have sex with me?” Although that is not the best chat-up line in the world, it is an explicit one.

Let us say that a man is buying dinner in the hope and expectation that he will receive sexual services somewhere down the line. I suspect that that does not constitute an offence. How explicit does the contract need to be before an offence is committed?

Proposed subsection (2) would insert:

“In subsection (1)(b) above, “payment” means any financial advantage, including the discharge of an obligation to pay”.

That is a pretty wide definition. Could that simply be inferred?

Hugh Henry: No.

Mr McFee: Surely, at a later stage, the clear intention of the male could be inferred. Where in the draft amendment is it made clear that the contract, for want of a better word, has to be explicit in the way that you suggested earlier?

Hugh Henry: I do not believe that inference would be sufficient. That said, there are people who will always be capable of suggesting that there was an inference. In such a matter of dispute, the proper authorities would have to determine whether what was said was more than an inference.

You also asked about where in the draft amendment the contract is specified. If you look at proposed subsection (1)(b), you will see that the offence is created if someone “makes or promises payment ... or knows that another person has made or promised such a payment”.

It is clear that not only does a financial advantage have to be involved but that that has to be agreed beforehand and be clearly related to that activity— to sexual services.

Mr McFee: So, just to clarify matters, proposed subsection (1)(b) says:

“before obtaining those services, A”—

for the avoidance of doubt, I mean person A—

“makes or promises payment for those services to ... a third person”.

It is pretty clear that if one individual does X, the other person will do Y, or at least will know that another person has made a promise of payment. However, what if the individual has simply proposed to the person with whom he is having dinner that if he pays for dinner, such and such a thing will happen? That does not involve a third party.

Hugh Henry: It involves “B”.

Mr McFee: The draft amendment says:

“knows that another person has made or promised such a payment”.

Hugh Henry: But before that, it says:

“before obtaining those services, A ... makes or promises payment for those services to B”—

Mr McFee: Okay. I see that: “B”, or a third person.

Hugh Henry: Yes. It says:

“or to a third person”.

Mr McFee: What corroboration will be required? We are talking about two people in a restaurant. I know what the Executive is driving at with the bill, and everyone agrees with putting a stop to child prostitution and so on. However, I am still concerned that the bill may have unintended consequences.

Let us say that person A is simply having dinner with person B and, at a later stage, person B says, “He said that if I slept with him he would write off my £300 rent arrears.” What corroboration would be required in such circumstances?

Hugh Henry: The Crown would have to prove beyond reasonable doubt not each and every part of what had happened but that the entire offence took place. Of course, the problem—if, indeed, it
can be called that—exists at the moment, in which an offence of a sexual nature takes place with only two people involved. Clearly, issues of corroboration need to be determined in such cases and I am sure that the Crown looks carefully at them. Indeed, it would need to be satisfied that a case was capable of being proved beyond reasonable doubt.

The Convener: Let us say that an exchange of money for sexual services takes place in the street and a young girl or boy is involved. In that instance—which is not uncommon—the circumstances that give rise to suspicion are obvious.

To go back to the scenario that Bruce McFee described, let us suppose that a 16-year-old girl and a 30-year-old man are simply having dinner, although there is consent to sex, and that a parent starts making accusations. I realise that the case would come down to the evidential test, but there would be nothing to prevent the Crown from proceeding if it could show that there was some financial advantage, such as the payment of a debt, for example. Perhaps we need something more to ensure that we do not give rise to such cases.

Hugh Henry: You underestimate the degree of diligence that the Crown would apply in determining whether the case was capable of being pursued. It would not be sufficient for a parent to make that allegation because, without evidence, there would be no reason to pursue the complaint. The simple purchasing of a meal would not be sufficient; the Crown would have to be satisfied that a promise of some reward had been made before sexual activity took place and that the reward was conditional on the sexual activity taking place.

On the issue of wider corroboration, with older people who may have a habit of acting in such a way, the Crown could reasonably look to other cases as part of the corroboration of one particular event. We are clear that an agreement that there will be some payment or financial advantage must have been made ahead of the sexual activity taking place.

The Convener: That will be difficult to prove in all cases.

Hugh Henry: We accept that, but, however we constructed the measure, it would be difficult to prove that. Even when there is an exchange of money between two individuals, someone could argue that the transfer of money was for some allegedly benign reason and that it just so happened that sexual activity took place after that. I am sure that those who are potentially guilty of the offences will deploy fairly imaginative arguments to deny that criminal activity took place.

We are faced with that situation, but, as I said earlier, we are required to introduce legislation that is consistent with the European framework decision. We believe that, in constructing the measure in the way that we have done, we are making it clear that, before the sexual services are provided, there must be the making or promising of a payment. We have described payment as "financial advantage", because it would be hard to include every conceivable type of activity. If we said that buying a drink or a meal was included, how many drinks would that be and what would the value of the meal be?

The Convener: When cases get to court, the court often has to explore such issues.

Hugh Henry: Yes, but it is for the Crown to decide whether the matter can be proved beyond reasonable doubt and, ultimately, it is for the court to determine whether the offence took place.

Stewart Stevenson: Until the last couple of paragraphs, you were using the phrase "sexual activity".

Hugh Henry: I beg your pardon—I meant sexual services.

Stewart Stevenson: Perhaps you were right, because the framework decision uses the words "sexual activity", whereas the draft amendments mention "sexual services". I raise the issue because I want to test whether certain activities would fall within the definition of sexual services in exchange for reward, but not within the definition of sexual activity in exchange for reward. I will give two examples.

The first example is that of a 17-year-old purchasing condoms. I know that soldiers put condoms over the mouths of their rifles to stop sand getting in them in the gulf, but in general terms—

The Convener: Only Stewart would know that.

Stewart Stevenson: We could get into another discussion about that.

The Convener: No thanks.

Stewart Stevenson: The purchase of a condom, possibly from a slot machine that is provided by a company rather than from an individual person, is the provision of a sexual service in exchange for money, albeit that it is not the provision of a sexual activity.

Secondly, a young lady of 16 or 17 may purchase on prescription, for which she has to pay, the contraceptive pill or the morning-after pill. Does that constitute sexual services and would it be caught by the use of the phrase "sexual services" in the bill? It would probably not be caught by the European framework decision, which uses the phrase "sexual activity".
Would you care to lighten our darkness, minister?

Hugh Henry: Whether I care to or not, I suspect that I will have to try. I honestly do not think that what you are describing is particularly relevant. For example, if a young girl obtains the contraceptive pill through her general practitioner, it could be for a number of reasons that are not necessarily related to contraception. That type of medication has a wider applicability, as I am sure you know. If someone buys condoms, whether to fit them over their rifle or air gun, to fill them with water or for any other reason, that in and of itself is neither a sexual activity nor a sexual service.

The draft amendments talk about sexual services, saying that "services are sexual if a reasonable person would, in all the circumstances but regardless of any person’s purpose, consider them to be sexual."

The Crown and, ultimately, the court would need to determine whether that definition would apply, but I do not think that the purchase of contraceptives for whatever purpose would necessarily be sufficient to lead to an offence under the draft amendments.

Stewart Stevenson: What about the use of spermicidal foam, which is used in connection with a contraceptive cap?

Hugh Henry: Perhaps I will pass on that.

Stewart Stevenson: I am only asking why the draft amendments say "sexual services" rather than "sexual activities".

Hugh Henry: Whether a girl, you, I or anyone else purchased such foam, the amendments are about a person intentionally obtaining, as the proposed new section says, sexual services. They are not about whether that person bought foam or whatever other accoutrements might be construed as capable of being used for that purpose in whatever shape or form.

Stewart Stevenson: It is just—

The Convener: I think that it is clear. We will move on from that topic.

Marilyn Glen (North East Scotland) (Lab): It is important that we be clear about the point that Stewart Stevenson has raised, because he is talking about sexual health services and there is no intention behind the bill or anything that the Executive or the committee is doing to stop sexual health services. It is really important that we be clear about the difference.

Mr McFee: I am glad of that, because I was starting to think that I was in an Ann Summers shop.

I have a question on financial advantage, which I ask because of the way in which some younger people are coerced into prostitution. Would "financial advantage" include a loan—albeit a high-interest loan such as one would get from the local loan shark—or the supply of drugs?

Hugh Henry: Yes. Potentially it could.

11:15

The Convener: I will turn to another issue. Under the bill, an offender could be aged 16 or above but the victim could be aged up to 18. Could there be a 16-year-old offender and a 17-year-old victim?

Hugh Henry: Yes, potentially.

The Convener: Do you see a problem with that?

Hugh Henry: No. That is one of the reasons why we have tried to be careful in our construction of the description of the committing of the offence and of the victim.

The Convener: Is the Executive comfortable with the concept that the offender could be younger than the victim?

Hugh Henry: If the person who is the victim is a person as described in the European framework decision, they are a victim irrespective of whether the perpetrator is a year younger than they are. One could be 17 and one could be 16. The issue is whether payment has been made in return for sexual services.

The Convener: I understand that that is the obligation under the framework decision and the United Nations protocol. I do not have a particular view on the issue, although it strikes me as a wee bit of an odd concept that we are trying to protect children up to the age of 18, yet we could have that scenario.

Hugh Henry: That is no different from the concerns that the committee expressed in relation to grooming.

Stewart Stevenson: That is exactly the point that I was going to ask you about. Given that you are creating a sexual offence that applies to someone under the age of 18 in this context, are you minded to reconsider—in the light of concerns that several members of the committee have expressed—the provision in section 1, which makes grooming an offence for someone who is over 18 but not an offence for people who are 16 and 17? Section 1 states:

"A person aged 18 or over … commits an offence if”.

Hugh Henry: I thought that amendments had been lodged on that matter.
Stewart Stevenson: Sorry. In that case, I withdraw my comments.

The Convener: We have not exhausted the issue yet, so I move on to Marlyn Glen.

Marilyn Glen: I will ask a question about the right to privacy. Is there any incompatibility between article 8 of the European convention on human rights, on the right to privacy, and the provision in the bill?

Hugh Henry: I do not think that there is a problem. As you know, the provision relates to the Council framework decision, which we are obliged to implement. It is a pan-European issue, as is the issue of the right to privacy. We are saying clearly that we are extending, in an appropriate way, protection against people who buy sex from those persons. That does not contravene any right to privacy.

Mrs Mary Mulligan (Linlithgow) (Lab): I will move on to the incitement of prostitution or pornography. I ask for a few points of clarification. The first is what you mean by pornography. Committee members have discussed exactly what we think it means. I want to be clear about what the Executive is saying.

Hugh Henry: I ask the committee to look at our proposed amendment 5, which begins “After section 8, insert—”. I think that the definition in that amendment covers what Mary Mulligan is asking about.

Mrs Mulligan: Would the recording of an indecent image of a 17-year-old be described as pornography?

Hugh Henry: As far as child prostitution or pornography is concerned, this provision deals with individuals or others who catch people up in the commercial activity of pornography and encourage and engage them in certain activities that could be exploited. We are still examining the question of taking the image or a photograph of a 16 or 17-year-old.

Mrs Mulligan: Would the recording of an indecent image of a 17-year-old be described as pornography?

Hugh Henry: There is an overlap between that issue and the issue of the taking of an indecent image, and we need to examine that matter. However, it would be for a court to decide the very specific example that Mary Mulligan has raised. People can refer to a significant body of case law on these matters. Even leaving aside the question of exploitation, I think that the matter would come down to the definition of indecency and whether a certain image would be construed as indecent. That definition is covered elsewhere, and court cases have been brought on the matter.

Mrs Mulligan: Can you point us to that definition of indecency?

Hugh Henry: The bill itself does not contain that definition. We draw such definitions from common law, which refers to material that is “likely to deprave or corrupt”.

Over the years, cases have been brought on that issue.

Mrs Mulligan: I shall return to a point that was raised earlier. Does incitement with regard to prostitution or pornography apply where B—I shall use these terms—is the spouse or registered partner of or has a recognised relationship with A? Are there any exemptions in that respect?

Hugh Henry: As far as exploiting someone for the purposes of pornography is concerned, there are no such exemptions. As I have said, we are still looking at the different issue of the taking of pictures.

Mrs Mulligan: I share your feeling that it would be difficult to introduce exemptions, because doing so might be a problem in some cases. I recognise why you do not want to go down that road, but it is important to put that on the record.

My final point is about the term “incitement” and whether the Executive intends its common-law meaning or whether you wish to go beyond that meaning.

Hugh Henry: We intend the common-law definition.

Mrs Mulligan: Purely and simply.

The Convener: I ask you about the thinking behind the provision. I appreciate that you did not do the thinking; it was done elsewhere.

Hugh Henry: I will take that as backhanded compliment, convener.

The Convener: You know what I mean.

Hugh Henry: You know me too well.

The Convener: I mean that it is European Union thinking that I cannot follow. The framework decision states:

“This Framework Decision should contribute to the fight against sexual exploitation of children and child pornography by complementing the instruments”

blah, blah, blah. In this country, we are crystal clear about how we view child pornography and we have stiff laws with stiff penalties. What will the framework decision add to what we already
criminalise, except for telling us that we have to extend the age range for which we do it?

**Hugh Henry:** All that the framework decision adds is the age thing.

**The Convener:** That was my conclusion.

**Hugh Henry:** We are not changing any of our other definitions; we are adding protection for 16 and 17-year-olds.

**The Convener:** Our common-law definition of pornography is anything that is “likely to deprave or corrupt”.

Corrupt who—the person looking at the image?

**Hugh Henry:** That is correct, but none of that changes the provisions that we have just now. We are extending the age range because we believe that protection should be given to 16 and 17-year-olds. Whether we believe in it or not, we are required to extend that protection to 16 and 17-year-olds.

Although this has nothing to do with definitions and more to do with the process, we are also adding in the ideas of “controlling” and “arranging or facilitating”.

The term “incitement” is still defined under common law, as is “corruption”.

**The Convener:** I find it confusing that we rely on the current definition of pornography, which is that it is “likely to deprave or corrupt”.

the person looking at the photographs, but that the policy intention behind the framework decision is to protect those who are in the image.

**Hugh Henry:** I presume that the argument would be that if an image is not “likely to deprave or corrupt” then the person of whom the image has been taken is probably not in need of that protection. For example, a picture of a semi-clad woman would cause no offence in some cultures, but in other societies it might cause offence and be regarded as “likely to deprave or corrupt”.

As far as we are concerned, the issue is not necessarily the taking of the image, although we need to come back to that, but whether the use or distribution of the image is likely to have other effects such as depraving or corrupting. Certain pictures could be taken that are not likely to deprave or corrupt and would therefore not be caught within the definition.

**The Convener:** I understand. The likeliness to deprave or corrupt is the test for who needs protection.

You used the word “commercial” a few times, although it does not appear in any documents. The only relevant point that I can find in the framework decision articles is about the production of child pornography. Do you assume that the production of child pornography is commercial?

11:30

**Hugh Henry:** If I have given you that impression, I apologise, convener. You are probably thinking of the previous discussion. There are circumstances, as we know from much of the evidence that this committee has taken, in which the distribution of pornography is not done for commercial advantage. For example, there are some people who obtain some satisfaction from taking and exchanging such photographs.

**The Convener:** Would a man who transmitted through a mobile phone an indecent photograph of his wife who is under 18 be caught by this legislation, providing that the image passes the test of being likely to deprave or corrupt?

**Hugh Henry:** What you describe could be caught by the legislation, but other aspects would have to be considered by the Crown. To some extent, we have dealt with child prostitution. As far as pornography is concerned, the issue is partly to do with somebody being used or drawn into a wider lifestyle.

The issue of the taking of pictures within a relationship is one of the things that we have said that we will come back to you on because we need to resolve the various complications that arise, depending on which route is taken.

**Stewart Stevenson:** Are you going to consider further article 3.2(b) of the European framework decision? In respect of children who have reached the age of sexual consent but who are still children, it makes a limited exemption in relation to pictures that have been produced with their consent and are solely for private use. The example that the convener gave would seem to fall within that area. Is there further room for you to express that limited exemption within what you are planning to put into Scots law?

**Hugh Henry:** That is exactly the dilemma that we are trying to resolve. The third page of my letter to the committee describes the options that are available to us. We will come back to the committee on that issue.

**The Convener:** Does anyone else have a question?

**Stewart Stevenson:** My brain hurts.
Mrs Mulligan: We are wrestling with this issue because of the need to include in legislation those who are above the age of consent but are still under 18. From evidence that we have had, we are aware that other European countries have an even bigger age gap than we have in that regard. The decision says that everything must be in line by January 2006. Are we aware of the deliberations that are taking place elsewhere on this issue?

Hugh Henry: No, we are not. We take our responsibilities seriously and have drafted the amendments that we are discussing to ensure that the legislation is consistent with our obligations. We have further thought to give to the question of what further exemptions, if any, should be considered in respect of the parts of the decision that Stewart Stevenson referred to.

The Convener: I thank you for your attendance, minister. As you are fully aware, the situation is not ideal from our point of view but at least we have had a chance to air some issues before the final text of the amendments is produced.

We will take a short comfort break.

11:34

Meeting suspended.

11:45

On resuming—

Protection of Children and Prevention of Sexual Offences (Scotland) Bill: Stage 2

Section 1—Meeting a child following certain preliminary contact

The Convener: Item 3 is our first day of stage 2 consideration of the bill. Amendment 1, in my name, is grouped with amendments 12, 13, 14, 3, 15, 16, 18, 4, 19, 20, 5, 21, 22, 6, 23, 26, 8, 27, 9, 28, 29, 10, 30, 31, and 32. There are several pre-emptions. Amendment 14 pre-empts amendment 3; amendment 18 pre-empts amendment 4; amendment 20 pre-empts amendment 5; amendment 22 pre-empts amendment 6; amendment 26 pre-empts amendment 8; amendment 27 pre-empts amendment 9; and amendment 29 pre-empts amendment 10. I think that everyone knows what a pre-emption is, so I need not go through the procedure.

Amendment 1 relates to the age of the offender, which, under the bill, is 18 or over. I will speak to the committee position and say why I believe that it is necessary to remove that age limit. I am sure that other members will want to speak in the debate.

I understand why the Executive put the minimum age of the offender at 18 in trying to protect an age group where people tend to be vulnerable. Some people thought that we should bring the age down to 16, but there is a variety of opinions as to what we should do. For example, the national hi-tech crime unit told the committee that evidence shows that those who are likely to display unhealthy behaviour towards children would be doing so by the age of 18.

Barnardo’s Scotland, a children’s organisation, was also keen that we lowered the minimum age of the offender to 16. However, the Scottish Children’s Reporter Administration pointed out that people of that age would be dealt with through the children’s hearings system rather than through the criminal justice system.

We should maintain the existing arrangements relating to the age of the offender, so that those cases that would normally be dealt with through the children’s hearings system would continue to be dealt with in that way, whereas people who had reached the appropriate age—those over the age of 16 where there is no supervision order—would be dealt with by the criminal justice system, albeit that the court would continue to have some discretion about whether to send the case back to the children’s hearings system. In our report, the
committee took the view that it would be best to remove the words “aged 18 or over” from the bill and mention no age limit, so that the normal rules could apply.

Several of the amendments in the group seek to do the same thing as amendment 1. I understand from our earlier discussions that the Executive is trying to do the same thing by replacing the words “adult” and “child” with the letters “A” and “B”. Notwithstanding Margaret Mitchell’s earlier comments, which are worthy of consideration, I believe that we should remove the words “aged 18 or over” from the bill—on balance, I think that that is the best way forward. However, I am open-minded about how to achieve our aim, so I will listen to what the Executive has to say.

I move amendment 1.

Hugh Henry: We have some sympathy with the committee’s proposition and we agree that we require to consider removing the age qualification for the accused in connection with the grooming offence. Our original position was that creating the offence was about strengthening the law to deal with the perceived problem of adults seeking to win the confidence of children and to take advantage of them—the process that we describe as grooming.

However, we have taken note of the evidence that was presented to the committee at stage 1, when a number of organisations said that teenagers can and do manipulate younger children and that the risk of damage to those younger children is considerable. We have reflected on some of the concerns expressed by the committee and we agree that the grooming offence should catch such behaviour. We are confident that prosecutorial discretion will mean that normal teenage romantic pursuits will not fall foul of the legislation and that the offence will be used only where there is evidence of predatory behaviour and the intention of committing a sexual assault.

Where our amendment differs from yours, convener, is that we think that the use of letters—I will not go into whether they should be “A” and “B” or other letters—is helpful in differentiating and clarifying in the bill the position of the accused and the intended victim, particularly as there could be situations in which the accused is a child. There is no difference in policy or effect between our amendments, so I hope that you will agree that what we are doing is helping to remove any potential weakness or anomaly.

Removing the reference to “child” also allows us to cater for the situation where attempts to groom a child have come to the attention of the police. We understand that it is normal practice in those situations for an undercover police officer to continue communications with the suspect, in order to ensure that the child is not exposed to any further potentially abusive communications. The police officer would assume the role of the child, or a friend of the child, having first been authorised to do so. The problem is that that practical step could subsequently mean that the accused could argue in court that he was not in fact grooming a child but was communicating with an adult.

We therefore propose that the bill should be amended so that the requirement of the offence is that the accused should have communicated either with someone who is under 16 or with a constable. That has to be read alongside section 1(1)(c), which requires the Crown to establish that the accused person did not reasonably believe the other party to be 16 or over.

We are conscious of the dangers of legislation that might be seen to encourage entrapment, but we are confident that the highly specialised police officers who undertake such work are properly trained in what is permissible in the context of that undercover work. Furthermore, the courts will continue to be responsible for determining what evidence is admissible and what is not. We think that the balance is clearly in favour of recognising the realities of policing what is a complex area. We believe that our amendments are a necessary addition to the bill and reflect the concerns of many organisations that gave evidence. I think that they also reflect the concerns expressed by the committee and the legitimate demand that you have made, convener, on behalf of the committee.

Stewart Stevenson: I welcome the amendments in the names of Pauline McNeill and Cathy Jamieson. I shall listen to what is said and decide which set to support. I am not unduly concerned at stage 2 about the use of the alphabetic letters “A” and “B”, because I am sure that, if we accept the minister’s amendments but want to substitute other letters, we can do so at stage 3.

The introduction of the words “a constable” in amendment 21 is welcome. However, I would like the minister to use his summing-up remarks to address the issue of authorisation. I agree with him that any such investigation should be properly authorised, but the bill does not make any reference to the circumstances in which, or the source from which, such authority might be derived. It would be useful to put on record some further explanation in that regard, so that the provision does not become—as I am sure the minister would not wish it to—simply a licence for any constable to take action. Such work requires the training, skills and supervision that can be found, for example, in the national hi-tech crime unit.
Marilyn Glen: I support the change in the definition of the age of the offender. In evidence, Barnardo’s Scotland pointed out the importance of recognising inappropriate behaviour as early as possible in order to effect change. If we are to effect change, it is important that we do not simply criminalise behaviour, but ensure that appropriate treatments are available for young people who display such behaviour. That is the main reason for my support for the amendments. Behaviour can be changed, but it is essential to do that as early as possible, so appropriate treatments must be available.

Margaret Mitchell: The minister said at stage 1 that he would consider the issue. I welcome the amendments, which improve the bill and make it stronger.

Mr McFee: At stage 1, the committee took the general view that it was incorrect to require the perpetrator to be over 18 and that it would be a worthwhile change to remove that measure and accept that children can be offended against by children, particularly those who have predatory behaviour as one of their traits. On the use of the terms “A” and “B” compared to the convener’s recommendation, I would not say that the issue is neither here nor there, because there are differences.

Amendment 21 is extremely loose. I appreciate the idea behind it and I have no problems in this instance with legislation allowing the potential for entrapment, because the medium with which we are dealing is difficult to police and, at present, the predators whom we are seeking to stop have the advantage in that medium. However, the problem is that if the bill simply mentions “a constable”, a police officer who engages in predatory behaviour would be exempt from the measures. It must be absolutely crystal clear in the bill, even if that means further amendments at stage 3, that the police officer must be authorised to carry out the task, otherwise the bill might have the unintentional consequence that a police officer who engages in such predatory behaviour would be outwith the scope of the bill. I want it to be absolutely crystal clear that the officer must be authorised to carry out such work.

The Convener: Before I wind up, the minister is welcome to comment on any of those points.

Hugh Henry: In one sense, it is not helpful to have the stark juxtaposition of the Executive’s amendments and the convener’s amendments. We believe that our amendments meet the aspirations that the convener has articulated, but we have sought to build in further safeguards and to build on the existing measures. I have explained why we believe that it is right not to include the reference that the convener seeks to put in.

Stewart Stevenson and Bruce McFee raised the issue of authorisation, but it is clear that police constables would have to apply for authorisation to become a covert human intelligence source under the provisions of the Regulation of Investigatory Powers (Scotland) Act 2000. Furthermore, Bruce McFee’s interpretation of amendment 21 is not correct. The word “constable” has a clear meaning in Scots law; it means a police constable under the Police (Scotland) Act 1967. We do not need to say anything further in the bill on the matter.

I disagree with Bruce McFee’s suggestion that the police constable could be doing the grooming. In effect, it is the police constable who would be being groomed, as he or she would have substituted themselves for the child. The bill is perfectly clear and concise on the matter. The provision gives a degree of added protection; it allows perpetrators to be caught without the child having to be exposed to further danger.

12:00

The Convener: Let me wind up. I endorse what other committee members have said. We are pleased that the Executive has responded to the views that we expressed in our stage 1 report and, given its response, I will seek the committee’s agreement to withdraw amendment 1.

I am sure that the minister will accept in good faith that the committee did not want to get into a ridiculous argument about whether the letters “A” and “B” or “E” and “F” should be used. That said, it is worth considering how we can ensure that everyone is absolutely clear about who is subject to the provision. With that comment, I seek the committee’s agreement to withdraw amendment 1.

Amendment 1, by agreement, withdrawn.

Amendments 12 and 13 moved—[Hugh Henry]—and agreed to.

The Convener: Amendment 2, in my name, is grouped with amendments 7 and 24.

Again, I am speaking to the committee’s position at stage 1. Amendment 2 relates to the number of communications that are required under the bill to demonstrate that a crime is complete. Under section 1(1)(a), communication on “two earlier occasions” is required. I have sympathy with the Executive’s original position—I believe that it is important that, in attempting to prosecute criminal behaviour, we do not catch people in innocent situations. However, the bill would not allow us to prosecute someone where only one communication had taken place yet there was a clear intention to groom a child with the purpose of meeting them. That is the deciding factor for me. On balance, I take the view that we should reduce the number of communications to one.
I move amendment 2.

Mrs Mulligan: I agree with the convener. Concern was expressed that someone can build up the confidence of a child even in one communication. Unless we press amendment 2, we will be unable to move on the issue. It is important that the bill refers to one and not two communications.

I appreciate that the Executive is trying not to catch in the bill communications that are made accidentally or as a result of a misunderstanding. However, the bill includes enough protection to ensure that that will not happen. As the minister said earlier, people will act sensibly in their interpretation of the legislation. Amendment 2 is a sensible amendment to the bill.

Mr McFee: I, too, agree that amendment 2 is a sensible amendment. The evidence that we took from Rachel O’Connell in particular was conclusive on the matter. She showed—as did the practical demonstration that the committee witnessed—how quickly a situation can develop in an internet chat room. In some instances, we are talking about a matter of minutes.

We wrestled with the problem of whether, under the bill as drafted, one prolonged communication in a chat room would count as being two communications if the person signed off mid-way through the conversation and logged back on again. I think that courts and the Procurator Fiscal Service would have the common sense to be able to consider cases that might be borderline—cases in which the content is not particularly explicit. However, the stuff that we saw was explicit in the extreme and we should not say that there has to be a second deluge of explicit material before judging that the offence has been committed. Therefore, I agree with the convener’s amendment.

Margaret Mitchell: In my member’s bill, I suggested that there should have to be two communications, as the Scottish Executive has done. However, having listened to the evidence—particularly that of Rachel O’Connell, who made us realise that an internet communication could go pretty far down the line and that we would want to curb it quickly—I and, I think, the rest of the committee have been persuaded that the bill should require there to have been only one communication. That would make the legislation as strong and effective as possible.

Hugh Henry: As has been suggested, our original intention was to ensure that we did not catch innocent or unwitting behaviour. The requirement for two communications was included to ensure that we targeted deliberate and considered actions. However, we recognise that it is possible that a calculating sex offender might tailor their actions to ensure that there was only one communication. The convener and others have referred to the evidence that the committee has heard about the possibility of the sex offender extending the first communication until they had persuaded the child to meet them. It is right that we properly consider the significance of that.

We also note that the offence would still require other deliberate steps to have been taken by the accused that would clearly indicate criminal intent. Having said that and having listened to the arguments, we are content with the changes that the convener is suggesting and think that they will strengthen the bill.

The Convener: We welcome the Executive’s position.

Amendment 2 agreed to.

Amendments 14 to 16 moved—[Hugh Henry]—and agreed to.

The Convener: Amendment 3 is therefore pre-empted.

Amendment 17, in the name of Mary Mulligan, is grouped with amendments 25 and 33.

Mrs Mulligan: Section 1 of the bill refers to the adult intentionally meeting the child or travelling to meet the child, but it does not mention the issue of communication. Amendment 17 would ensure that all aspects were covered. Initially, it might have seemed unlikely that people would either travel worldwide or communicate worldwide for the purposes that we are discussing. However, as we heard more and more evidence, we realised that that was possible. That is why I hope that the committee will accept the amendment.

I move amendment 17.

Mr McFee: Mary Mulligan neglected to mention what, for me, was the most important part of the issue—luckily, however, amendment 17 deals with it. The glaring hole in the bill is that, although the offence is completed if the adult travels to meet the child, it is not completed if the adult gets the child to travel to meet him or facilitates some sort of travel arrangements for the child. Amendment 17 will rectify that situation, which is why it is worthy of support. If that glaring hole in the bill is not closed, paedophiles will be presented with the opportunity of escaping possible conviction simply by arranging for the child to travel to meet them. I welcome the closing of that loophole.

Margaret Mitchell: The Law Society of Scotland pointed out the loophole. It had not occurred to us before then that the bill should refer to the child travelling to meet the adult. Amendment 17 would close that loophole.

Hugh Henry: As members have suggested, it is clear that there is a potential loophole that could
allow a sex offender to seek to evade the requirements of the grooming offence by having a child travel to meet them. If a meeting had taken place, it would not matter who had travelled, although, in cases where the police were running an undercover operation, it would be unlikely that they would allow a child to meet a potential abuser.

Mary Mulligan’s amendments are helpful and would allow a prosecution to proceed where the accused had clearly arranged for the intended victim to travel to meet him without the requirement for the accused to travel or for that meeting to have taken place. It is important that the accused has to take active and deliberate steps—in this case, arranging for an intended victim to travel to a meeting at which the accused intends to commit a sexual offence. It is clear that it would not be sufficient if the child decided of their own volition to travel to meet that person. However, the situation is properly catered for in Mary Mulligan’s amendments 17, 25 and 33 and we are happy to support them.

Mrs Mulligan: I am pleased that members recognise the loophole that my amendments attempt to close.

Amendment 17 agreed to.

Amendments 18 to 23 moved—[Hugh Henry]—and agreed to.

The Convener: Amendments 4 to 6 are therefore pre-empted.

Amendments 7 and 24 moved—[Pauline McNeill]—and agreed to.

Amendment 25 moved—[Mrs Mary Mulligan]—and agreed to.

Amendments 26 to 32 moved—[Hugh Henry]—and agreed to.

12:15

The Convener: Amendments 8 to 10 are therefore pre-empted.

Amendment 33 moved—[Mrs Mary Mulligan]—and agreed to.

Section 1, as amended, agreed to.

Schedule agreed to.

The Convener: That ends the consideration of amendments at stage 2 for today. I thank the minister and his team for attending.
Protection of Children and Prevention of Sexual Offences (Scotland) Bill

2nd Marshalled List of Amendments for Stage 2

The Bill will be considered in the following order—

<table>
<thead>
<tr>
<th>Section 1</th>
<th>Schedule</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sections 2 to 11</td>
<td>Long Title</td>
</tr>
</tbody>
</table>

Amendments marked * are new (including manuscript amendments) or have been altered.

After section 1

Pauline McNeill

11 After section 1, insert—

<Offence for purposes of Part 2 of Sexual Offences Act 2003

Sexual offences for purposes of Part 2 of Sexual Offences Act 2003

In Schedule 3 to the 2003 Act (sexual offences for purposes of Part 2) after paragraph 43 there is inserted—

“43A Breach of the peace if—

(a) the offence was committed against a child; and

(b) the court determines that there was a significant sexual aspect to the offender’s behaviour in committing the offence.”>

Section 2

Marilyn Glen

42 In section 2, page 2, line 30, leave out <aged 18 or over>

Cathy Jamieson

34 In section 2, page 3, line 2, at end insert—

<( ) An application under subsection (1) above shall be made by summary application.>

Cathy Jamieson

35 In section 2, page 3, line 2, at end insert—

<( ) Such an application shall be made within—

(a) the period of 3 months beginning with the date on which the matter mentioned in subsection (1)(a) above appears to the applicant to be the case; or
such longer period as the sheriff considers equitable having regard to all the circumstances.>

Stewart Stevenson

43 In section 2, page 3, line 3, at beginning insert <Subject to subsection (3A) below,>

Stewart Stevenson

44 In section 2, page 3, line 9, at end insert—

<(3A) An act described in paragraphs (b) to (d) of subsection (3) above is not an act within that subsection if the act was done for the protection of the child.>

Mrs Mary Mulligan

45 In section 2, page 3, line 10, after <may> insert <after giving parties an opportunity to be heard>

Mrs Mary Mulligan

46 In section 2, page 3, line 15, at end insert—

<(4A) Before making a risk of sexual harm order, the sheriff shall, where the person against whom the order is sought is present in court, explain in ordinary language—

(a) the effect of the order and the prohibitions proposed to be included in it;
(b) the consequences of failing to comply with the order;
(c) the powers the sheriff has under sections 4 and 6; and
(d) the entitlement of that person to appeal against the making of the order.

(4B) Failure to comply with subsection (4A) above shall not affect the validity of the order.>

Mrs Mary Mulligan

47 In section 2, page 3, line 20, at end insert—

<(  ) unless otherwise stated in the order, has effect throughout Scotland.>

Stewart Stevenson

50 In section 2, page 3, line 26, at end insert—

<(  ) Where a sheriff makes a risk of sexual harm order, the sheriff must also consider whether the case of the person against whom the order has effect should be referred to the Scottish Ministers to determine if that person should be included in the list kept by Scottish Ministers of individuals considered unsuitable to work with children.>

Section 3

Stewart Stevenson

48 In section 3, page 3, line 32, at end insert—

<(  ) an act is done for the protection of a child if the person acts for the purpose of—

(i) protecting the child from sexually transmitted infection;
(ii) protecting the physical, psychological or emotional safety of the child, including preventing the child from becoming pregnant; or

(iii) promoting the child’s physical, psychological or emotional well-being by the giving of advice,

and not for the purpose of obtaining sexual gratification or for the purpose of causing, facilitating or encouraging the activity constituting the act described in paragraphs (b) to (d) of subsection (3) above or the child’s participation in it;>

Cathy Jamieson
36 In section 3, page 3, line 33, after <person> insert <aged>

Section 4

Cathy Jamieson
37 In section 4, page 4, line 15, leave out <subsections (4) and (5)> and insert <subsection (4)>

Cathy Jamieson
38 In section 4, page 4, line 15, after <sheriff> insert—

<(  ) if satisfied, except where the application is made by the chief constable mentioned in subsection (2)(c) above, that the application has been intimated to that chief constable; and

(  )>

Cathy Jamieson
39 In section 4, page 4, line 24, leave out subsection (5)

Section 5

Marlyn Glen
49 In section 5, page 5, line 6, leave out <if considering it just to do so> and insert <after giving parties an opportunity to be heard, and if satisfied—

(a) that prima facie the conditions mentioned in paragraphs (a) and (b) of section 2(4) are met; and

(b) that it is in the interests of justice to do so.>

Cathy Jamieson
40 In section 5, page 5, line 6, leave out <considering it just to do so> and insert <subsection (3A) applies>

Cathy Jamieson
41 In section 5, page 5, line 8, at end insert—

<(3A) This subsection applies if the sheriff is satisfied—>
(a) except where the application is made by way of the main application, that it has been intimated to the person against whom it is made;
(b) that *prima facie* the person against whom the order is sought has on at least two occasions, whether before or after the commencement of section 2 above, done an act within subsection (3) of that section; and
(c) that it is just to make the order.

Marlyn Glen

51 In section 5, page 5, line 12, at end insert—

<\[\text{( )} \] unless otherwise stated in the order, has effect throughout Scotland.>

Marlyn Glen

52 In section 5, page 5, line 12, at end insert—

<\(4\text{A})\) Before making an interim risk of sexual harm order, the sheriff shall, where the person against whom the main application was made is present in court, explain in ordinary language—

(a) the effect of the order and the prohibitions proposed to be included in it;
(b) the consequences of failing to comply with the order;
(c) the power the sheriff has to recall the order; and
(d) the entitlement of that person to appeal against the making of the order.

\(4\text{B})\) Failure to comply with subsection (4A) above shall not affect the validity of the order.

Marlyn Glen

53 In section 5, page 5, line 15, at end insert—

<\(\text{( )} \) Where the main application does not result in a risk of sexual harm order being made, any interim risk of sexual harm order (including any order varied, renewed or discharged under subsection (5) above) made in respect of the person against whom the main application was made shall be treated as never having been made.>

**After section 5**

Marlyn Glen

55* After section 5, insert—

<**Notification of making etc. of orders and interim orders**

(1) Subsection (2) applies where—

(a) a risk of sexual harm order is made, varied, renewed or discharged; or
(b) an interim risk of sexual harm order is made.

(2) The clerk of the court by which the order is made, varied, renewed or discharged shall cause a copy of, as the case may be—

(a) the order so made, varied or renewed; or
(b) the interlocutor by which discharge is effected,
to be served on the person subject to the order.

(3) For the purposes of subsection (2), a copy is served if—
   
   (a) given to the person subject to the order; or
   
   (b) sent to that person by registered post or the recorded delivery service.

(4) For the purposes of subsection (3), a certificate of posting of a letter issued by the postal operator concerned shall be sufficient evidence of the sending of the letter on the day specified in the certificate.

(5) In subsection (4), “postal operator” has the meaning given by section 125(1) of the Postal Services Act 2000 (c.26).>

Section 7

Marilyn Glen

54 In section 7, page 5, line 37, leave out subsection (4)
Protection of Children and Prevention of Sexual Offences (Scotland) Bill

Groupings of Amendments for Stage 2 (Day 2)

Sexual offences for purposes of Part 2 of Sexual Offences Act 2003
11

RSHOs: age limit
42, 36

RSHOs and interim RSHOs: procedure
34, 35, 45, 46, 37, 38, 39, 52, 55

RSHOs: protection of children exemption
43, 44, 48

RSHOs and interim RSHOs: area where order has effect
47, 51

Referral for inclusion in list of persons unsuitable to work with children
50

Making of interim RSHOs
49, 40, 41

Notes on amendments in this group
Amendment 49 pre-empts amendment 40

Effect of determination of RSHO application on interim RSHO
53

Disposals for offence of breaching RSHO or interim RSHO
54
Present:
Marlyn Glen                  Bruce McFee
Pauline McNeill (Convener)  Margaret Mitchell
Mrs Mary Mulligan           Stewart Stevenson
Mr Jamie Stone

Protection of Children and Prevention of Sexual Offences (Scotland) Bill: The Committee considered the Bill at Stage 2 (Day 2).

The following amendments were agreed to (without division): 42, 34, 36, 37, 38, 40, 41 and 54.

The following amendments were agreed to (by division)—
  35 (For 6, Against 0, Abstentions 1)
  39 (For 6, Against 0, Abstentions 1)

Amendments 11, 43, 47, 50, 49 and 53 were moved and, with the agreement of the Committee, withdrawn.

Amendments 44, 45, 46, 48, 51, 52 and 55 were not moved.

Sections 6 and 8 were agreed to without amendment.

Sections 2, 3, 4, 5 and 7 were agreed to as amended.

The Committee ended consideration of the Bill for the day, section 8 having been agreed to.
Scottish Parliament
Justice 1 Committee

Wednesday 27 April 2005

[The Convener opened the meeting at 10:04]

Protection of Children and Prevention of Sexual Offences (Scotland) Bill: Stage 2

The Convener (Pauline McNeill): Good morning and welcome to the 12th meeting in 2005 of the Justice 1 Committee. We have not received any apologies. I am sure that Margaret Mitchell will join us later.

Item 1 is the second day of stage 2 of the Protection of Children and Prevention of Sexual Offences (Scotland) Bill. Once again, I welcome Hugh Henry, the Deputy Minister for Justice, Hugh Dignon, Kirsten Davidson and Paul Johnston.

After section 1

The Convener: Amendment 11, in my name, is in a group on its own.

Having considered at stage 1 the offence created under section 1, the committee felt strongly that in cases in which there was no evidence that an adult had arranged to meet a child, or in cases in which there had been a sexually explicit conversation over the internet—which is already, we believe, charged under breach of the peace—the adult, if convicted, should go on the sex offenders register, provided all that is proved. We heard evidence from witnesses, including some of the police organisations, that they were not confident that adults charged with such offences under breach of the peace would go on the sex offenders register.

There was nothing official on that point from the Executive in its written response at stage 1. I presume, minister, that you will tell the committee this morning that there is already provision for such offences under the Sexual Offences Act 2003. Therefore, provision exists to deal with such behaviour.

I move amendment 11.

Stewart Stevenson (Banff and Buchan) (SNP): I support what the convener has said and I look forward to the minister's response. I have read the Sexual Offences Act 2003 and the Protection of Children (Scotland) Act 2003, and I am not clear where—if at all—either of those acts makes the kind of reference that we are looking for. It would be helpful if the minister could tell the committee specifically where those provisions are made. The bill amends other acts, and I recognise that it is sometimes not immediately apparent, when one comes to read the bill, which references are provided. It is clear that, up to a point, there has been a gap in the legislation; we should ensure that we use every opportunity to put people who have a serious sexual aspect to their criminality on the appropriate register.

Mrs Mary Mulligan (Linlithgow) (Lab): I wish to make two points. First, it was implied to us that it was not possible to recognise the sexual content of such actions under breach of the peace and that there was therefore a need to do something further. My second point, to which the convener has already referred, is that a perpetrator may have no intention of taking a conversation any further, yet damage can be done as a result of the explicit nature of the conversation and the gratuitous way in which it takes place. The committee felt that it wanted to ensure that the damage that could be done in that way was recognised. We therefore want to add to our protection of children and young people.

The Deputy Minister for Justice (Hugh Henry): I sympathise with the intentions behind amendment 11, but we do not support it, for two strong reasons. First, the amendment is unnecessary. I will pick up points that members made latterly. Sexually explicit conversations could be prosecuted as lewd and licentious behaviour or as a breach of the peace. Therefore, provision exists to deal with such behaviour.

Stewart Stevenson asked what provisions or powers cover the situation. Paragraph 60 of schedule 3 to the Sexual Offences Act 2003 makes it clear that if the court, in imposing sentence in relation to any offence other than one that is expressly mentioned elsewhere in the schedule, considers that the offender's behaviour in committing the offence had a significant sexual aspect, that offence can form the basis of a
requirement to register as a sex offender. That means that the court can already require notification in the circumstances that the convener's amendment envisages.

Secondly, perhaps more crucial is the fact that our advice is that if amendment 11 were agreed to, it could have a significant unintended consequence. Paragraph 60 applies only to offences that are not mentioned elsewhere in schedule 3 to the 2003 act, so an express reference to breach of the peace elsewhere in the schedule would mean that paragraph 60 could not apply to that offence.

The convener’s amendment would insert in schedule 3 breach of the peace only when the offence was committed against a child. As a result, any breach of the peace offence that did not involve an offence against a child could not lead to a requirement to notify. If an offender harassed an adult with letters or phone calls in which sexual threats were made, the Crown might decide to prosecute such a case as breach of the peace. In some circumstances, the court might consider that the accused was a sex offender who should be subject to the notification requirements. If we agreed to the amendment, the court would have no powers to put that offender on the sex offenders register, so the amendment could reduce the powers that are available to the courts when dealing with breach of the peace offences.

In the circumstances, I hope that Pauline McNeill accepts the assurance that amendment 11 is unnecessary and that she shares our concern that the unintended consequence could leave us worse off.

The Convener: What you have said helps the committee to understand the 2003 act. It would have helped to have that response in writing, so that we could have considered further confirmation that we are avoiding such an unintended consequence.

I will listen to the response to my next point before I say whether I will press my amendment to a vote. I hope that the Executive accepts that the matter is fundamental for the committee. If the 2003 act covers the cases that we have seen, which we believe form the greater number, we need to have confidence that the courts will use that act to put such offenders on the sex offenders register.

Hugh Henry: I cannot assure the committee that any court will use provisions in any legislation—that is a matter for the courts. I hope that the courts will use the legislation that is available, but each determination is a matter for the courts and not for ministerial guidance or diktat to courts.

The Convener: I appreciate that that is a matter for the courts. My only reservation is that we now just have to leave the subject alone and see what happens. Will the Executive consider whether the legislation should be monitored in some way? This is probably our only opportunity in this parliamentary session to consider the protection of children, which is why we are being particularly careful to ensure that we do everything that can be done to put the correct provisions in place so that they can be used. Will you consider monitoring whether the legislation is being used as intended?

10:15

Hugh Henry: We will certainly keep our eye on how the legislation is being used. It is appropriate to consider whether any legislation introduced by the Parliament is having the desired effect or whether there are still gaps and weaknesses. Parliament should come back to any piece of legislation to determine whether it should be strengthened in future.

We are still at a relatively early stage. The Sexual Offences Act 2003 only came into force in May last year, so it will take some time to establish a body of evidence. However, undoubtedly we will keep our eye on how the legislation is being used.

The Convener: Given what you said about an unintended consequence, I feel that I have no option but to withdraw amendment 11, but I might want to revisit the issue. I want to be sure that the Executive accepts what the committee said in its report about our need for adequate provisions to catch offences that are outside the new offence under section 1. We have not had anything in writing from you about that.

Hugh Henry: We believe that the matter is adequately covered but we will reflect on what the committee has said.

Amendment 11, by agreement, withdrawn.

Section 2—Risk of sexual harm orders: applications, grounds and effect

The Convener: Amendment 42, in the name of Marlyn Glen, is grouped with amendment 36.

Marlyn Glen (North East Scotland) (Lab): Amendment 42 seeks to achieve consistency with the changes that we have already made to section 1. If an offender can be under 18, and we have accepted that they can, the risk of sexual harm order should also be available for general use. Given we have accepted that people younger than 18 can exhibit problem behaviour, we must make this change to section 2. I take this opportunity to reiterate that when we take this route, suitable interventions should be available for those young people.
I move amendment 42.

Hugh Henry: Amendment 36, in the name of the Minister for Justice, is a minor amendment that inserts the word “aged” in section 3(b) to ensure that the language used in the bill is consistent and that there is no doubt that we are talking about the age of the child when we refer to that child being “under 16”. I hope that amendment 36 is uncontroversial.

We support amendment 42 for the same reasons that I set out when we considered the amendment to section 1 that removed the 18-year age limit for the grooming offence. We have taken note of the evidence and the consultation responses that highlighted the risk that those who are under 18 can present to young children and the damage to those children that results. It is therefore right that risk of sexual harm orders, which we believe will be a useful addition to the protection measures for children who are at risk of sexual harm, should also be available for the courts to use when it is judged that under-18s pose a risk to children. Of course, we expect that such individuals will be the subject of intervention from social work departments and possibly also the children’s panel, although those issues are probably more for guidance rather than for the bill.

Mr Bruce McFee (West of Scotland) (SNP): I agree with the minister and Marlyn Glen. There are two sides to the matter. First, we have to recognise—as we did on the first day of stage 2—that such offences and behaviour are not exclusive to those who are over the age 18.

Secondly, we have to provide an intervention mechanism. If we as a society are to try to affect someone’s behaviour, it is vital that we catch that behaviour as early as possible. Amendment 42 will ensure that the armoury has an additional weapon so that that function can be carried out.

Amendment 42 agreed to.

The Convener: Amendment 34, in the name of Cathy Jamieson, is grouped with amendments 35, 45, 46, 37 to 39, 52 and 55.

Hugh Henry: There has been discussion by the committee and in evidence about the procedure that is to be followed when applications are made for RSHOs—full RSHOs and interim RSHOs. I should make it clear at the outset that the Executive shares the view that the procedure should be completely fair and should allow all parties the opportunity for a fair hearing. Our approach to achieving that fairness in procedure has been to rely on the sheriff court summary application rules, which cater for almost all situations that could be envisaged. In taking that approach, we note the terms of rule 1.4 of the Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc Rules) 1999, which states:

“Unless otherwise provided in this Act of Sederunt or in any other enactment, any application or appeal to the sheriff shall be by way of summary application and the provisions of Chapter 2 of this Act of Sederunt shall apply accordingly.”

However, to ensure that there is no room for doubt, we specify in amendment 34 that the summary application procedure is to be used.

Amendment 35, in the name of Cathy Jamieson, specifies a time limit for making an application. Under the rules to which I referred, the default position would be that an application can be made no later than 21 days after the action that leads to the application. In the case of RSHOs, it is our view that if the 21-day limit were applied to the actions that are listed in section 2(3), that would be unduly restrictive, given the complexities of the matters to be considered, such as whether prosecution would be a more appropriate response. Therefore, we propose a time limit of three months after the act in question comes to the attention of the chief constable, because we think that that is a more realistic period. We are conscious that there may be occasions on which, although it is not possible to meet that time limit, there is still a strong case for making an order. We think that it is right that in those circumstances, such action should be permissible, provided that the sheriff is satisfied that it would be equitable to take that action, once he has taken into account all the circumstances.

Amendment 39 seeks to remove the need for consent of the chief constable or the person who is subject to the RSHO to be obtained before the RSHO can be discharged within two years of its having been made. Having reflected on the matter, we think that it is perfectly adequate to ensure that the chief constable always has the right to be heard and that there is no need to give the chief constable a veto. The sheriff court rules will ensure that the chief constable who applies for an order in the first place, and the person who is subject to the order, will both have the opportunity to put their cases when any application for variation or discharge is made.

Amendment 38 is related to amendment 39, in that it seeks to ensure not only that the chief constable who applied for the order, but the chief constable of any area in which the person under an RSHO has gone to live, will be given the chance to be heard.

I will not go into detail on the amendments that Mary Mulligan and Marlyn Glen have lodged. We are sympathetic to their underlying intentions, but it is our general view that procedural aspects are adequately covered by the sheriff court summary application rules that I have mentioned, and that
further specification of the procedure is not necessary. I add that the summary application rules can be amended to set out particular procedures that apply to specific types of application, if it is decided that that is necessary.

I move amendment 34.

Mrs Mulligan: The minister picked up the points that I was trying to make in my amendments. We wanted to ensure through amendment 45 that there would be an opportunity for a person to be heard, as natural justice should allow in any other situation.

On amendment 46, it is important that the accused be given the opportunity to hear the cause, effect and consequences of the RSHO. We are not trying to catch somebody out by placing on them an RSHO: we are trying to prevent them from putting a child at risk or in danger of an act that would harm the child. Therefore, it is important that we ensure that the perpetrator is aware of what is covered in the RSHO.

I appreciate that the minister has tried to pick up the spirit of amendment 46. I hope that he appreciates that my amendments would also provide that when someone is not present in court, we do not want the process to be held up just by people's absenting themselves. I want the minister to consider other ways of ensuring that a person who is not present in court knows exactly what is involved in the RSHO, as they would had they been present. That said, the minister has probably picked up the spirit of the amendments, so I shall not press the matter.

Marilyn Glen: Like Mary Mulligan, I have been persuaded that it is not necessary to spell out in the bill more of the procedures. However, it is important that we balance the rights of the accused with the rights of those who are offended against. It is important that we have this discussion openly and that the courts and everyone else are aware that a balanced view is necessary.

Stewart Stevenson: I want to test my understanding of the effect of amendment 35, which seeks to change the 21-day timescale—to which the act of sederunt refers—to three months when applying for an RSHO. I want to be clear about when the clock will start ticking.

The references are to section 2(3) and the four activities on page 3 of the bill, to which the act of sederunt refers. Will the clock start ticking when a complaint is made to the chief constable, and in what form will the complaint have to be made for the clock to start ticking? At that point, there might be absolutely no prima facie evidence to sustain a malicious and anonymous letter that might have been received by the chief constable, for example. In the whole gamut of sexual offending, we know that this is a very difficult area in which to prove cases and to see through prosecutions in the criminal justice system. It is true that the offence comes under the civil system to an extent, but the question is important.

Mary Mulligan will probably not move her amendments. We will see about that, but notwithstanding that, if amendment 45—which would insert the phrase “after giving parties an opportunity to be heard”, for RSHOs, but not for interim RSHOs—were to be written into the bill, would the effect be to require the person who might become the subject of the RSHO to be present in court at the hearing, or would it be sufficient that the person was aware of the court hearing and was given the opportunity to appear, but did not have the opportunity to veto by failing to appear? It would be useful to understand the implications of that if it were to be written into the bill. I generally support the minister's amendments, but I want to ensure that we fully understand their implications.

10:30

Margaret Mitchell (Central Scotland) (Con): I have reservations about proposed new subsection (b) that would be inserted by amendment 35. I understand that proposed subsection (a) in the amendment will have the effect of extending the timescale for submitting an application from three weeks to three months, while proposed subsection (b) will, more or less, give a blank cheque. There will be no time limit whatever, apart from in exceptional circumstances. That is already quite a variation.

I also have reservations about amendment 39, which seeks to remove section 4(5), which will give chief constables an absolute veto over discharging RSHOs as a result of the chief constable being the person who was in full possession of the facts when the interim order was made. Are you quite satisfied that section 4(4) covers that? I feel that it is a somewhat of a belt-and-braces measure.

I have reservations about other matters, but I seek clarification on amendments 35 and 39.

Hugh Henry: On the latter of Stewart Stevenson’s two points about requiring presence in court, Mary Mulligan's amendment 45 says: “giving the parties an opportunity to be heard”. It does not require the parties to be present. I hope that that answers the question.

Stewart Stevenson wondered when the clock would start ticking. It will start when it appears to the chief constable that two acts have taken place. We do not specify how that information should be
presented; however, the chief constable has to satisfy himself or herself that there are sufficient grounds for taking a matter forward. In any case, we are quite clear that the clock will start ticking when that information is presented to the chief constable.

Stewart Stevenson: I want to nail the matter down. Does the clock start ticking when the chief constable becomes aware of the second act, regardless of how far in the dim and distant past the first act might be?

Hugh Henry: Yes. Stewart Stevenson is right to point out that the process is triggered not by the first incident, but by a second similar event. As a result, a fair summation is that the time period that he referred to will start from the second event, because the process cannot be started simply by one event.

Stewart Stevenson: Again, just to be absolutely clear, there would be no bar to the first event's being an event over which a person had been successfully prosecuted and sentenced, perhaps even 10 years before. Could the second event be something that happens 10 years later? Would that scenario count under the definition that is set out in the bill? I am not trying to suggest that it should not; I am simply testing the intention behind the proposal.

Hugh Henry: We should remember that this is not a prosecution process.

Stewart Stevenson: I am aware of that.

Hugh Henry: However, I presume that Stewart Stevenson is describing a situation in which two acts have been committed, one of which resulted in an earlier prosecution. In an application that links two events that are separated by a substantial period of time, the courts would have to determine whether such a link should be made.

Stewart Stevenson: So, in the context that we are talking about, there would be no question of the first offence's being regarded as spent because it might be in other circumstances in the judicial process.

Hugh Henry: No—the first offence could have other consequences, which might still apply.

The Convener: Stewart Stevenson has raised an important matter that I had not considered. Could the defence argue under the European convention on human rights that the first offence was too old? There is a tendency to argue that point.

Hugh Henry: We understand that that would not be a valid argument. However, who knows what might be argued in the future under the ECHR? It would be for the courts to determine the matter.

The Convener: If Parliament provides no guidance on the matter, a court might take the view that too much time had elapsed between the two incidents. At stage 2, we should consider making it clear in the bill that we are concerned not about the time between the two acts but about the fact that acts took place that come within the scope of the bill.

Hugh Henry: We have not specified any limit on the time between acts. If we did that, or if we specified that there must be a link between the acts, there would be a danger that cases might be regarded as being outside the scope of the bill. We would rather deploy flexibility, notwithstanding the fact that the courts might take a different view in the future. It is right that the courts should properly consider each case; I would worry about including a specific provision that might militate against a court's taking action against someone whose activities had lain dormant for some time.

Mrs Mulligan: I appreciate that the minister wants to ensure flexibility. It is helpful that he has said on the record that he will not set a limit on the time between incidents, so no one should think that there is any such time limit. However, the convener mentioned the ECHR. If the first incident had led to a sentence, could it be argued that the offence had been dealt with and should not be regarded as the first act? I would appreciate the minister's stating on the record his views on the matter.

Hugh Henry: I do not think that such an argument could be applied. We are not talking about offences; we are talking about behaviour. In the situation that the convener described, the earlier offence would have provided confirmation of the individual's behaviour. However, we are not linking the acts or considering whether they are spent offences. There would be sufficient justification for the court to act if it considered that the individual's behaviour, confirmation of which had been provided in relation to the previous offence, was such that the person presented a risk to children. The person would not be being punished for the previous offence, which would have been dealt with. The question for the court would be whether the previous offence was sufficient to enable the court to identify a pattern of behaviour that posed a risk.

Stewart Stevenson: The minister is probably aware that I received an answer this week to a parliamentary question that I asked about reoffending rates. Strictly speaking, of course, the statistics are on re-conviction rates. It is clear that the re-conviction rates for sex offenders are dramatically lower than the rates for other categories of offender. I think that there is a shared view that that is partly because of the difficulty in detecting the crime, in obtaining the
appropriate evidence and in convicting people who commit sex offences, because such crimes often take place out of the sight of others. I have focused on the issue to ensure that we have the opportunity to catch people who may not be on the sex offenders register because the offence was committed before that was possible and who are now establishing a pattern of behaviour that may lead to an escalation of their activity, which may lead to criminal conviction at some point. By catching them early enough, we can enhance public protection.

I assure the minister that he will have my support in ensuring that we have the finest-mesh net that is consistent with defending the rights of individuals from harassment, persecution and unrealistic prosecution by the state. It is useful to have had this discussion and have it on the record, but in the light of the discussion I invite the minister to consider further whether other things should be said explicitly, perhaps at stage 3, to nail the matter down on the parliamentary record so that judges are clear about the intention of the legislators.

Mr McFee: I think that we are clear about the situation in which there has been a successful prosecution in the past. I will stand the situation on its head. What would be the minister’s view of a situation in which there had been a prosecution of an allegation of behaviour of that type two or three years previously, but it had been unsuccessful because there was not enough evidence or corroboration to secure a conviction? Despite the fact that the person had been found not guilty or the case had been not proven, could that still be used to establish an alleged pattern of behaviour?

Hugh Henry: I still have to come back to Margaret Mitchell’s comments, which I will deal with once I have dealt with those questions.

If we need to say anything at stage 3 to make the legislation clear, I will certainly do so; I do not want there to be any doubt about Parliament’s intention to provide the greatest level of protection for our children.

On Bruce McFee’s question, it is not for me to specify an absolute, but it might be that an unsuccessful prosecution at some time in the past could be seen as having helped to establish a pattern of behaviour that causes concern and which may well prompt chief constables to act if they believe that to be necessary. Such action would be taken on the balance of probability, but it would be for the court to determine whether it considers the unsuccessful prosecution to be relevant when it assesses the matter.

The Convener: Do you want to come back on Margaret Mitchell’s point?

Hugh Henry: Yes. When Margaret Mitchell talked about subsection (b) in amendment 35, she used the phrase “blank cheque”. The provision in that proposed new subsection is similar to what exists elsewhere in statute, for example in the Human Rights Act 1998. There is no significant departure from what is familiar within our legal system.

On chief constables having a veto, I emphasise that chief constables will still have the chance to state their case. That opportunity will not be lost.

Margaret Mitchell: Do you not consider that the bill would be stronger if section 4(5) was left in to underline that fact and to ensure, given that we live in a busy world in which people are under various pressures, that the chief constable was formally approached?

Hugh Henry: A balance needs to be struck on all those matters. The concern is that giving chief constables a veto could be regarded as giving them a disproportionate power rather than giving them the opportunity to state the case and leave it to the court to determine the matter. We believe that chief constables will consider the opportunity to state their case before any action is taken as a significant opportunity, but it is probably right, on balance, that what was described as the veto is not made available.

10:45

The Convener: I would like to clarify another matter. I am trying to understand how the various aspects of the bill link with one another. You have been asked about the scenario in which there has been a conviction, and about whether that could be deemed to be one of the two acts that will be necessary before a chief constable can apply for an RSHO. There is a section that will allow the courts to make sexual offences prevention orders and I had presumed that its purpose was to ensure that, on conviction, such orders were to be used. The system should operate in that way; if the conviction did not merit a sexual offences prevention order, it would be odd for a chief constable then to use the conviction to show the pattern of behaviour when applying for a risk of sexual harm order. It seems to me that that would negate the purpose of the sexual offences prevention order.

Hugh Henry: No, I do not think so. If there had been a previous conviction for a sexual offence, I think that the scenario that you describe in relation to the sexual offences prevention order is right—such an order would probably be more appropriate. We are trying to envisage a scenario in which something may have happened a considerable time ago, and to consider whether that could, at some indeterminate point in the
future, be linked to events at that time in deciding whether an RSHO could appropriately be applied. That is not to negate the use of the sexual offences prevention order. That would still be entirely—

The Convener: That is not what I asked about—I am talking about the idea behind the bill and what will be done when it comes into force. In the scenario that Bruce McFee described, in which there has been a conviction for a sexual offence, the point of having prevention of sexual offences orders is that they should be used if the conviction merits such an order. We do not want to exclude that scenario, but that is the idea behind it. If the court did not apply a sexual offences prevention order, it seems odd to me that the same act would be used in establishing a pattern of behaviour to apply for a risk of sexual harm order, when the court could in the first place have applied a sexual offences prevention order in respect of that conviction.

Hugh Henry: We are looking at two different things. The court cannot make a sexual offences prevention order unless there is a conviction—if there is a conviction, it can make such an order. We started off with a scenario in which someone might have been charged with a particular offence but the prosecution had been unsuccessful, and we asked whether that could be linked to future behaviour. We are saying that, potentially, it could, if the court thought it relevant. The chief constable would make the link first, and it would then be a matter for the courts. That is not to say that what we are now talking about is somehow diluting or removing provisions that would be more appropriate, the sexual offences prevention order having been placed as a result of conviction. We started off discussing a slightly different scenario about unsuccessful convictions, but the question is whether a conviction with a sexual offences prevention order from some point in the dim and distant past could in theory be sufficient for a RSHO to be considered because of another event. In theory, it could—if it was felt that an RSHO was relevant. However, other safeguards in respect of the individual might still apply. Arguably, they could be just as effective, or even more so.

The Convener: I am not disagreeing with that interpretation; I was just making an observation about relying on a past act in an application for a risk of sexual harm order. The point of having such an order is that the court can consider that act. However, the defence might argue that, if the act was not used in any previous application for a sexual offences prevention order, it should not be used as evidence in an application for a risk of sexual harm order. Why should the courts get another go, using the same act? The whole point of having sexual offences prevention orders on conviction is that the act really merited such an order.

Hugh Henry: There are a number of different scenarios. The first scenario is that of an unsuccessful prosecution. The question is whether that trial could be sufficient to trigger a second order. The answer to that, I believe, could be yes.

The second scenario is that of a successful prosecution after which a sexual offences prevention order is established. Whether there would be a need for a risk of sexual harm order at some point in the future would be arguable, but such an order could not be ruled out.

The third scenario—and the one that I think you are referring to—is that of a successful prosecution at which the court determines that no sexual offences prevention order is required. Should it be possible to obtain an RSHO in future? The answer to that could be yes. If we can link such an order to an unsuccessful prosecution, it would be right to be able to link it to a successful prosecution at which the court determined that no sexual offences prevention order was required.

With RSHOs, we are not trying to convict people but to take action because of concern about behaviour that could be a current or future risk to children.

The Convener: It is helpful to clarify the purposes of the two kinds of order.

Margaret Mitchell: I am curious to know how this would work in practice. The minister has said that, in theory, if someone has been prosecuted, albeit unsuccessfully, something relating to that trial could be the first incident that then—in conjunction with a second incident—triggers the interim RSHO. If there was a not guilty or a not proven verdict, how does one go back to the first prosecution and tease out the elements that could be acted on?

Hugh Henry: An incident is brought to the attention of the chief constable. If the chief constable believes that the incident is not isolated but can be related to something that took place before—at whatever point and of whatever nature—and believes that the balance of probability is sufficient to suggest a risk to children, the chief constable can go to the next stage and apply for a risk of sexual harm order.

Mr McFee: The information has been useful. Could an unsuccessful trial provide both the first and the second incidents that the chief constable would require before seeking a risk of sexual harm order?

Hugh Henry: Only if the court considered more than one incident. If there was only one incident, it is hard to conceive of there being sufficient justification to say that there were the two
separate events that would be required for a risk of sexual harm order.

Mr McFee: But two events could occur and be used in evidence in criminal proceedings. In such situations, I think that you are saying that one unsuccessful court case could possibly produce both the incidents that would be required to apply for an RSHO.

Hugh Henry: If a prosecution that related to more than one event was unsuccessful and the chief constable believed that there were two events and he had concerns, I presume that the chief constable could decide whether to apply for an RSHO. It would then be for the court to determine whether the requirements had been met, whether there had been two events and whether the individual's behaviour posed a sufficient risk. It should be remembered that we are talking not about a conviction, but about something being done with a different level of proof and about building in protection and safeguards. As long as there were two events, it is conceivable that a chief constable could consider it appropriate to take such action.

Mr McFee: I understand the different levels of proof, which is why I asked the question. If a person has been convicted but no sexual offences prevention order was issued by the court at that time, would it be possible for the chief constable then to apply for a risk of sexual harm order if the court case had covered two separate incidents?

Hugh Henry: Potentially, yes.

Mr McFee: So further evidence would not be needed.

Hugh Henry: Potentially, they could apply, but I would have thought that it would be more appropriate to apply for a sexual offences prevention order rather than a risk of sexual harm order. However, what Bruce McFee has described is potentially and theoretically possible.

The Convener: We seem to have exhausted all the scenarios and no other member seems to want to speak. Minister, do you want to say anything to wind up?

Hugh Henry: No. The matter has been adequately covered.

Amendment 34 agreed to.

Margaret Mitchell: I want to abstain, so the amendment is not agreed to.

The Convener: I am sorry, but it has been agreed to. Anyway, you have said what you have said and that will be recorded in the Official Report. For clarity, if members do not agree to an amendment, they must say that they do not, so that there can be a division. That is how abstentions are recorded.

Amendment 35 moved—[Hugh Henry].

The Convener: The question is, that amendment 35 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Glen, Marilyn (North East Scotland) (Lab)
McFee, Mr Bruce (West of Scotland) (SNP)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Stevenson, Stewart (Banff and Buchan) (SNP)
Stone, Mr Jamie (Caithness, Sutherland and Easter Ross) (LD)

Abstentions
Mitchell, Margaret (Central Scotland) (Con)

The Convener: The result of the division is: For 6, Against 0, Abstentions 1.

Amendment 35 agreed to.

11:00

The Convener: Amendment 43, in the name of Stewart Stevenson, is grouped with amendments 44 and 48.

Stewart Stevenson: As members will recognise from our discussions at stage 1, and as the minister will recall, amendment 43 is, in essence, lifted from section 14 of the Sexual Offences Act 2003, which applies south of the border. Its purpose is to address the concerns of a number of special interest groups, all of which have contacted me in recent days. The groups that feel that their position is not adequately protected include teachers who provide sex education and advice, such as guidance teachers, who may be providing advice to pupils who are “a child” under the terms of the bill. They also include doctors, and the British Medical Association has concerns that doctors, who may be providing sexual health advice to youngsters, are not adequately protected by the bill. Finally, they include magazine and newspaper publishers that run agony aunt columns and the like, which respond to queries from their readership. In giving a response on a matter that may be sexual in character, but is a responsible response aimed at enhancing the protection of the child, they feel that—as the bill is
currently framed—they may be crossing the boundary into prosecutable activity.

I do not defend some of the things that are printed in some publications, which do not deserve protection. That is why amendment 48, which contains the substance of the three linked amendments, makes the same specific provisions as does section 14 in the 2003 act, in referring to

“(i) protecting the child from sexually transmitted infection;

(ii) protecting the physical, psychological or emotional safety of the child, including preventing the child from becoming pregnant; or

(iii) promoting the child’s physical, psychological or emotional well-being by the giving of advice”.

If the minister is able to point to statute law elsewhere that provides the necessary protection for teachers, doctors, publishers and, indeed, others who have not yet made their concerns known to me or other committee members, those groups would of course be entirely happy and I would not seek to press the amendments. However, as the bill is presently constructed, people who are on the side of children, and on our side in trying to protect children, have some real concerns. My amendments are geared to aid them, in aiding children and in aiding us.

I move amendment 43.

Marilyn Glen: I am glad that we are having this discussion on the record. It is important that we clarify what the bill is about and what the bill is not about. Some of the confusion may have arisen because of a muddle in terminology at the previous committee meeting, when we were talking about the difference between sexual services and sexual health services. We should put on record the importance of sexual health advice and services.

The special interest groups that Stewart Stevenson talked about have expressed concerns about the bill. That is a great pity, because they should not have such concerns. We are talking about special interest groups—about anybody who gives sexual health advice. I do not want to list them all, but they range from parents to professionals, as well as publishers. There is a huge group of people who give sexual health advice informally as well as formally. We should give them—and be clear that we are giving them—our support. We should be clear that the bill is not about them at all.

We have decided that we will not ask for exemptions for certain categories of people; if someone breaks the law, they should be answerable. However, it is a good idea for us to have an open discussion about the issue, so that all the people who have expressed concerns can be reassured.

The Convener: I, too, am grateful to Stewart Stevenson for lodging this group of amendments, because it is important to debate the issue, as we did at stage 1. The problem is that there is nothing in section 2(1), under which the chief constable may apply for a risk of sexual harm order, to say that such an application should be for the purpose of protecting a child. That is not mentioned until we get to the provisions in section 2(4) on such an order being made only if a sheriff is satisfied that

“it is necessary … for the purpose of protecting children”.

Section 2(3) states that acts that can lead to an application for a risk of sexual harm order include

“(c) giving a child anything that relates to sexual activity or contains a reference to such activity”

and

“(d) communicating with a child, where any part of the communication is sexual.”

That is what has given rise to the concern of the organisations that have written to us all. They are not asking for something to be included in the bill, but they want reassurances that the work that they do will not be hampered in any way by the passing of the bill.

I have reservations about adopting the English provisions and feel that a relationship with a child that might involve discussing sexual health or having explicitly sexual conversations should not place any person in a position to abuse the child’s trust. Therefore, it is important to hear what assurances the minister can give to nail down the meaning of section 2.

Mr McFee: I have a great deal of sympathy with amendments 43, 44 and 48 for the reasons that Stewart Stevenson outlined and I am keen to hear the minister’s answer. It is possible to read section 2 in two different ways. The acts that are described in sections 2(3)(b) to 2(3)(d) seem to cover the ordinary activities of professionals such as doctors and teachers.

I wonder whether the minister is relying exclusively on paragraphs (a) and (b) of section 2(1), which stipulate not only that for there to be an application for a risk of sexual harm order the acts must have taken place on at least two occasions but that they must give the chief constable

“reasonable cause to believe that it is necessary for such an order to be made.”

Is that sufficient to protect the professions that Stewart Stevenson has mentioned? I want to hear the answer to that before we reach a final determination.

Hugh Henry: Reference has been made to the content of various teenage magazines, but I will leave aside my personal prejudices and thoughts
about the content of some of those magazines and try to deal with the amendments that are before us.

Unusually, Stewart Stevenson confuses two different issues. He talks about prosecutable activity and cites section 14 of the 2003 act, which deals with offences. However, we are talking not about offences but about a completely different issue. Section 14 of the 2003 act does not apply to RSHOs, so there are no exemptions from RSHOs for doctors or teachers in England and Wales similar to those that Stewart Stevenson proposes.

It is important to remember the context in which it is possible for an RSHO to be made, which brings us back to Bruce McFee's point about section 2(1). We need to remember that for anyone—including teachers, youth workers, medical workers and health advisers—who is dealing with children to have a risk of sexual harm order made against them, two conditions would need to be satisfied. First, there would have to be two activities that were of concern, so we are not talking about prosecuting people or taking out risk of sexual harm orders against them if they are just giving advice or doing their job. There would have to be two specific acts that the chief constable was concerned about. If, after hearing reports, the chief constable was concerned about a teacher, the chief constable would have to determine whether further action was required.

The chief constable could be concerned about the activities of a teacher, a youth worker, a church leader, a health worker or a medical professional, and it might be entirely appropriate to take further action. We are certainly not saying that people in certain categories of society will never be prosecuted or never be considered for an RSHO. Tragically, we know all too well from cases over many years that people from all different backgrounds can be a risk to children. However, someone who is simply doing their job in all good faith could not, I believe, be caught up in these orders. The person would have to have done something that was reported to the chief constable; and the chief constable would have to have concerns about the person because of the actions of the person and things that had happened on more than one occasion.

There would then be further safeguards before any person could be caught up in such an order. The chief constable would have to apply to the courts for an order. The court would then determine whether or not the actions were such that an RSHO should be considered—but only after a hearing at which the person would be able to present their case.

For example, why would a chief constable think that a teacher who was following the curriculum should have an RSHO taken out against them? Even if that chief constable perversely thought that following the curriculum was sufficient to establish the need for such an order, it would be for the court to decide whether the teacher following the curriculum was a risk to pupils.

A similar example would be that of a health worker giving health advice. The chief constable would have to determine that there had been harm, and the person would be able to argue their case in front of a court. The court would decide whether or not an RSHO was required.

We are talking not about prosecutions, but about actions by individuals—irrespective of who they are—that could be construed as being harmful to children. A risk of sexual harm order could come about only after a number of safeguards had been triggered. Anyone doing their job properly and in good faith could not possibly be caught up in what would be casual use of such an order.

**Marlyn Glen:** I would like you to reiterate some of that, because people are concerned about the possible triggers for the orders. A teacher who is simply following a formal curriculum could not possibly be considered to be breaking the law. However, lots of people—including teachers—will give advice outside the curriculum. For example, they might answer a question that was put to them directly.

Another concern is that, whereas teachers in schools have formal curriculums, other workers do not have that kind of formal structure. We need reassurances on that point.

**Hugh Henry:** If those workers are doing the job that they are employed to do and are acting appropriately, I do not think that there is any potential for the orders to be used. If, within the curriculum or in response to a question, a teacher behaves appropriately, I do not think that the chief constable would be able to establish anything that would be sufficient to apply for a risk of sexual harm order.

Equally, anybody who made inappropriate comments, be they a teacher or other worker in the school, would have to consider the consequences of their actions. We are not saying that some people have absolute protection, because we know that there have been teachers who have acted inappropriately over the years. There is a clear duty on us all to think carefully about what we say and to consider the harm that might be done.

If a chief constable were concerned that things were being said in the curriculum that were sufficient for the chief constable to think about taking out an RSHO, that chief constable should
discuss that with the director of education. If the chief constable felt that advice was being given by any member of staff as part of their routine job, the chief constable should be discussing with the chief executive of that local authority or health board the result of the activities that caused the chief constable concern. If there were wider concerns, they would not apply to one individual and the matter would need to be resolved.

However, we must remember that if anything of concern is said, it has to happen on more than one occasion. The chief constable would have to be satisfied that the matter was sufficient to take the process forward and the court would then make the final decision following a hearing at which the individual would have the opportunity to put their case.

The Convener: I am entirely comfortable with the Executive’s broad position on the matter, but as you and other witnesses have said, the chief constable should consult other agencies before embarking on a final decision. What legislative obligation is there on the chief constable, or is the decision solely one for the chief constable?

Hugh Henry: Yes, but for the purposes of clarity, I will repeat what I said before. I do not think that I said that the chief constable would be required to consult the director of education.

The Convener: That is what I am asking you about. So the chief constable is not required to consult.

Hugh Henry: No, I said that if a chief constable were becoming concerned that the curriculum was leading to concerns, then I believe that the chief constable should discuss the curriculum with the director of education. If there were general concerns about workers getting themselves into a situation in which they were at risk in the course of their work, it would be incumbent on the chief constable to discuss that with the chief executive.

The Convener: That is my point. I understand that it would be incumbent on the chief constable, but the legislation does not make it incumbent. The legislation says that it is a matter for the chief constable.

Hugh Henry: That is correct, but I am talking about two different things. As far as the legislation is concerned, any concern is a matter for the chief constable to take forward. There is no requirement on the chief constable to discuss it. I am trying to describe a situation in which someone who was doing their job reasonably was left open to the chief constable’s concern. Those issues should be discussed by the chief constable with the appropriate agency, but as far as the legislation is concerned, it is a matter for the chief constable.

The Convener: I understand what you are saying, but witnesses have said to the committee that they think it is important to be clear. In fact, some would argue that the legislation should include the fact that it is incumbent on the chief constable to consult others, although no committee member has stressed that point at stage 2 so far.

Where it says in section 2 that the chief constable can make an application to the sheriff for an RSHO when the chief constable has “reasonable cause to believe that it is necessary for such an order to be made”,

I would have been happier had the wording included “for the protection of a child” at that point. I say that because, although I accept everything that you say about the intention behind the provision and the practical realities of what would be expected, the committee has expressed concerns about the extent of the provision.

I would like the test to happen at the beginning and the situation to be nailed down before it gets to court, because once that happens, whether the sheriff accepts or dismisses the case, one is already in the process. As we have discussed in the past, the process is based on the balance of probability. I would like to be sure that when the chief constable is making the decision about whether to proceed, there are enough safeguards in place.

I am not suggesting any changes or opposing the Executive’s view. Stewart Stevenson’s amendment has been useful, as it has resulted in this discussion, but I will not support it. However, I reiterate that further discussion on the test may be needed at stage 3. I trust the chief constables whole-heartedly—I would not say anything other than that on or off the record—but they are not infallible. The legislation must be clear cut and we as legislators must be satisfied that everything that needs to be done to achieve what has been said is covered by section 2 of the bill.

Hugh Henry: I am happy to consider whether further strengthening of section 2 is needed to achieve what has been suggested. If that is possible and will assist, we will come back with proposals at stage 3.

The Convener: The final word will go to Stewart Stevenson.

Stewart Stevenson: I say straight away that I do not think that there is a fundamental disagreement about what we are trying to achieve and say to people who have expressed concerns and others that I am reasonably satisfied that it would be likely that a perfectly proper case could be made in court under section 2(4)(b), which
states that the sheriff may make a risk of sexual harm order if he is satisfied that
“it is necessary to make such an order for the purpose of protecting children generally”.

A case could properly be made that people who provide sex education, advice or whatever protect rather than harm children, although they undertake acts in section 2(3), which refers to “giving a child anything that relates to sexual activity” and “communicating with a child, where any part of the communication is sexual.”

However, section 3, on the interpretation of section 2, makes it clear that people who provide sex education and advice would undertake activities that relate to sexual activity—I refer to section 3(e)(i)—and that there could be sexual communication. I am reasonably happy that people would be able to argue successfully in court if they have behaved properly, although I accept that such people are capable of behaving entirely improperly.

Our key concern is probably about section 2(1), where the process initiates, and the considerations that the chief constable can and must take into account in deciding to start an action. I will certainly take into account the minister’s helpful suggestion about considering the matter at stage 3, but I say to him that it is important not to make people in education, the medical professions or, indeed, publishing feel inhibited about doing constructive things. Part of the debate is about ensuring that anything that we say in parliamentary debates or that we put in the bill does not damage their confidence about doing the constructive things that they do.

I am interested in the option of published ministerial advice or guidance to chief constables that qualifies for people the considerations that chief constables might make so that there is not a licence for people to misbehave, as well as in other options. On that basis, I am content to seek the committee’s permission to withdraw amendment 43.

Amendment 43, by agreement, withdrawn.
Amendments 44 to 46 not moved.

The Convener: Amendment 47, in the name of Mary Mulligan, is grouped with amendment 51.

Mrs Mulligan: The intention of amendment 47 is simple. I want to be reassured that the effect of an RSHO would not be negated if someone moved outside the sheriffdom where it was granted.

Amendment 51 is similar and I am glad that Marlyn Glen picked up the example that I missed.

I move amendment 47.

Marlyn Glen: As Mary Mulligan suggests, amendment 51 follows on from amendment 47. It seeks clarity about the extent of interim orders.

Hugh Henry: We do not think that either amendment 47 or amendment 51 is necessary. Unless otherwise stated in the orders, full and interim orders will have effect throughout Scotland. All civil orders are valid throughout Scotland and RSHOs, whether full or interim, will be no different.

For example, if a sheriff makes an order requiring one person to pay £50,000 to another person, the first person cannot escape liability simply by moving to another sheriffdom. The order automatically has effect throughout Scotland. Likewise, if someone is put on an RSHO, whether full or interim, the order will have effect throughout Scotland. The wording of the bill makes that clear. Section 2(4)(b) refers to “protecting children generally” from the subject of an order—in other words, protecting children not only in one sheriffdom but throughout Scotland.

My officials are in discussion with the Scotland Office about using an order under section 104 of the Scotland Act 1998 to make it clear that breach of a Scottish RSHO in England, Wales or Northern Ireland would also be an offence. That would mean that Scottish RSHOs would have effect in other jurisdictions of the United Kingdom and not only in Scotland. Not only would an amendment to specify that orders would have effect throughout Scotland be unnecessary; it might in fact constrain us in what we are trying to do.

Mrs Mulligan: I am reassured by the minister that not including the wording of amendment 47 will not cause any problems, and I am pleased that the amendment has given him the opportunity to inform us about the application of a section 104 order. I think that what he said has further reassured the committee.

Amendment 47, by agreement, withdrawn.

The Convener: Amendment 50, in the name of Stewart Stevenson, is in a group of its own.

Stewart Stevenson: Amendment 50 is a probing amendment. In an open-minded way, I certainly want to hear what the minister has to say.

Amendment 50 goes with another amendment to the bill that would amend the Protection of Children (Scotland) Act 2003. The clerks have that other amendment, but it has not yet appeared on the marshalled list. The amendments would provide that when an RSHO is taken out against an individual, that individual will—if it is appropriate—end up on the disqualified from working with children list. From reading the 2003 act, it appears to me that that would not be possible at present. If my interpretation is wrong, and if the interpretation of the organisations that
have expressed concerns is wrong, I would be delighted to hear that from the minister.

After talking about organisations’ duty of care not to put people who are on that list into positions of child care, section 11(5) of the 2003 act says:

“It is a defence for an organisation charged with an offence under subsection (3) above to prove that the organisation did not know, and could not reasonably be expected to have known, that the individual was, at the time of the offence, disqualified from working with children.”

11:30

Now, an RSHO on an individual could touch clearly on a risk to children, and that should mean that the individual should not work with children. Indeed, the RSHO could place a restriction on the individual’s activity so that they are not able to work with children. However, if organisations seek—from Disclosure Scotland or elsewhere—information about an individual who has applied to work with children, it seems that those organisations would not be told about the RSHO. There is no mechanism for organisations to find that out. Therefore, although the individual who is subject to the order is committing a breach of that order by applying, the organisations are not able to play their part in protecting children. They cannot become aware of the RSHO through the disclosure process.

Amendment 50 seeks simply to address that issue. I will be delighted if the minister has another way of addressing it, if he can tell us that our concerns are misplaced, or if he can tell us that he will consider the matter further at stage 3.

The second amendment that I have lodged is, in essence, a copy of section 10 of the 2003 act, but adapted to allow an RSHO case to be referred to ministers. It is not a straightforward amendment; I certainly did not find it straightforward to work up a first draft. The minister and his advisers may make us aware of possible complications. However, the litmus test is this: if somebody is subject to an RSHO that prevents them from working with children, organisations must be able to find that out so that they can play their part in ensuring that children are protected from people who, after going through the court system, have been deemed a risk to children. That is the bottom line.

I move amendment 50.

Hugh Henry: YouthLink Scotland has produced a very good briefing that has informed the discussion this morning. I appreciate and agree with YouthLink Scotland’s concerns that all relevant information on a person’s suitability to work with children should be made available to employers whether the person is currently in employment or whether the person is applying for a new position. It is important that information about the existence of an RSHO can be passed to the relevant people.

One option would be that of amendment 50, which is to refer people who are subject to RSHOs to Scottish ministers for possible inclusion on the disqualified from working with children list. I appreciate that it is a probing amendment but, as it stands, there are technical problems with the drafting. For example, it is not clear what the court should do once it has considered the issues; nor is any detail given on the test that the court should apply when considering whether a person who is subject to an RSHO should be referred to Scottish ministers. We therefore cannot support the amendment as drafted.

At present, information about the existence of an RSHO can be passed to employers in a number of ways. However, rather than go into those this morning, I would simply agree with Stewart Stevenson that the current arrangements could be usefully strengthened to provide a more systematic procedure. That would ensure that anyone who is the subject of an RSHO is also considered for inclusion on the disqualified from working with children list, and that employers are made aware of the existence of an RSHO where relevant.

We are already working on implementing the Bichard recommendations to ensure better information sharing and to increase safeguards. As part of that work, we will consider how we can improve information sharing about RSHOs so that all relevant information about the order is made available to the person’s employer or potential employer.

Having made those general comments, I will make a commitment to come back at stage 3—either with further amendments that help to clarify or confirm the situation, or with a more detailed explanation of the procedures that will have to be put in place to ensure that information is shared effectively.

Stewart Stevenson: The response from the minister is helpful, and recognises the validity of the concerns that were expressed by YouthLink Scotland and the organisations that it represents.

Amendment 50, by agreement, withdrawn.

Section 2, as amended, agreed to.

Section 3—Interpretation of section 2

Amendment 48 not moved.

Amendment 36 moved—[Hugh Henry]—and agreed to

Section 3, as amended, agreed to.
Section 4—RSHOs: variations, renewals and discharges

Amendments 37 and 38 moved—[Hugh Henry]—and agreed to.

Amendment 39 moved—[Hugh Henry].

The Convener: The question is, that amendment 39 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR
Glen, Marlyn (North East Scotland) (Lab)
McFee, Mr Bruce (West of Scotland) (SNP)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Stevenson, Stewart (Banff and Buchan) (SNP)
Stone, Mr Jamie (Caithness, Sutherland and Easter Ross) (LD)

ABSTENTIONS
Mitchell, Margaret (Central Scotland) (Con)

The Convener: The result of the division is: For 6, Against 0, Abstentions 1.

Amendment 39 agreed to.

Section 4, as amended, agreed to.

Section 5—Interim RSHOs

The Convener: Amendment 49, in the name of Marlyn Glen, is grouped with amendments 40 and 41. If amendment 49 is agreed to, it will pre-empt amendment 40.

Marlyn Glen: Amendment 49 is on rights of representation and the different standard of proof that is required to grant interim RSHOs. It attempts to change the test that will be applied by a sheriff in determining whether to make an interim RSHO. The test in section 5 is whether it is “just” to make an order, which seems to be a lesser standard than the test under section 2, which is that it is “necessary” to do so. Amendment 49 seeks to sort that out. It also attempts to ensure that the sheriff has all the relevant information before making an interim RSHO, by providing for the parties to address the court.

I move amendment 49.

Hugh Henry: I acknowledge and support what Marlyn Glen is seeking to achieve.

Amendments 40 and 41, in the name of Cathy Jamieson, expand on the provision in the bill, which says that the sheriff should make an interim order if he or she considers it just to do so. The amendments add two further requirements. First, the sheriff must be satisfied that the interim order has been intimated to the person against whom the order is sought. Where the application for an interim order is part of the main application for the order, it is quite clear that it will in all circumstances have been intimated as part of the normal procedure under the sheriff court rules. However, where the application for an interim order is separate from the main application, it will be incumbent on the sheriff to satisfy himself or herself that that has been intimated as well as the main application.

The second additional requirement is that the sheriff must satisfy himself or herself that prima facie it appears that the person against whom the order is sought has on at least two occasions done something that falls within the acts that are set out in section 2(3). Clearly, the question whether the person has in fact done those acts is likely to be the subject of further debate at the hearing of the main application but, if there is a prima facie case, that part of the requirement is met.

Finally, in keeping with what is in the bill at present, the sheriff must also be satisfied that it is just to make the interim order.

We sympathise with what Marlyn Glen seeks to achieve, but our view is that requiring the sheriff to ensure that all parties have the opportunity to be heard is unnecessary. An integral part of sheriff court summary application procedure is that anyone who has received intimation of an application automatically has the right to be heard. Therefore, I hope that Marlyn Glen agrees that pressing her amendment is unnecessary.

The Convener: I want to clarify the effect of Executive amendments 40 and 41. Will the provisions in section 5 be strengthened in any way, or will there simply be clarification?

Hugh Henry: The amendments will expand and, I hope, clarify. Amendment 40 will leave out "considering it just to do so" and amendment 41 will insert proposed subsection (3A) in section 5. We hope that the amendments will help to clarify matters.

The Convener: The words "considering it just to do so" will be removed, but they will in effect be put back in. I ask about the matter because the committee was concerned about the only test being whether the sheriff considered it just to make an interim order. Will the Executive amendments strengthen the requirements by bringing everything together? Will the requirement that there is a prima facie case that an individual has done an act within section 2(3) strengthen the provisions?

Hugh Henry: Yes. The sheriff must be satisfied that there is a prima facie case and that "it is just to make the order."

We think that that approach will strengthen the bill.
The Convener: I understand. The phrase
"that it is just to make the order"
does not sit alone. There must also be the other
test.

Hugh Henry: That is correct.

Marilyn Glen: I accept the minister’s
reassurances and do not intend to press the
amendment.

Amendment 49, by agreement, withdrawn.

Amendments 40 and 41 moved—[Hugh
Henry]—and agreed to.

Amendments 51 and 52 not moved.

The Convener: Amendment 53, in the name of
Marilyn Glen, is in a group on its own.

Marilyn Glen: I will be brief. Amendment 53
reconsiders the rights of the accused person and I
ask the minister to consider it. The amendment
states what will happen to an interim order if a risk
of sexual harm order is not made.

I move amendment 53.

Hugh Henry: I understand what Marlyn Glen is
trying to achieve in amendment 53 and on first
sight it appears sensible that if a sheriff decides
that an RSHO is not required after all, the interim
RSHO should be nullified and no record should be
kept. However, I hope that the committee, on
reflection, will agree that there are important
arguments against that approach. An RSHO might
not be granted, but the behaviour that gave rise to
the concerns could be sufficiently serious to justify
the police’s retention of the information. If the
record was simply deleted every time that an
RSHO application was denied, the possibility of
building up a pattern of behaviour would be lost.
To do their job effectively, the police must
sometimes hold sensitive soft information about
individuals.

11:45

For example, if a person frequently comes to the
police’s attention because of suspicious
inappropriate behaviour towards children, they
might not commit an offence, but their behaviour
could be enough to raise police suspicions. The
chief constable applies to the court for an RSHO
and an interim order is made. However, if on
further consideration the court is not convinced on
the balance of probabilities that an RSHO is
necessary to protect a child or children from harm
by that person, what do we do?

In the worst-case scenario, that person could
obtain a job working with children and might not
have to reveal that an interim order had been
imposed. That person could then use that job to
sexually abuse children. Would it not be better for
the police to retain the information about the
interim RSHO, so that when an employer makes
an enhanced disclosure request, the information
about the interim order can be revealed? That is
exactly the kind of information that the police
should retain and reveal in appropriate
circumstances if we are to protect children.

Of course, safeguards exist on the holding of
such information, and the police would certainly
not reveal the information to just anyone. Before a
decision was made on whether to release such
information to a third party, proper account would
always be taken of the balance that needs to be
struck between the rights of the person concerned
and the duty of the police to protect children.
Furthermore, procedures are in place for the
police to review regularly all the information that
they hold, to determine whether any of it should be
deleted.

I have some sympathy with amendment 53, but I
hope that the concerns that I have expressed
about the potential consequences of not holding
the information are sufficient to persuade Marlyn
Glen to withdraw the amendment.

Stewart Stevenson: Could we explore one or
two possible scenarios? An interim order is
granted and a hearing for a full order takes place.
We require the commission of two acts for an
order to be made. I foresee circumstances in
which the court is not satisfied about one act but is
satisfied about another. That will not be sufficient
for an RSHO to be granted. In those
circumstances, do you suggest that it would be
reasonable to retain the information that related to
the act that the court was satisfied about but which
was insufficient for the granting of an order?

Hugh Henry: The court could reasonably decide
on the balance of probabilities that the evidence or
information was insufficient for the granting of an
order. However, the evidence could be sufficient
for the police to have suspicions and to act. What
is legitimate for the police to act on must be
separated from what the court requires to satisfy
itself that something further needs to be done.

Stewart Stevenson: I move on to when an
interim RSHO can be granted. The bill requires an
application for an order to be intimated to the
person who may be subject to the order, but that
does not necessarily mean that that person should
have received the intimation. It would be useful
to have that clarified. The intimation must be sent in
a way that allows a reasonable expectation of
delivery.

In any event, the person need not be present at
the hearing. Subsequently, at the hearing for the
full RSHO, the interim RSHO that was granted on
the balance of what was before the court at the
time might be dismissed on the basis that the whole thing was based on malicious reference to the police or whatever. Under those circumstances—if the basis on which the court had granted an interim RSHO has been dismissed—would it be reasonable for the information to be retained?

Hugh Henry: It would be difficult to start specifying some situations in which information on unsuccessful RSHO applications was retained and others in which it was not. That would lead to further complexities.

You mentioned notification. The sheriff court rules clearly set out the processes under which notification should be made, not just in relation to this matter but in other situations. Those rules are robust and I have no reason to think that notification in relation to RSHOs will be different from other circumstances in which the sheriff court rules apply.

Stewart Stevenson: I think that I am with you, but would it be useful to consider by what mechanism transparency will be achieved in relation to what information may be retained? That might be open to legal challenge by someone who has been the subject of an interim RSHO, or indeed of an RSHO. The retention of information could have a significant effect on that person’s future employability or other things in their life.

Hugh Henry: I sympathise with what Stewart Stevenson is trying to achieve, but I have a mind that is nowhere near as analytical as his and I struggle to think how we could build in all the complexities that would be required to achieve exactly what he seeks. I struggle to conceive of something that would satisfy him on the matter. We will reflect on it, but I doubt whether we could easily and coherently build in something that would be sufficient to achieve the transparency that he seeks.

The Convener: I see your point, but for the purposes of the debate it is worth while to explore further the point that Stewart Stevenson raises about cases in which there has been malicious reporting. What protection does an innocent person have in a system that requires the chief constable to make an application only on the balance of probabilities? If an application fails, the information may be kept, but nobody knows on what basis. I understand your argument, but I want us to explore the other side of the argument, too. Once we go down the road of thinking about an application, the process is unstoppable. Whether or not the order is granted, the subject has already provided information that could be used.

Hugh Henry: That situation pertains in many circumstances. The police may receive information from a variety of sources and they have to determine what is credible, what is malicious and what is vexatious. They do that in relation to sexual harm to children, allegations about drug dealing and violent crime. There are a number of situations in which the police have to determine whether information is sufficiently credible for them to proceed. If there is more than one act and the chief constable thinks, on the balance of probabilities, that there is sufficient information, it is right for the police to act appropriately. As in other circumstances, the police would have to determine whether something had been done maliciously or with no reference to the facts.

The Convener: I would like you to clarify something that you said earlier. You were asked about cases in which an interim order was granted but a full order was not. Would the situation be identical if no application for an interim order were made and the application for a full order failed? Would the fact that an order had been applied for still be the subject of disclosure, if someone were seeking to work with children?

Hugh Henry: It could be, rather than would be, the subject of disclosure. There is a distinction to be made.

Mr McFee: Let us clear up the issue. Amendment 53 relates particularly to situations in which an interim order has been granted, but the full order has not. Stewart Stevenson asked what would happen if, between the granting of the interim order and the non-granting of the full order, it transpired that the allegations against the individual against whom the interim order had been granted were malicious. In other words, what would happen if, during that time, it emerged that the person had been falsely and maliciously accused? In straightforward layman’s terms, how would the individual clear his or her name? If amendment 53 is not agreed to, what would be the mechanism for removing from the person’s record the interim order that was granted on the basis of malicious and false allegations, especially if they applied for a job that required either a disclosure or an enhanced disclosure to be made?

Hugh Henry: The person would not have a record as such, because this is not a criminal conviction. If it were established clearly at the hearing that an allegation was malicious and vexatious and that there were no grounds for it, there would be no reason for the chief constable to have concerns about the information and to use it in disclosure procedures. However, we are discussing situations in which the court may decide that a full order is not appropriate, but in which there is no reason for determining that the allegation was malicious or vexatious. In such cases, it will be for the chief constable to determine whether holding the information for disclosure purposes may be appropriate.
Margaret Mitchell: I share other members’ reservations about this provision. Interim orders are granted on the balance of probabilities. They may be granted in response to a malicious attempt to say something that is quite untrue and there may have been no opportunity to prove substantially that the allegation was not malicious. I gather from what you are saying that the information could remain on someone’s record, quite unjustly, for some time. I have a problem with that.

Given what is involved in breaching an interim RSHO, I wonder whether a different way of serving notice of an order could not be considered, in order to give the accused every possible chance to defend themselves. We are talking about a quite different animal from an interim antisocial behaviour order, because the offence concerned is of a sexual nature. For that reason, could serving the order in person be considered?

12:00

Hugh Henry: If we were concerned about how the order is to be served, we should be concerned about how other notices are to be served. If we were concerned about the orders being served effectively, we would have to examine the sheriff court procedures. If those procedures did not work in this case, I would worry that they would not work in other circumstances, which is a much bigger issue.

Margaret Mitchell’s first point was about the retention of information. If information is malicious or vexatious and has no basis in fact, there are no grounds for the chief constable to hold that information so that he can examine patterns of behaviour or decide whether there are any disclosure issues. Any information that the chief constable decides to retain can be retained only in accordance with the principles of the Data Protection Act 1998; safeguards that are already built in allow the retention only of information that the chief constable considers to be relevant, necessary and up to date. If something is clearly malicious and false, how can it be relevant, necessary and up to date?

Margaret Mitchell: I suppose that I am thinking of the situation of a teacher who has been accused maliciously by a child; the accusation has not really gone anywhere and nothing further has happened. There is no proof that the accusation is malicious, but equally there is nothing to move the situation on. Does that become routine?

Hugh Henry: I am not sure how that would apply. If no one considers the accusation to have any relevance, how could it lead to the consideration of an RSHO?

Margaret Mitchell: In the first instance, under sexual education. We talked about that in the previous discussion. There could be enough in a child’s perception or interpretation of a situation for someone to think that an interim RSHO is needed, but then it is not taken any further. There are grey areas that cause me concern; that is just one possible scenario.

Hugh Henry: I cannot accept that. Margaret Mitchell is describing a malicious complaint from a child that is not significant enough to be pursued, although it might remain as a stain on the teacher’s reputation. If the complaint is not significant and no one believes it, why would a chief constable see that as a reason for proceeding with an RSHO? We are not talking about someone making a complaint about a teacher that goes nowhere and in which no one else is interested, but in relation to which the information is held because it might build up into a pattern of activity. If, on the other hand, the chief constable thought that there was sufficient substance to the accusation, that would be entirely different.

However, we are discussing not that situation but one in which a full order has not been granted but, at the time, the chief constable thought that there were sufficient grounds for an interim order. The debate is about whether any of that information should be retained. Remember my earlier point about the Data Protection Act 1998. Even if the chief constable thought that it was appropriate to retain the information, they could do so only if the information was relevant, necessary and up to date. If it was established that the accusation was malicious, there is no way that the chief constable could retain the information in the way that Margaret Mitchell described.

Mr McFee: I want to nail this matter. If an interim order had been granted, but during consideration of the application for a full order it was discovered that the evidence was false or had been maliciously fabricated, are you saying that there would be no circumstances in which the chief constable would reveal the existence of the interim order under the disclosure or enhanced disclosure requirements?

Hugh Henry: That would clearly be the case if the interim order had been granted as a result of evidence that was without foundation or based on malicious or vexatious allegations.

The Convener: However, a problem would arise if there was no discussion or understanding of the sheriff’s reasons for not granting the full order. If the sheriff did not say that the application for the full order had failed because the allegations were false or malicious, it would be left wide open for the chief constable to use the information.
Hugh Henry: That would be the case if the sheriff was the only person who knew that the allegations were false and malicious. However, I assume that the sheriff would reach their conclusion as a result of evidence of false allegations being led in the discussion, to which the chief constable would be party.

The Convener: However, we are being asked to accept that the chief constable could retain information that formed the basis of an application and use it for disclosure purposes, even if the 50:50 test could not be passed and the application for a full order failed.

I am happy about what Marlyn Glen said and she must decide whether to press or withdraw amendment 53, but the discussion has raised wider issues, which we should address at stage 3. Given the minister's comments, I now think that the bill should contain more safeguards in relation to the decisions that the chief constable might make. The minister said that even if an interim order was not granted and the application for a full order failed, the information could still be subject to disclosure. I am not convinced that information about a person who was simply unable to prove that the allegation against them was false should be used to prevent the person from working with children. I am uncomfortable about leaving such uncertainty in the bill and I would be happier if we considered amending the bill at stage 3 to include further safeguards, to make clear the basis on which the chief constable could disclose to another party information that related to a failed application for an order.

Hugh Henry: We are not just talking about the failure of an application; we are talking about cases in which an interim order was granted and there was an application for a full order. The sheriff might decide that the case was made and the events took place, but that it was not appropriate to grant a full order. There might be circumstances in which the information was sufficient to cause concern, but insufficient—for whatever reason—to enable the sheriff to grant a full order.

I will reflect on whether information could be disclosed if it had been established beyond doubt that allegations had been made maliciously or vexatiously and I hope to give the committee further assurances on the matter. However, I strongly believe that there will be circumstances in which, although a full order is not granted, it will be reasonable for the chief constable to retain information, in order to protect children.

The Convener: I think that the committee agrees with you on that point, but there is another scenario, about which we need to be sure. I realise that I am broadening out the discussion and I probably would not support amendment 53 or call for further thoughts on it.

However, for me, the debate has raised wider issues. You have now said that, even if there is no interim order and the main application fails, the matter would still be up to the chief constable to decide. I am uncomfortable with simply leaving the situation like that. From the beginning, I was not comfortable with the test of the balance of probability. I have accepted the Executive's argument and I think that you have made a good case for why we should accept a balance of probability test. However, I am at the limit of where I am comfortable. Now that we have had the discussion about disclosure, I certainly do not want to give the impression that, in not supporting amendment 53, I am saying that I am entirely happy with the disclosure debate.

I am happy with what you said about having a discussion about the matter at stage 3 and accept that we may come to share your view. However, I feel that that is an important debate to have.

Hugh Henry: It is important to put on the record that, although we have talked about an application failing, it could be that it is not that the application has failed but that the decision of the court is not to grant the order for whatever reason. That is not necessarily the same as an application failing.

The Convener: I accept that.

Marlyn Glen: The discussion has been useful. It echoed the debate that we had earlier, in that it was to do with balancing people's rights. I appreciate the fact that committee members have been able to express their concerns.

I understand the need for retention of information in various circumstances and recognise the important point of establishing patterns of behaviour. As I said, there is a need to consider the issue of the balance of rights, but, at the moment, the paramount issue is the protection of children.

From a different perspective—if I may bring in a new element—I wondered whether, in a situation in which malicious complaints are being made, it might be useful for the adult if that information were retained. If there were a pattern of malicious complaints against the same adult, which can happen, it would be useful if the police had kept that information.

However, the committee has been asked to accept the minister's assurances that the police review such information carefully and follow robust procedures. For the moment, I accept that position, bearing in mind the minister's agreement to reflect further on the points. With the committee's agreement, I will not press amendment 53.
Amendment 53, by agreement, withdrawn.
Section 5, as amended, agreed to.

After section 5
Amendment 55 not moved.
Section 6 agreed to.

Section 7—Offence: breach of RSHO or interim RSHO

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

Marlyn Glen: Amendment 54, which concerns the use of probation as a disposal, would remove section 7(4) from the bill. Section 7(4) says that probation shall not be a disposal that is open to the court if a person is convicted of an offence under section 7. I do not know why the bill limits the options that are available to the court in such cases. I suggest that there will be cases in which a probation order would be appropriate and could assist in addressing offending behaviour.

I move amendment 54.

Mr McFee: I have some sympathy with amendment 54 and would like to hear the minister’s response. Given that section 7(3) says that a person who is guilty of an offence under section 7 is liable—both on summary conviction and on conviction on indictment—to imprisonment or a fine or both, I wonder why that other road will not be available. Is there a specific logic behind the decision to exclude probation as a method of disposal or is section 7(4) an unfortunate inclusion?

12:15
Hugh Henry: Our original rationale for not allowing a probation order to be used as the disposal for breach of an RSHO was that the offender had already demonstrated that he or she could not meet the requirements of an order that required him or her to behave in a particular way. Our thinking was that it would therefore be inappropriate to impose another order that would require the offender to behave in a certain way.

However, I am persuaded that, in certain circumstances, a probation order might be a useful disposal for breach of an RSHO and that it would be wrong to prevent the courts from using an order if they considered it to be appropriate in the circumstances of a case. I am therefore happy to support the amendment.

Amendment 54 agreed to.

Section 7, as amended, agreed to.

Section 8 agreed to.

The Convener: That brings us to the end of agenda item 1. I thank the minister and his team for attending.

Members are reminded that, as Monday 2 May is a holiday, the deadline for lodging amendments for our next meeting is Thursday 28 April at noon.

12:16
Meeting suspended.
You will by now have seen the child prostitution and indecent images amendments which were lodged on Tuesday. As this is the first time that the Committee will have seen the indecent images amendments, it might be helpful if I set out how they are intended to work.

The provisions amend sections 52 and 52A of the Civic Government (Scotland) Act 1982.

Section 52(1) makes it an offence to:

- take, permit to be taken, or make an indecent photograph or pseudo-photograph of a child;
- distribute or show such an indecent photograph or pseudo-photograph;
- possess such an indecent photograph or pseudo-photograph with a view to its being distributed or shown; and
- publish or cause to be published any advertisement likely to be understood as conveying that the advertiser distributes or shows such an indecent photograph or pseudo-photograph or intends to do so.

Section 52A(1) makes it an offence for any person to have an indecent photograph or pseudo-photograph of a child in his possession.

For the purposes of sections 52 and 52A, “child” is defined as a person under the age of 16.

Subsection 2 of the new provisions amends section 52(2) so that the references to “16” read “18”. For the purposes of the revised sections 52 and 52A, “child” is therefore redefined as a person under the age of 18.

The new provisions then go on to make a series of exceptions for the offences set out in sections 52(1)(a) to (c) and 52A(1). The exceptions work as follows. If the the accused raises the issues set out below, the Crown would need to disprove at least one element in order for the offence to be proved. The issues that the accused would need to raise are:

- Either the photograph was of a person aged 16 or over or the accused reasonably believed that to be so;
- At the time of the offence charged, or at the time when the accused obtained the photograph, the accused and the person aged 16 or 17 who is the subject of the photograph were either married to each other or partners in a relationship;
- The person aged 16 or 17 who is the subject of the photograph consented to the photograph being made, taken or in the accused’s possession or the accused reasonably believed that to be so; and
- In relation to the distribution offence at section 52(1)(b), that distribution was only to the person aged 16 or 17 who is the subject of the photograph; and in relation to the offence at section 52(1)(c), the accused intended to distribute the photograph only to the person aged 16 or 17.
Furthermore, in each case, the exception only applies where the photograph shows the person aged 16 or 17 alone or with the accused, but not if it shows any other person.

There are no exceptions to the offence at section 52(1)(d).

Now that the amendments have been lodged, I hope that the Committee will have the opportunity to take evidence on the draft provisions and on the policy underpinning them. As I explained in my letter of 15 April, the Framework Decision allows for the exclusion of photographic material depicting a child, or a person appearing to be a child, who has reached the age of consent, and where the images have been produced and possessed with the consent of the child and solely for their own private use. The provision of exceptions in this context represents a delicate balancing act between maintaining the civil liberties of young people, while at the same time strengthening the protection available against those who would exploit and abuse them. There are clearly a number of different ways we could address this issue. I would welcome the Committee’s consideration of this issue, and in particular the question of what exceptions should be considered.

Hugh Henry MSP
Deputy Minister for Justice
Protection of Children and Prevention of Sexual Offences (Scotland) Bill

3rd Marshalled List of Amendments for Stage 2

The Bill will be considered in the following order—

<table>
<thead>
<tr>
<th>Section 1</th>
<th>Schedule</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sections 2 to 11</td>
<td>Long Title</td>
</tr>
</tbody>
</table>

Amendments marked * are new (including manuscript amendments) or have been altered.

After section 8

Cathy Jamieson

56 After section 8, insert—

<Abuse of children through prostitution and pornography

Paying for sexual services of a child

(1) A person ("A") commits an offence if—

(a) A intentionally obtains for himself or herself the sexual services of another person ("B");

(b) before obtaining those services, A—

(i) makes or promises payment for those services to B or to a third person; or

(ii) knows that another person has made or promised such a payment; and

(c) either—

(i) B is aged under 18, and A does not reasonably believe that B is aged 18 or over; or

(ii) B is aged under 13.

(2) In subsection (1)(b) above, "payment" means any financial advantage, including the discharge of an obligation to pay or the provision of goods or services (including sexual services) gratuitously or at a discount.

(3) For the purposes of subsections (1) and (2) above, services are sexual if a reasonable person would, in all the circumstances but regardless of any person’s purpose, consider them to be sexual.

(4) A person guilty of an offence under this section in respect of a person aged 16 or over is liable—

(a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;

(b) on conviction on indictment, to imprisonment for a term not exceeding 7 years.
(5) A person guilty of an offence under this section in respect of a person aged under 16 is liable—
   (a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;
   (b) on conviction on indictment, to imprisonment for a term not exceeding 14 years.

Cathy Jamieson

57 After section 8, insert—

<Causing or inciting child prostitution or pornography

(1) A person (“A”) commits an offence if—
   (a) A intentionally causes or incites another person (“B”) to become a prostitute, or to be involved in pornography, in any part of the world; and
   (b) either—
      (i) B is aged under 18, and A does not reasonably believe that B is aged 18 or over; or
      (ii) B is aged under 13.

(2) A person guilty of an offence under this section is liable—
   (a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;
   (b) on conviction on indictment, to imprisonment for a term not exceeding 14 years.

Cathy Jamieson

58 After section 8, insert—

<Controlling a child prostitute or a child involved in pornography

(1) A person (“A”) commits an offence if—
   (a) A intentionally controls any of the activities of another person (“B”) relating to B’s prostitution or involvement in pornography in any part of the world; and
   (b) either—
      (i) B is aged under 18, and A does not reasonably believe that B is aged 18 or over; or
      (ii) B is aged under 13.

(2) A person guilty of an offence under this section is liable—
   (a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;
   (b) on conviction on indictment, to imprisonment for a term not exceeding 14 years.

Cathy Jamieson

59 After section 8, insert—

<Arranging or facilitating child prostitution or pornography

(1) A person (“A”) commits an offence if—
(a) A intentionally arranges or facilitates the prostitution or involvement in pornography in any part of the world of another person (“B”); and

(b) either—

(i) B is aged under 18, and A does not reasonably believe that B is aged 18 or over; or

(ii) B is aged under 13.

(2) A person guilty of an offence under this section is liable—

(a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;

(b) on conviction on indictment, to imprisonment for a term not exceeding 14 years.

Cathy Jamieson

60 After section 8, insert—

<Sections (Causing or inciting child prostitution or pornography) to (Arranging or facilitating child prostitution or pornography): involvement in pornography, etc.

(1) For the purpose of sections (Causing or inciting child prostitution or pornography) to (Arranging or facilitating child prostitution or pornography) above, a person is involved in pornography if an indecent image of that person is recorded; and similar expressions, and “pornography”, are to be construed accordingly.

(2) A person does not commit an offence under section (Causing or inciting child prostitution or pornography), (Controlling a child prostitute or a child involved in pornography) or (Arranging or facilitating child prostitution or pornography) above by reason only of doing something within section 52(1) or 52A(1) of the Civic Government (Scotland) Act 1982 (c.45).

Cathy Jamieson

61 After section 8, insert—

<Liability to other criminal proceedings

(1) Sections (Paying for sexual services of a child) to (Arranging or facilitating child prostitution or pornography) above do not exempt any person from any proceedings for an offence which is punishable at common law or under any enactment other than those sections.

(2) But nothing in those sections or this section enables a person to be punished twice for the same offence.

Cathy Jamieson

62 After section 8, insert—

<Unlawful intercourse with girl between 13 and 16

Removal of time limit for prosecution of offence

Subsections (4) and (7) of section 5 of the Criminal Law (Consolidation) (Scotland) Act 1995 (c.39) (unlawful intercourse with a girl under 16) are repealed.
Cathy Jamieson

After section 8, insert—

<Indecent images of children

Indecent photographs of 16 and 17 year olds

(1) The Civic Government (Scotland) Act 1982 (c.45) is amended as follows.

(2) In section 52 (which makes certain conduct in relation to indecent photographs of persons under 16 an offence), in subsection (2), for “16” in both places where it occurs there is substituted “18”.

(3) After section 52A (which makes possession of indecent photographs of persons under 16 an offence) there is inserted—

“52B Sections 52 and 52A: exceptions for photographs of 16 and 17 year olds

(1) If subsection (2) below applies, the accused is not guilty of an offence under section 52(1)(a) of this Act of taking or making an indecent photograph of a child.

(2) This subsection applies if—

(a) either—

(i) the photograph was of the child aged 16 or over; or
(ii) the accused reasonably believed that to be so;

(b) at the time of the offence charged or at the time when the accused obtained the photograph, the accused and the child were—

(i) married to each other; or
(ii) partners in a relationship; and

(c) either—

(i) the child consented to the photograph being taken or made; or
(ii) the accused reasonably believed that to be so.

(3) If subsection (4) below applies, the accused is not guilty of an offence under section 52(1)(b) of this Act relating to an indecent photograph of a child.

(4) This subsection applies if—

(a) either—

(i) the photograph was of the child aged 16 or over; or
(ii) the accused reasonably believed that to be so;

(b) at the time of the offence charged or at the time when the accused obtained the photograph, the accused and the child were—

(i) married to each other; or
(ii) partners in a relationship;

(c) either—

(i) the child consented to the photograph’s being taken or made; or
(ii) the accused reasonably believed that to be so; and

(d) the showing or distributing of the photograph was only to the child.
(5) If subsection (6) below applies, the accused is not guilty of an offence under section 52(1)(c) of this Act relating to an indecent photograph of a child.

(6) This subsection applies if—

(a) either—

(i) the photograph was of the child aged 16 or over; or

(ii) the accused reasonably believed that to be so;

(b) at the time of the offence charged or at the time when the accused obtained the photograph, the accused and the child were—

(i) married to each other; or

(ii) partners in a relationship;

(c) either—

(i) the child consented to the photograph’s being in the accused’s possession; or

(ii) the accused reasonably believed that to be so; and

(d) the accused had the photograph in his possession with a view to its being distributed or shown only to the child.

(7) If subsection (8) below applies, the accused is not guilty of an offence under section 52A of this Act relating to an indecent photograph of a child.

(8) This subsection applies if—

(a) either—

(i) the photograph was of the child aged 16 or over; or

(ii) the accused reasonably believed that to be so;

(b) at the time of the offence charged or at the time when the accused obtained the photograph, the accused and the child were—

(i) married to each other; or

(ii) partners in a relationship; and

(c) either—

(i) the child consented to the photograph’s being in the accused’s possession; or

(ii) the accused reasonably believed that to be so.

(9) Subsections (2), (4), (6) and (8) above apply whether the photograph showed the child alone or with the accused, but not if it showed any other person.

52C Section 52B: proof of exceptions

(1) This section applies for the purpose of determining whether a matter within a paragraph of section 52B(2), (4), (6) or (8) of this Act is the case.

(2) If sufficient evidence is adduced to raise an issue as to whether the matter is the case, it shall be held to be the case, except where subsection (3) below applies.

(3) This subsection applies where the prosecution proves beyond reasonable doubt that the matter is not the case.
(4) Otherwise, the matter shall be held not to be the case.”.

Before section 10

Cathy Jamieson

64 Before section 10, insert—

<Minor and consequential amendments

Schedule (Minor and consequential amendments) to this Act, which contains minor
amendments and amendments consequential on this Act, has effect.>

Long Title

Cathy Jamieson

66 In the long title, page 1, line 3, after <nature> insert <, including provision for implementing in part Council Framework Decision 2004/68/JHA>

After schedule 1

Cathy Jamieson

65 After the schedule, insert—

<SCHEDULE

(introduced by section (Minor and consequential amendments))

MINOR AND CONSEQUENTIAL AMENDMENTS

The Criminal Law (Consolidation) (Scotland) Act 1995 (c.39)

1 In section 16B of the Criminal Law (Consolidation) (Scotland) Act 1995 (commission of certain sexual acts outside the United Kingdom), in subsection (7)—

(a) the word “and” immediately before paragraph (j) is repealed; and

(b) after that paragraph there is added—

“(k) an offence under section 52A of that Act (possession of indecent images of children);

(l) an offence under section (Paying for sexual services of a child) of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (asp 00) (paying for sexual services of a child);

(m) an offence under section (Causing or inciting child prostitution or pornography) of that Act (causing or inciting child prostitution or pornography);

(n) an offence under section (Controlling a child prostitute or a child involved in pornography) of that Act (controlling a child prostitute or a child involved in pornography); and

(p) an offence under section (Arranging or facilitating child prostitution or pornography) of that Act (arranging or facilitating child prostitution or pornography).”.
The Criminal Procedure (Scotland) Act 1995 (c.46)

2 In Schedule 1 to the Criminal Procedure (Scotland) Act 1995 (offences against children under 17 to which special provisions apply), after paragraph 2A there is inserted—

“2B Any offence under section 52 or 52A of the Civic Government (Scotland) Act 1982 in relation to an indecent photograph of a child under the age of 17 years.

2C Any offence under section 1, (Paying for sexual services of a child), (Causing or inciting child prostitution or pornography), (Controlling a child prostitute or a child involved in pornography) or (Arranging or facilitating child prostitution or pornography) of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 in respect of a child under the age of 17 years.”.

The Sexual Offences Act 2003 (c.42)

3 In Schedule 3 to the 2003 Act (offences which make a person subject to the notification requirements of Part 2 of the Act)—

(a) in paragraph 45, after “children)” there is inserted “if the child was under 16 and—

(a) the offender—

(i) was 18 or over, or

(ii) is or has been sentenced in respect of the offence to imprisonment for a term of at least 12 months, or

(b) in imposing sentence or otherwise disposing of the case, the court determines for the purposes of this paragraph that the notification requirements of Part 2 should apply to the offender”;

(b) in paragraph 46, after “children)” there is inserted “if the child was under 16 and—

(a) the offender—

(i) was 18 or over, or

(ii) is or has been sentenced in respect of the offence to imprisonment for a term of at least 12 months, or

(b) in imposing sentence or otherwise disposing of the case, the court determines for the purposes of this paragraph that the notification requirements of Part 2 should apply to the offender”;

(c) after paragraph 59 there is inserted—

“59A An offence under section 1 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (asp 00) (meeting a child following certain preliminary contact) if—

(a) the offender—

(i) was 18 or over, or

(ii) is or has been sentenced in respect of the offence to imprisonment for a term of at least 12 months, or

(b) in imposing sentence or otherwise disposing of the case, the court determines for the purposes of this paragraph that the notification requirements of Part 2 should apply to the offender.”
59B An offence under section (*Paying for sexual services of a child*) of that Act (paying for sexual services of a child), if the victim or (as the case may be) other party was under 16 and—

(a) the offender—

(i) was 18 or over, or

(ii) is or has been sentenced in respect of the offence to imprisonment for a term of at least 12 months, or

(b) in imposing sentence or otherwise disposing of the case, the court determines for the purposes of this paragraph that the notification requirements of Part 2 should apply to the offender.

59C An offence under any of sections (*Causing or inciting child prostitution or pornography*) to (*Arranging or facilitating child prostitution or pornography*) of that Act, if the prostitute or (as the case may be) person involved in pornography was under 16 and—

(a) the offender—

(i) was 18 or over, or

(ii) is or has been sentenced in respect of the offence to imprisonment for a term of at least 12 months, or

(b) in imposing sentence or otherwise disposing of the case, the court determines for the purposes of this paragraph that the notification requirements of Part 2 should apply to the offender."

(d) in paragraph 60, for “59” there is inserted “59C”.>
Groupings of Amendments for Stage 2 (Day 3)

Abuse of children through prostitution and pornography
56, 57, 58, 59, 60, 61

Removal of time limit for prosecution of offence: unlawful intercourse with girl between 13 and 16
62

Indecent images of 16 and 17 year olds
63

Minor and consequential amendments and Long Title
64, 65, 66
Present:
Marilyn Glen  Pauline McNeill (Convener)
Margaret Mitchell  Mrs Mary Mulligan
Stewart Stevenson  Mr Jamie Stone

Protection of Children and Prevention of Sexual Offences (Scotland) Bill: The Committee considered the Bill at Stage 2 (Day 3).

The following amendments were agreed to (without division): 56, 57, 58, 59, 60, 61, 62, 63, 64, 65 and 66.

Sections 9, 10 and 11 were agreed to without amendment.

The Long Title was agreed to as amended.

The Committee completed consideration of the Bill at Stage 2.
Protection of Children and Prevention of Sexual Offences (Scotland) Bill: Stage 2

10:09

The Convener: Agenda item 2 is stage 2 of the Protection of Children and Prevention of Sexual Offences (Scotland) Bill. I welcome for the final time to discuss the bill at stage 2 the Deputy Minister for Justice, Hugh Henry, and his legal team, which consists of Hugh Dignon, Kirsten Davidson and Paul Johnston.

As usual, members have a marshalled list of amendments. However, the procedure will be slightly unusual, as I thought that, in considering the first group of amendments, committee members should have the chance to explore each of the component parts of the proposals to do with pornography and prostitution. Therefore, I propose to break down the debate on the first group into three mini-debates. The first debate will be on the new offence of paying for sexual services; the second debate will be on the new offences that relate to prostitution; and the third debate will be on the new offences relating to pornography.

After section 8

The Convener: Amendment 56, in the name of the minister, is grouped with amendments 57 to 61. I invite the minister to speak about amendment 56 and the new offence of paying for the sexual services of a child.

The Deputy Minister for Justice (Hugh Henry): Members have already seen an earlier draft of the amendments. The proposed provisions differ only slightly from the versions that we sent the committee a few weeks ago. The amendments will create four new offences: paying for the sexual services of a child; causing or inciting child prostitution or pornography; controlling a child prostitute or a child involved in pornography; and arranging or facilitating child prostitution or pornography.

The effect of the first offence is clear—it will be an offence for someone to pay for the sexual services of a person who is under 18. In other words, we will make it an offence to purchase sex from a child. The provisions are drafted to ensure that we catch those who purchase sex from children in whatever way they do it—whether by making a direct payment to that child, by paying someone else to allow them to have sex with the child or by providing goods or services in exchange for sex with the child. If a person promises some reward in exchange for sex with a child, that person will be committing an offence.
I move amendment 56.

Stewart Stevenson (Banff and Buchan) (SNP): I entirely support the policy objective behind the amendments, but I want to explore how amendment 56 deals with the purchase of sexual services from a 16-year-old or a 17-year-old. What thought has been given to casting the amendment differently? Specifically, it seems to me that the issue can be looked at as involving person B providing sexual services conditionally, the condition being that a benefit—payment—is provided by person A to person B, rather than as involving person A providing payment that is said to be for sexual services, which is how the amendment is cast.

Has the minister considered casting the amendment on that basis? The question is simply a drafting question—it is not meant to be anything other than that—and I ask it because the timing of a payment from person A to person B could in some circumstances allow legitimate doubts to be expressed by the defence agent for person A in a criminal trial. I wondered whether considering the matter the other way round might avoid that difficulty. I am genuinely interested to hear what the minister has to say; indeed, we could well have an animated discussion on the matter. Perhaps something interesting will emerge from that.

Hugh Henry: I fear not, convener. The short answer to Stewart Stevenson’s point is that we have not considered that construction. We think that our construction properly focuses on the person whom we believe commits the offence. However, I am not sure about the line of argument that Stewart Stevenson took at the end of his contribution—it might be interesting to explore his example a little further.

10:15

Stewart Stevenson: For example, person A might settle person B’s debts and subsequently suggest that sexual services be provided. Can a legal link be made between the two actions? Although, in person A’s mind, he might have acted to create an environment in which person B could provide sexual services, no such agreement had been made at the point at which the financial or beneficial transaction was completed. I am genuinely interested in finding out whether the proof can break down in court when it should not.

Hugh Henry: If I understand him properly, Stewart Stevenson is referring to a scenario in which someone had cleared a debt or made a payment in advance of seeking to obtain sex. In such circumstances, there would be no offence. The question is whether a promise of payment has been made for sexual services, so if a payment was made in relation to something else at a point in time that was far removed from the attempt to obtain sex, a proper link could not be made.

It would need to be clear that payment was made because of a promise of obtaining sex or a condition that sex would be obtained. If, out of the goodness of their heart or for some other reason, someone had decided to make a payment then suggested some months later that a sexual act should take place or that there should be a sexual relationship, I do not think that one event could be linked with the other.

In that respect, subsection (1)(b)(i) of the new section that amendment 56 seeks to insert is very specific. It stipulates that person A commits an offence “if … before obtaining those services, A … makes or promises payment for” sexual “services to B”.

As a result, I do not think that the situation that Stewart Stevenson describes could easily be construed as an offence.

Stewart Stevenson: Perhaps we should look at the same scenario of activity and relationships from person B’s point of view. What if person B had provided sexual services to person A, but would not have done so had the debt in question not been settled or the payment not made in advance? I am not going to make a meal of the matter beyond this, minister; I simply want to test the provision.

Hugh Henry: Sure. In any case, it is for the procurator fiscal and, ultimately, the courts to determine whether there was a sufficient link between the two events. However, I cannot see any causal link in the current description of the situation.

Margaret Mitchell (Central Scotland) (Con): I say at the outset that I support amendment 56, but I would welcome further clarification of what exactly it covers. For example, does it cover unlawful intercourse with a girl under 16 per se? In other words, there may not be any financial advantage or payment involved. I suppose that I am asking about that specifically because of amendment 62, which seeks to repeal the Criminal Law (Consolidation) (Scotland) Act 1995 provision on unlawful intercourse with someone under 16. Could you clarify whether that is covered?

Hugh Henry: The latter point to which Margaret Mitchell has referred is to do with repealing the time limit. On the first point, there is a separate offence in any case and the bill does not seek to substitute anything for that offence.

Margaret Mitchell: That is helpful, thank you.
The Convener: I note that subsection (1)(b) in amendment 56 contains the phrase
“makes or promises payment for those services to B or to a third person”.

Does that cover payment by a third party for a third party? I take it to mean that payment to a third person in exchange for sexual services is not allowed, but there could be an exchange between two parties relating to sexual services for a third party.

Hugh Henry: The wording would cover a third party. The amendment criminalises someone who obtains from a child sexual services that have been paid for by a third party. Whether the purchasing of sexual services to be provided to someone else is an offence would clearly depend on the circumstances of each case. For example, if the person is deliberately arranging for a child to become involved in prostitution, proceedings could be taken under the provision relating to arranging or facilitating. It would be for the Crown to decide in each case whether proceedings would be taken.

The Convener: So when we come to the question of exchange of financial advantage for a third party, that is dealt with not by amendment 56, but by the provision that concerns arranging or facilitating. Is that correct?

Hugh Henry: That is correct. That would be dealt with under the provision on arranging or facilitating.

The Convener: Does that mean that only prostitution is covered as far as the third party is concerned, given that amendment 56 is about paying for sexual services? Presumably that is broader than prostitution.

Hugh Henry: What we are trying to get at is that the person who pays for the sexual services of a child, whether to a third party or not, knows that they are committing an offence. You may be touching on a slightly different issue, convener, although it is an interesting one. Amendment 56 is about paying for the sexual services of a child and amendments 57, 58 and 59 and other amendments are about child prostitution. I suppose that it could be argued that amendment 56 contains a wider definition than the definition in the other amendments, which are about child prostitution.

The Convener: That was one of my points. Amendment 56 is about a wider offence of paying for sexual services—the definition of that is what a reasonable person thinks would be a sexual service. I hear what you are saying about references to a third party being dealt with in the provisions on controlling or facilitating, but as those provisions refer exclusively to prostitution, might the Executive want to expand the third-party elements of the provision covering paying for the sexual services of a child?

Hugh Henry: I think that what we are talking about in relation to amendment 56 is specifically about the person paying for the sexual services. We will move on to the point that you raise about third parties causing, inciting, controlling or being involved in certain activities when we consider the next batch of amendments. You touched on a difference in emphasis; you compared the provision of sexual services with prostitution and said that the definition of the former is based on how it would appear to a reasonable person. It will be a matter for the Crown and, ultimately, for the courts to determine what payment for sexual services would entail, because that is wider than prostitution. I would guess that it could cover a range of matters that we would not specifically construe as prostitution.

The Convener: We should have that debate—either now or when we discuss amendments 57 to 61—so that we are clear about the difference between payment for sexual services and prostitution.

Hugh Henry: There are two separate debates. One is about the definition of payment for sexual services and the difference between that and prostitution, and the other, which we can have later, is about whether the phrase “child prostitution” is sufficient, particularly in relation to third parties.

The Convener: I accept that. To be absolutely clear, amendment 56 covers
“Paying for sexual services of a child”,
which is wider than prostitution. The amendment refers to payment that is made to a third person for services. There is no reference to the wider offence of payment for a third person. A payment that is made to a third person for anything that is outwith prostitution but that would be regarded as a sexual service is covered, but a payment that is made for a third person would not be covered. Is that right?

Hugh Henry: No, because subsection (1)(b)(ii) of the proposed new section refers to a situation in which a person
“knows that another person has made or promised such a payment”.

Your line of argument has been covered. The definition is another matter.

Mrs Mary Mulligan (Linlithgow) (Lab): On the point about payment for sexual services being wider than just child prostitution, the note that we received from the Law Society of Scotland suggests that the definition in the bill is narrower than the definition in section 78 of the Sexual
Offences Act 2003. Will you explain the difference between those definitions? You said that the definition in the bill is wider. If you could give an example, we might better understand the difference.

Hugh Henry: I am trying to locate what the Law Society said.

The Convener: In relation to the objective test, the English position seems to be a bit wider.

Hugh Henry: In our bill, a sexual activity is

“an activity that a reasonable person would, in all the circumstances but regardless of any person’s purpose, consider to be sexual”.

That means that activities that are not objectively sexual to most people but that a particular person finds sexual are not covered. The definition in the 2003 act, on the other hand, includes activities that are considered to be sexual by the person who carries them out. Our reason for not including that subjective definition is that we think that something that is simply in the mind of the accused, which would not appear to be sexual to a reasonable person, is unlikely to harm a child. If the committee thinks that it would be helpful to extend the definition, we will consider that before stage 3.

Whether a reasonable person would consider certain activities, other than prostitution, to be harmful to a child is a moot point. If a 16-year-old were engaged in lap dancing, would a reasonable person think that that activity was sexual in nature and could harm that child? I suppose that my perception is that, given the nature of lap-dancing establishments, that activity could be construed as being sexual in its nature and harmful at that age. The committee might want to think about other activities to which the same considerations would apply. We could have a debate on that and on whether the words “sexual services” are sufficient to cover those activities or whether another form of wording is needed.

10:30

Mrs Mulligan: Given that we are discussing the Protection of Children and Prevention of Sexual Offences (Scotland) Bill, we would want to ensure that, if an activity could be harmful to a child, it is included in the bill. However, that might be something on which we would want to consider lodging amendments at stage 3.

Hugh Henry: Mary Mulligan raises a valid point. Most reasonable people would be alarmed if 16-year-old girls were involved in the provision of telephone sex services or were employed in lap-dancing or strip clubs. As I understand the situation, legally, there is nothing to stop them being so employed, certain elements of civic government legislation notwithstanding. Would those activities be described as “sexual services”? I think that it is possible that most reasonable people would see them in that way. I suppose that we can come back to the issue of causing or inciting child prostitution, which the convener raised, but, as far as those activities are concerned, I think that the definition that we are discussing is sufficiently wide to cover them.

If amendment 56 is accepted, I will consider carefully whether we need to do something at stage 3 to clarify the situation. From your comments, convener, and the way in which members around the table are nodding, I take it that there is concern about those types of activities and a feeling that they need to be addressed. I think that the current wording is sufficient to address them, but, if that is not the case, we can revisit the issue, if that is what the committee wants.

The Convener: We are testing you this morning on what the Law Society is saying about the English position. I am not sure that, if we adopted that position, it would help us in the situation in which we are in, because the question relates to what a reasonable person would regard as being a sexual service.

You have used the example of lap dancing, pole dancing or whatever we want to call it, but I am not sure that, in the 21st century, everyone would agree with your view of that activity. I think that I am a reasonable person and I think that it should be covered by the definition of “sexual services”. However, I say that as the representative of Glasgow Kelvin, which is fast becoming the lap-dancing capital of Scotland—although not if I can help it—and I know that some people would say that, in this day and age, it is an unreasonable view to say that lap dancing is not a normal activity. That is certainly the argument that is put forward by those who provide lap dancing as a service or a business in cities in Scotland. We need to be clear about the intentions behind the amendment and whether it would cover the provision of such services by a 17-year-old, as seen by a reasonable person.

Hugh Henry: You are right that there is a difference between what we propose and what exists in English legislation. If the committee is in broad agreement that the intention of the amendment needs to be clarified, I will certainly ensure that it is clarified. However, we are talking specifically about such activities in relation to what we now define as children for these purposes. You said that reasonable people might think that certain activities were okay, but reasonable people might think that the taking or distribution of certain types of pictures and images—particularly of women, but not necessarily—is reasonable. We
are saying that, when it comes to children, those activities are not acceptable. Although some people might argue that no offence would be committed if older women or men engaged in such activities, we are talking about making an offence specifically in relation to children.

**The Convener:** I hear loud and clear what you are saying, but we are being asked to debate the definition of “sexual services”. At the moment, the objective test is what a reasonable person would think. It has been suggested that we consider the English approach, which brings into the equation the more subjective test of the circumstances of the child or the accused. However, having a subjective rather than an objective test might not take us any further forward.

You said that we are trying to decide what we mean by paying for a sexual service in relation to what we now define as a child—for these purposes, someone up to the age of 18. Perhaps we need to clarify the definition of “sexual services” according to a reasonable person in the context of legislating to cover children of 18 years or under.

**Hugh Henry:** You are right that the subjective test would not take us any further forward.

**The Convener:** My point is that, when the courts come to interpret the bill as it stands, they will have to use the reasonable person test to define a sexual service. Is there any way in which the test involving the definition of a sexual service could be made more objective for the courts in the context of protecting children? At the moment, all that the provision asks for is a test based on what a reasonable person defines as a sexual service. Do you see the distinction that I am trying to make?

**Hugh Henry:** I do. Subsection (3) of the proposed new section says:

“For the purposes of subsections (1) and (2) ... services are sexual if a reasonable person would, in all the circumstances but regardless of any person’s purpose, consider them to be sexual.”

That would probably allow sufficient grounds to deem as sexual such activities for 16 and 17-year-olds with regard to the circumstances.

**The Convener:** There is nothing to say that, however. When the court comes to define sexual services, it could interpret the subsection literally—I presume that it is entitled to do so—unless you are saying that “all the circumstances” means that the provision is to protect children.

**Hugh Henry:** Yes, but you should remember that “all the circumstances” would mean that the court would take into account the fact that it was dealing with a child and not an adult in relation to the activities in question. Before I know what I must provide the committee with by stage 3, I need to get an understanding of members’ feelings about the other services that we are talking about. Does the committee believe that they should be covered by a definition of sexual services?

**The Convener:** The answer to that is yes.

**Hugh Henry:** That means that I must give the committee an assurance that we will be able to cover such activities. My worry about providing lists is that we might exclude certain activities, simply because we had not thought of them or because technology or social entertainment tastes might move on, which could leave children vulnerable. I believe that amendment 56 adequately deals with the issue, but I give the committee a commitment that we will reflect on whether we need to clarify matters so that everyone is assured that children as defined in the bill are adequately and properly protected as regards a wider definition of sexual services.

**Margaret Mitchell:** I want to move on to consider the penalties that are proposed in the new section that amendment 56 seeks to insert. If the offence that is committed involves someone who is aged 16 or over, the maximum sentence that can be imposed is seven years, but if it involves someone who is under 16, the maximum sentence is 14 years. Why is such a distinction made? Is age a factor?

The proposed new section refers to an offence involving someone who is under 13. At present, under separate legislation, if there is just unlawful sex with someone of that age—in other words, if there is no payment element—that can attract a life sentence. What would happen if there was a payment element in such circumstances? It appears that the penalty would be less; it would be 14 years.

**Hugh Henry:** We need to bear it in mind that the distinction in the tariff applies not to the age of the person who commits the offence, but to that of the victim. We believe that a person who commits the offence should be considered for a higher tariff if the victim is under the age of 16, rather than 16 or over. That reflects the way in which we have dealt with many offences in other pieces of legislation. Although we are in the process of changing the definitions—we are extending the bill’s provisions to include 16 and 17-year-olds—we still believe that offences against younger children should be taken more seriously. That said, I acknowledge your point that if we are changing the definitions, we might as well reconsider the sentences, too.

10:45

**Margaret Mitchell:** That is helpful, but I wondered whether you had thought about not
specifying a term of 14 years and just leaving sentencing to the court to determine. A case could involve a very sheltered 16 or 17-year-old, whereas some people mature more quickly, and perhaps it should be up to the judge to make the decision. Would not it be better for the law to leave it to the judge to decide?

Could you reassure me on the point about payment for unlawful intercourse with a 13-year-old? According to the bill, if a case were prosecuted under the provisions that would be inserted by amendment 56, the maximum sentence would be 14 years—I presume that we are sending out a strong message. However, if the sex was unlawful under section 5 of the Criminal Law (Consolidation) (Scotland) Act 1995, the sentence could be up to life. Would there be any problem with going for a life sentence? I am confused that there should be a lesser penalty for what seems an even more invidious crime.

**Hugh Henry:** If the victim is under the age of 13, the accused could be prosecuted in a number of ways, one of which could attract the longer sentence of life imprisonment that Margaret Mitchell referred to, so that protection is still available for younger children.

**Marilyn Glen (North East Scotland) (Lab):** I want to follow up on Margaret Mitchell’s point on the use of different penalties, depending on the age of the child. It is not really about whether the offence occurs before or after the child’s 16th birthday; it is about the defendant’s knowledge of the age of the child, which complicates matters. Could you say a bit about consistency and the bill’s approach to the defendant’s knowledge of the age of the child, and whether that has to be proved beyond reasonable doubt?

**Hugh Henry:** We have attempted to reflect the fact that with younger children there should be no defence of reasonable belief. If the victim is a young child—which we have defined as under 13, having regard to other legislation—the accused cannot come back and say, “I reasonably believed that the person was older.” It is right that we build in as much protection as possible for younger children.

We recognise that there can sometimes be difficulties as children grow older. A protection is built in, because it has to be established that the defendant did not reasonably believe that the person was older. It is right that we reduce that defence element with younger children, so that it cannot be used. Of course, the Crown must be able to prove the case.

**Stewart Stevenson:** I found it useful to have the distinction between prostitution and sexual services explained, because I was not clear about that. From where I am sitting, the range of activities that has been described constitutes sexual services and should fall within the bill. I welcome the minister’s commitment to consider further the legal advice and to determine what is required to make the measures watertight at stage 3. I encourage his efforts.

**The Convener:** I want to ask about the proposed new subparagraph (1)(c)(ii) that would be inserted by amendment 56, which refers to the situation in which the victim is under 13. Which act does that tie in with?

**Hugh Henry:** It ties in with section 5 of the Criminal Law (Consolidation) (Scotland) Act 1995. Of course, our discussion has to take place within the context that it is for the Crown to prove the case.

**The Convener:** We seem to have exhausted that line of questioning so we will move on to discuss amendments 57 to 59 and 61, on new offences as they relate to prostitution.

**Hugh Henry:** The three offences covered by amendments 57 to 59 are slightly different from the offence that we have just been speaking about. I shall focus for the time being only on the prostitution-related aspects of the offences. Whereas the offence that we have just been speaking about is aimed at the person who is actually purchasing sex for himself, these three offences seek to tackle the situation in which someone is organising child prostitution and is arranging for children to be involved.

The offence created by amendment 57 criminalises those who intentionally cause or incite children to become prostitutes; amendment 58 creates an offence of controlling a child prostitute; and the offence created by amendment 59 criminalises those who arrange or facilitate child prostitution. The offences therefore target the pimps, the recruiters and those who make the arrangements for people to purchase sex from children. All three offences have a maximum penalty on indictment of 14 years’ imprisonment.

Clearly, if someone is committing one of those offences, they might also be committing another. For example, someone might arrange for a child to become involved in prostitution and might also purchase sex from that child. Amendment 61 therefore ensures that proceedings can be taken against that person for both those offences. We are ensuring that the law can deal appropriately with those who would wish to harm our children through prostitution.

In light of the discussion that we have just had, both the committee and I will have to consider whether we should deal only with those who organise and recruit children for prostitution, or whether we should deal also with those who
organise and recruit children for other activities that would be deemed sexual services.

Stewart Stevenson: Will the minister point me and other committee members towards the definition of prostitution in Scots law? That question balances the one that I asked about sexual services.

In light of what the minister has just said, and because I feel that this is the right time to raise this point, I want to stray outside the immediate topic that we are discussing. Referring to the proposed new sections that would be introduced by amendments 56 and 59, the proposed new subsection (2) that would be introduced by amendment 61 says:

“But nothing in those sections or this section enables a person to be punished twice for the same offence.”

What overlap is there between the offence in amendment 59 and offences in existing legislation that amendment 61 seeks to ensure does not cause a problem?

Hugh Henry: In amendment 61, we seek to ensure that there cannot be double jeopardy—in other words, that a person cannot be punished twice for the same offence. However, a person could be punished for a range of offences. If the offences were different, the person could be punished for each one.

Stewart Stevenson asked about the definition of prostitution. We rely on the common-law definition. The word “prostitute” is not defined in the soliciting offence under section 46 of the Civic Government (Scotland) Act 1982, but case law makes it clear that the word refers to “someone who offers her (or his) services to all and sundry”.

We are not persuaded that the offences need to be amended so that the offence of paying for the sexual services of a child is dealt with differently. However, in light of the first part of our discussion, we may need to reflect on having a different definition.

Stewart Stevenson: One reason that I asked about double jeopardy is that it applies to amendment 59 but not to amendments 57 and 58, unless I misunderstand the amendments. In relation to double jeopardy, what is the distinction between the three amendments that we are discussing in this mini-debate? This is a technical issue that I do not understand.

Hugh Henry: I hope that I can give Stewart Stevenson the assurance that he seeks. The double jeopardy provision applies to the new sections that would be introduced by amendments 57 and 58, although we have not listed them.

Stewart Stevenson: I apologise—I now see the word “to” in subsection (1) of the new section that amendment 61 would insert, which means that all the amendments are covered. I made the mistake of reading only the two headings.

The Convener: Subsection (2) of the new section that amendment 61 would introduce states:

“nothing in those sections or this section enables a person to be punished twice for the same offence.”

Is that not already the law? Why does the provision need to be included?

Hugh Henry: It is there purely to ensure that there is no doubt.

The Convener: That is fair enough. However, often when we say that, for the purposes of clarity, we would like the Executive to accept an amendment, we are told that the amendment is not necessary because it restates the existing law. The inclusion of this provision is contrary to the Executive’s previous practice. I am not getting just at you, minister.

Hugh Henry: I am broad enough to take it, convener.

The Convener: In the many years during which I have sat in the convener’s chair, I have repeatedly had to hear that an amendment is unnecessary. Is there a special reason why this provision must be included?

Hugh Henry: I cannot answer the question immediately. I will look again at whether the provision is required. If we decide that it is not necessary, it can be removed. If it is required, I will explain clearly to the committee why we believe that it is necessary.

Margaret Mitchell: I seek further explanation of what you mean by “involved in pornography” in the new section that would be introduced by amendment 57. Does the provision apply to situations in which someone causes a child to become involved in pornography verbally and through an image? Could it cover a communication in a chat room that is perceived to be of a pornographic nature?

The Convener: In this mini-debate, we are talking about prostitution.

Margaret Mitchell: And pornography.

The Convener: I thought that we should get the prostitution issues out of the way first. I will come back to you when we debate the pornography issues.

Marlyn Glen: Stewart Stevenson asked about the definition of a prostitute in the new section that would be inserted by amendment 57, which is about inciting another person to become a
prostitute. I find that a bit loose. [Interruption.] I did not mean to use that word. The definition of a prostitute in common law, to which you referred, minister, is not good enough to protect children in the situations that we are discussing. You said that the common law defines a prostitute as a woman who offers sexual services to “all and sundry”. Does that definition cover a 17-year-old who is being incited to go with a small group of men?

11:00

Hugh Henry: There are two issues. If we simply use the term “prostitution”, the common law is sufficiently clear and the courts would have no doubts as to what would constitute prostitution. However, we have now had a discussion about widening what should be covered and, having regard to our discussion on amendment 56, in which we talked about paying for sexual services from a child, we have to reflect on whether we are talking about prostitution alone or also about some of the activities that were mentioned earlier. If it is the latter, we will have to come back with another definition that might say something like “causing or inciting a child to be involved in the provision of sexual services”, knowing that that would include prostitution and might also include the other activities that we described earlier. However, that will have to be addressed at stage 3. If prostitution is all that we are talking about, it would be acceptable to use that term, but I will have to come back at stage 3 on the wider issues that were mentioned earlier.

Marilyn Glen: Thank you.

The Convener: I have a probing question on proving the complainer’s age. The Law Society of Scotland has highlighted to us the contrast between the different approaches towards that in amendments 56 and 63. Amendment 56 creates an offence and places the burden of proving that the accused did not reasonably believe that the complainer was 18 years or over on the prosecution, whereas amendment 63, which concerns indecent photographs of 16 and 17-year-olds, creates a defence to the principal offences that are contained in sections 52 and 52A of the Civic Government (Scotland) Act 1982. Why is it necessary to adopt two different approaches?

Hugh Henry: One of the main parts of the offence that amendment 56 creates is that the offender

“does not reasonably believe that”
the child

“is aged 18 or over”.

Therefore, we think that it is right that the burden to prove all the relevant facts that constitute the offence should be on the Crown. However, when it comes to claiming the benefit of a specific exception to an offence—as in the case of the indecent pictures exceptions—it is right to require the accused to raise an issue on the different elements of the exception. The burden of proof is on the Crown under the main offence on indecent pictures and shifts only when it comes to the exception.

The Convener: I think that I understand that.

The third and final mini-debate on group 1 concerns the new offences as they relate to pornography.

Margaret Mitchell: I seek a fuller explanation of the phrase “involved in pornography” in paragraph (1)(a) of the new section that amendment 57 would insert. Would it include involvement in verbal activities as well as images and would it cover a communication in an internet chat room?

Hugh Henry: Amendment 60 provides the definition that Margaret Mitchell seeks:

“a person is involved in pornography if an indecent image of that person is recorded; and similar expressions, and ‘pornography’, are to be construed accordingly.”

Do you want me to talk generally about the offences as they relate to pornography or do you want me to stick to answering that specific question, convener?

The Convener: I am happy for you to continue, if you so wish.

Hugh Henry: I will do so. If there are any further questions, I will get back to Margaret Mitchell.

By creating these offences, we are trying to tackle the situation in which someone is organising activities related to child pornography and is arranging for children to be involved. The offence created by amendment 57 criminalises someone who “intentionally causes or incites” children to become involved in pornography. Amendment 58 creates an offence of controlling a child involved in pornography. The offence created by amendment 59 criminalises those who arrange or facilitate child pornography. Therefore, these offences target the pimps, recruiters and those who make the arrangements for children to become involved in pornography. All three offences have a maximum penalty on indictment of 14 years’ imprisonment.

Amendment 61 also applies to these offences. That means that prosecution for one of the offences does not exempt that person from any proceedings for any other offence. In effect, that means that someone who recruits children into pornography and also takes indecent photographs of them would be liable to proceedings under the causing or inciting pornography offence and under the offence of taking an indecent photograph of a
child, which I will speak to later. However, the provisions also ensure that the causing, inciting and arranging pornography offences do not inadvertently catch those who would otherwise fall within an exception to the indecent photograph offences. The indecent photographs amendments provide certain exceptions for people who are over the age of 16 who are married or in a relationship. I will deal with those amendments later.

However, I mention that, for example, we propose that someone who takes an indecent photograph of a 16 or 17-year-old would not commit an offence if they can show that the person gave consent for the photograph to be taken and that they were either married or in a relationship with that person. In certain circumstances, taking an indecent photograph of a 16 or 17-year-old could be construed as arranging that person's involvement in pornography. In such circumstances, it is right that proceedings should be taken under both offences. However, if the circumstances are such that the activity is excepted from the indecent photograph offence, it seems sensible that the person taking the photograph should not be liable to prosecution for that activity under any other provision. Amendment 60 therefore provides that a person does not commit one of the offences in the group solely by committing one of the indecent photographs offences.

Margaret Mitchell: This is still not clear to me. We seem to talking about a photographic image all the time. Could a verbal communication be pornographic in nature and be covered by the legislation?

Hugh Henry: I doubt it very much. I cannot think of any circumstances in which verbal communication could be construed as pornographic for the purposes of the bill. Stewart Stevenson raised questions about the differences between images and photographs, and we are quite clear that the interchangeable use of the words in various areas is such that images would be covered.

Margaret Mitchell: Given the evidence of Rachel O'Connell and the Scottish high-tech crime unit, we are aware that explicit communication—a reasonable man might consider it to be pornographic in nature—can happen very quickly in a chat room on the internet and that it can be verbal. Would you be prepared to reconsider the matter?

The Convener: Before you answer, minister, I should point out that we will continue to press you on the point that Margaret Mitchell raises, as we have been advised that such activity would be charged under breach of the peace, even though it relates to conversations. Our question is whether the activity would be covered by the Sexual Offences Act 2003. Although we think that the point may be covered, there is also the question whether controlling, inciting or facilitating would be covered.

Hugh Henry: I was going to respond to Margaret Mitchell on exactly the point that you raise. I believe that breach of the peace and lewd and libidinous behaviour would cover such behaviour. However, for the purposes of defining pornography, I am not sure that it would be easy to include the type of activity described by Margaret Mitchell.

The Convener: Perhaps I should have raised this earlier in the debate, but if a 16 or 17-year-old is involved in a sex telephone line, would that constitute a sexual service? I think that Margaret Mitchell was referring to that category of pornographic conversation.

Hugh Henry: I intended to come back on that point. If we agree to the definition of sexual services that we have been discussing, and if the activities raised earlier can be construed as being defined under the heading "sexual services", such conversations, or the words involved in them, would certainly be caught by this part of the legislation. However, it would be difficult to legislate on the basis that a comment from one person to another, whether over the telephone or otherwise, should be sufficient to be regarded as involving pornography. Other offences exist that would cover such behaviour. We can reflect on the point, but I doubt whether anything could easily or sensibly be done to widen that part of the definition.

Margaret Mitchell: That explanation is helpful and welcome. Some internet activities may fall more within the definition of a service as opposed to being individual communications. I hope that we can consider the matter further, perhaps at stage 3.

The Convener: To go back to the starting point, some of the amendments amend the Civic Government (Scotland) Act 1982, section 52 of which refers to any person who takes, permits to be taken, distributes, possesses or publishes indecent photographs of a child. That provision is to be amended to extend the definition of a child to people of 18 years of age. There are a number of exceptions. The European Council framework decision allows an exception for pornographic material depicting a child or a person who has reached the age of consent. Therefore, although the Executive has chosen to amend the 1982 act, it could have chosen not to do so.

Hugh Henry: That is correct. We could have stuck with the framework decision and made no exceptions.
The Convener: The Executive could have stuck with the framework decision, given that the age of consent in Scotland is 16 years of age. If it had done so, exceptions would not have been required.

Hugh Henry: We would have been required to make exceptions because the framework decision is very specific and refers only to exceptions in relation to private use. Therefore, we could not just leave the age limit at 16.

The Convener: I understand. There has been a lot of emphasis on the point that the Executive could not do that.

One of the exceptions that I want to debate with the minister is that in relation to marriage or partnership relationships.

Hugh Henry: That relates to the next group of amendments.

The Convener: I will leave it for now in case I confuse matters.

If no other member wishes to speak, I will ask the minister briefly about language—it may or may not be a similar point to the point that we discussed in relation to sexual services and prostitution. The Civic Government (Scotland) Act 1982 talks about indecent photographs and the amendments talk about pornography. Are those terms interchangeable? Do they mean the same thing?

11:15

Hugh Henry: Pornography is defined as being an indecent image. There is no difference in meaning between the words “image” and “photograph” in the context of the provisions. Different words have been chosen at different points for drafting reasons. We do not intend there to be any difference in meaning, and we do not believe that there is any difference in meaning.

The Convener: Do you wish to say anything to wind up?

Hugh Henry: While I commend the amendments to the committee, I recognise that, in light of our discussion, there will have to be a further reflection on certain aspects of the amendments and that those issues will need to be addressed at stage 3. The best way to do that would be to agree to the amendments and to build on them for stage 3, rather than have to come back at stage 3 with a whole batch of new amendments.

Amendment 56 agreed to.

Amendments 57 to 61 moved—[Hugh Henry]—and agreed to.

The Convener: Amendment 62, in the name of the minister, is in a group on its own.

Hugh Henry: The purpose of amendment 62 is to remove the time limit in relation to the offence at section 5(3) of the Criminal Law Consolidation (Scotland) Act 1995, which allows for the prosecution of any person who has, or attempts to have, unlawful sexual intercourse with any girl of, or over, the age of 13 and under the age of 16. Section 5(4) directs that no prosecution shall commence for an offence under section 5(3) more than one year after the commission of the offence.

The apparent purpose of section 5 is to act as a safeguard that will prevent prosecution for offences long after they have occurred. However, the Crown Office has advised that the time bar does not take into account the reality of how long it can take victims in such cases to disclose fully the circumstances of what happens to them. As a result, the time bar has frequently left the Crown unable to prosecute such cases. The Crown has informed us that there are cases in which it has considered prosecution for rape but, because of the nature of the relationship between the accused and the victim, it has not been in a position to establish that sexual intercourse occurred without the victim’s consent.

The alternative offence for victims aged between 13 and 16 is the one under section 5(3), but by the time evidence has been gathered and the Crown finds that it is unable to prosecute for rape, it is often too late to take proceedings under the section 5(3) offence. It is clearly unacceptable that cases that may have involved abuse of girls by adults should escape prosecution because of a time bar. The normal rules on delay in relation to a fair trial would, of course, still apply. I hope that the committee agrees that the time bar should be removed.

I move amendment 62.

The Convener: How will that affect custody cases or cases in which a person has been remanded and the 110 or 140-day rule applies? I assume that the proposal will not affect such cases because the time limits apply from the time of committal, by which time the victim has already reported the crime.

Hugh Henry: Amendment 62 will not affect those time limits in any way. The time limits are clearly set out elsewhere.

Amendment 62 agreed to.

The Convener: Amendment 63, in the name of the minister, is in a group on its own.

Hugh Henry: I apologise for the difficulties that we have caused the committee through our delayed lodging of amendment 63. I realise that the committee wanted to consult more widely on
the matter, but we wanted to ensure that we had the right definitions and that our amendments were adequately and properly constructed. I hope that the amendment can at least be the starting point for further deliberation. Even if the committee accepts amendment 63, it will have time to reflect further, if it so wishes, before stage 3.

Amendment 63 will amend the indecent pictures offences at sections 52 and 52A of the Civic Government (Scotland) Act 1982 so that they apply to young people under 18. The offences currently apply only to children under 16. However, given that the age of sexual consent is 16, I believe that it is only right that there should be some limited exceptions to those offences for young people who are in consensual relationships and who consent to photographs being taken or possessed by their partner.

The amendments that we have lodged are an attempt to create a set of exceptions in relation to the offences at sections 52 and 52A of the 1982 act. The exceptions will be created by setting out a number of issues that the accused requires to raise and which the Crown would then have to disprove in order for the offence to be proved.

Let us take, for example, the offence of taking or making an indecent photograph. If the accused argues that either the person in the photograph was 16 or over, or that the accused reasonably believed that to be so and that, when the offence was charged or the accused took the photo, the accused and the child were either married or were partners in a relationship and the child consented to the photographs being taken, or the accused reasonably believed that the child consented, then the Crown must disprove at least one of those elements in order for the offence to be proved. In other words, unless the Crown establishes beyond reasonable doubt the contrary to one of those issues, raised by the accused, the offence has not been committed.

All the indecent pictures offences have similar exceptions, except the offence at paragraph 52(1)(d) of the 1982 act, which creates the offence of publishing an advertisement that conveys that the advertiser distributes or shows indecent photographs of children. I cannot see any circumstances in which we would want an accused person to be exempt from committing that offence.

I hope that the committee agrees that there is a balance to be struck between maintaining the civil liberties of young people while strengthening protection of them from people who would exploit and abuse them. I would very much welcome the committee’s views on whether we have struck that balance and found the best way to proceed.

I move amendment 63.

Margaret Mitchell: On the reference to partners in a relationship, could you make that provision a bit more precise? The Law Society of Scotland suggested that that could almost mean partners in a commercial relationship and that a better definition might be that in the Family Law (Scotland) Bill, which refers to people who are married, cohabiting, civil partners or two persons who are living in a relationship that is similar to that of a husband and wife. Such a definition might be more precise and would avoid any loophole.

Hugh Henry: Of course, it is for the courts to define the word “relationship”. Proposed new subparagraph 52B(2)(b)(i) of the Civic Government (Scotland) Act 1982 uses the word “married”, so that relationship is covered. Proposed new subparagraph 52B(2)(b)(ii) of the act refers to alternative relationships to marriage; such a relationship would have to be construed as a personal or emotional relationship. It is certainly not our intention that commercial relationships be covered by the bill but, as I say, that would be a matter for the courts.

I would welcome the committee’s views on whether we are right to consider the exceptions, whether they are right and whether they are sufficiently robust.

The Convener: I am ambivalent about the exceptions. In the previous debate on grooming, I was persuaded that making marriage an exception is not a good idea. Marriage should not be a defence for doing something wrong. However, I am not going to make a major argument here; I do not feel strongly one way or the other.

On Margaret Mitchell’s point, the provision that covers partners in a relationship seems to be exceptionally wide and open to misinterpretation and could be construed as meaning any relationship. I would be happier if the definition was tighter. I appreciate that it is difficult to define a thing when we are trying to narrow its scope, but I feel that the definition is too wide. We are trying to protect children, but we know that there are all sorts of people out there who will manipulate children and collaborate with others and that they will find a way around the provision, especially because it is so wide.

Proposed new paragraphs 52B(2)(a), (b) and (c) of the Civic Government (Scotland) Act 1982 would all have to apply. A photograph would have to be of a child aged 16 or over, the people would have to be married to each other or be partners, and there would have to be consent before we could say that no offence was committed. We might want to debate consent later on, but new section 52B needs to be clearer that all three criteria would have to be fulfilled together.
However, my main point is that the provision about partners in a relationship is too wide.

**Stewart Stevenson:** I have an example that might cause a legal difficulty, which is that of two men and a girl who live in a house together. It is perfectly possible that the girl could have simultaneous relationships with both men. Is it envisaged that that is a relationship that would be excluded when, for example, one person took a photograph of the other two? The question is almost rhetorical because I do not think that we think that such a case ought to be excluded, but is there a risk that such a situation would be excluded?

**Marilyn Glen:** I am considering the matter from two different points of view, which is strange. If we pursue Stewart Stevenson’s point, amendment 63 could almost be interpreted as making an exception for partners in a sexual relationship, which would offer a defence for everyone. If there is to be an exception for people who are married, the bill should also provide an exception for people who have entered into a civil partnership.

11:30

**Margaret Mitchell:** Two factors would have to kick in: the consent of the 16 or 17-year-old; and the existence of a relationship. If there was no relationship, could a person who kept such material for private use still be subject to prosecution?

**Hugh Henry:** Yes. That brings us back to the convener’s point. We are saying that if an exception is to apply, three clearly linked facts must be established, which are set out in paragraphs (a), (b) and (c) of subsection (2) of proposed new section 52B of the 1982 act. All three paragraphs must apply, notwithstanding that there is no “and” between paragraphs (a) and (b)—that is just how the language works. Margaret Mitchell is right to say that there can be no exception if there is no relationship.

People who had entered into civil partnerships would be regarded as “partners in a relationship”. However, I take it from what the convener said that she is concerned that the phrase “partners in a relationship” is too wide and might be open to misinterpretation—I do not know what other members of the committee think about that.

Stewart Stevenson asked what would happen if a person was in a relationship with two people. If we accept that a girl is involved in two relationships and a photograph of her is taken with one of the people with whom she is in a relationship, the defence on the ground that the two people in the photograph were partners in a relationship could apply. Of course, that defence would not apply to the third person, because that person would not be a partner in that relationship. However, there might be a defence for the third person if that person were photographed. I hope that I understood Stewart Stevenson correctly.

Subsection 6 of proposed new section 52B of the 1982 act would also have to be considered, because an offence would be committed if a photograph was distributed or shown to anyone other than the child. Therefore, if the photograph was shown to the third party who was in a relationship with the child, an offence would be committed, because the third party was not involved in taking the picture, even though they were in a relationship with the child. In Stewart Stevenson’s scenario, two different relationships are going on. Although the exception might apply to the second and third parties in relation to their respective relationships with the girl—if that could be properly established—the defence could not be widened to include a third party, because new section 52B(6) of the 1982 act would provide a defence only if the photograph was being kept to be “distributed or shown only to the child.”

Therefore, if the photograph was shown to a third party who was not involved in the photograph, an offence would be committed.

**The Convener:** However, “partners” might refer to more than two people.

**Hugh Henry:** Yes, but the other partner would not be regarded as a partner for the purposes of a defence in relation to the photograph. They would be regarded as a partner in relation to other photographs—if we accept that definition of a relationship.

**Stewart Stevenson:** The difficulty is that we do not have a definition that is solid. I accept what you are saying, and I think that it is useful to have that on the record. Nevertheless, I think that you should consider the matter further.

**Hugh Henry:** Do you mean the definition of “partners in a relationship”?

**Stewart Stevenson:** I am just making a general point. The phrase that I have used previously—the one that we had in our minds—is “marriage or a relationship having the general characteristics of marriage”. That is what we were all thinking about, and it appears to offer the opportunity to draw the definition more broadly. However, it is useful to have what you have said on the record.

**Hugh Henry:** Because of the delay in putting amendment 63 before the committee, I welcome the opportunity to hear what each member of the committee has to say, especially as the committee may want to reflect further on the matter ahead of stage 3. In reconsidering what we need to do—I have heard from most members of the
committee—it would be useful to know the general view of the committee.

Marilyn Glen: This debate underlines the difficulty in our not looking at the matter in depth before this stage. I urge the minister to reconsider the amendment from an equal opportunities point of view. I do not accept what he said about proposed new subparagraph 52B(2)(b)(i) of the 1982 act—“married to each other”—and about civil partnerships being included in proposed new subparagraph 52B(2)(b)(ii). I am also not entirely comfortable with what Stewart Stevenson said about relationships that are like marriage. I do not think that the bill’s intention is to make rules about relationships that are like marriage. I do not have any views on them. My main concern is that we should not allow the range of options within a relationship to be used as a defence when a child is being exploited.

Mrs Mulligan: I share the concerns that other members of the committee have expressed with regard to how we define relationships. I have some concerns about the opportunity for exploitation with the use of a relationship as a defence. Some of the points that Marilyn Glen has just raised might lend themselves even more to that possibility, and I would have concerns about that.

In the context of defining a relationship, did the Executive give any thought to whether some element of time should be involved? If somebody has been in a relationship for two weeks, is that an established relationship or does the relationship have to have continued over a period of time? Does it have to display certain characteristics? I am not sure how we can answer such questions, but I am interested to hear whether the minister has any views on them. My main concern is that we should not allow the range of options within a relationship to be used as a defence when a child is being exploited.

Hugh Henry: We spent some time trying to get the balance that I mentioned between protecting the civil liberties of young people and giving protection to those who could be exploited. It would be for the courts to determine whether the definition could apply to a relationship of two weeks or whether the relationship would have to have been established for two months or longer. I note what the committee has said in seeking a clearer definition. There must be an element of stability, and we must try to avoid the possibility of exploitation based on vulnerability, which can happen in some relationships. I will reflect on those issues.

The Convener: It would be helpful to reflect on that whole debate. If we were to tighten up the question of marriage and what partners we want to give exceptions to, would we be happy to exclude from those exceptions 17-year-olds in a casual relationship such as a one-night stand? We need to be clear that that scenario would not be exempt and that it would be criminalised.

Hugh Henry: Most members of the committee seem to be saying that they accept the principle of exceptions, but that they want more clarity and better definition in relation to those exceptions, particularly with regard to the involvement in a relationship.

Margaret Mitchell: The definition of “partners in a relationship” could be clarified.

Stewart Stevenson: I am happy with what the minister said. A final thing that the minister might consider, in relation to the exception, is whether the rights to any such images cease if the relationship ceases. Is that otherwise covered? It looks like it might be.

Hugh Henry: It would depend what happens at the end of the relationship. However, if we consider subparagraph (6)(c)(i) in amendment 63, the child would have to consent to the photograph being in the possession of the accused. Paragraph (6)(d) in amendment 63 says:

“the accused had the photograph in his possession with a view to its being distributed or shown only to the child.”

I suppose we could argue that, at the end of a relationship, the child—as defined for this legislation—could be content for that person to be left with a photograph, but without the child’s consent it would become an offence to retain possession. Whether the consent had been withdrawn would be a matter of fact to be determined by the court.

The Convener: That raises a different point, which we wanted you to clarify. However, it clarifies Stewart Stevenson’s point. We are now on to the question of consent. What happens if consent is withdrawn? You said that that is a matter of fact. When is consent not consent? Is it when someone consented at the time but later withdraws that consent?

Hugh Henry: If the person who has the photograph knows that the consent has been withdrawn, they should dispose of the photograph.

The Convener: Right.

Marilyn Glen: I have a question that is connected to the Prohibition of Female Genital Mutilation (Scotland) Bill, which the Equal Opportunities Committee—of which I am a member—is considering. That committee has been considering informed consent, forced consent and the word “consent” itself. We have been talking about over-16s, and it appears that in some cases we do not accept that there can be
informed consent by over-16s; in this committee, however, we do. Are we talking about consent that has not been forced in any way?

Hugh Henry: Scots law is quite clear. I do not think that it would cover the concept of forced or enforced consent because, for the purposes of Scots law, consent must be freely given by a person who is capable of understanding the implications of doing so. Case law has already been established that consent should not be the direct result of violence, or of the accused having taken advantage of an age difference between himself and the victim or of a position of responsibility over the victim.

11:45

The Convener: As members have nothing more to say about consent, I ask the minister whether he wants to say anything further to wind up.

Hugh Henry: No, other than to say that if amendment 63 is agreed to as a starting point for another discussion at stage 3, the Executive will reflect on the points that members have made.

Amendment 63 agreed to.

Section 9 agreed to.

Before section 10

The Convener: Amendment 64, in the name of Cathy Jamieson, is grouped with amendments 65 and 66.

Hugh Henry: The amendments in the group will create a new schedule that makes minor and consequential amendments to other legislation. First, new offences will be added to section 16B of the Criminal Law (Consolidation) (Scotland) Act 1995 in relation to indecent pictures of children, paying for the sexual services of a child and arranging or facilitating child prostitution and pornography. As a result, any act that is done by a British citizen or United Kingdom resident in a country or territory outside the UK that constitutes an offence in that country and which would also be one of the new offences if it had been done in Scotland will constitute that offence, and proceedings can be taken in Scotland. That means that people cannot escape prosecution simply by travelling to another country to carry out the offences. As long as the behaviour is also an offence in that country, we can prosecute them here.

Secondly, the new grooming offence and all the new child prostitution and pornography offences will be added to schedule 1 to the Criminal Procedure (Scotland) Act 1995 for cases in which the victim of the offence is under 17 years old. That will have a number of benefits. The 1995 act provides additional powers of arrest without warrant in relation to those who are suspected of committing those offences, but more important, a number of child protection procedures can result from the offences being included in the schedule. A convicting court will have the power to refer a child who is the victim of any of the offences to the reporter to the children’s panel. That additional protection would also extend to any child who lives in the same household as the victim, any child who lives in the same household as the offender and any child who comes to live in any of those households in the future. Any specific compulsory measures that are needed to protect or support the child could then be arranged by the children’s hearing.

Of course, whether a child needs support or protection as a result of the offences will depend on the circumstances of the particular case, and referral to the reporter will be at the discretion of the court. Even when the court refers, it will be for the reporter to consider the circumstances of individual cases and to determine whether compulsory measures are needed and a children’s hearing should be convened. To maintain consistency in schedule 1, those procedures will be triggered only when the victim of the offence is under 17 years of age.

Finally, the amendments will add all the new offences to schedule 3 to the Sexual Offences Act 2003, which lists offences that result in referral to the sex offenders register. Members will see that automatic referral will occur only in cases in which the victim is under the age of 16 and the offender is either over 18 or has been sentenced to at least 12 months’ imprisonment. There is a balance to be struck and the amendments strike that balance. It would not be right for people who have purchased sex from someone aged between 16 and 18 to go on to the sex offenders register in all circumstances or for them necessarily to be regarded as a sex offender in all circumstances. Equally, it is clear that there could be circumstances in which that is appropriate. Likewise, someone who is under 18 who commits any of those offences should not necessarily be regarded as a sex offender in all circumstances—therefore, they should not automatically be subject to the notification requirements. However, as I have said, there will be circumstances in which the people whom I have mentioned should go on to the register, which is why the amendments provide for the court to have discretion to refer to the register any offender who has committed any of those offences if it thinks that it is appropriate to do so.

I move amendment 64.

The Convener: Does that mean that, in the case of a 17-year-old who was charged with one of those offences, the court would determine whether they would go before a children’s panel?
Hugh Henry: If they were sentenced to 12 months’ imprisonment or more, they would automatically go on to the register; in other cases, the court would determine that.

The Convener: So the length of the sentence determines whether they go on the register.

Hugh Henry: Yes.

Stewart Stevenson: Under the existing provisions, can people under the age of 18 be put on the sex offenders register?

Hugh Henry: Yes. If Stewart Stevenson gives me a moment, I will check the position. My officials have confirmed that the Sexual Offences Act 2003 includes provision for offences such as rape.

Stewart Stevenson: Given that age is excluded in other parts of the bill, why does the Executive want to include this provision?

Hugh Henry: We are trying to reflect the committee’s concerns on the way in which we deal with young people in particular. We want to ensure that we deal with them appropriately and not automatically. That is the balance that we are attempting to strike.

Stewart Stevenson: To clarify, are you saying that, if someone below the age of 18 has committed an offence under part 1 of the bill, the courts would have the option of putting that person on the sex offenders register.

Hugh Henry: That is correct.

The Convener: Do you want to say anything in winding up?

Hugh Henry: No, thank you.

Amendment 64 agreed to.

After the schedule

Amendment 65 moved—[Hugh Henry]—and agreed to.

Sections 10 and 11 agreed to.

Long title

Amendment 66 moved—[Hugh Henry]—and agreed to.

Long title, as amended, agreed to.

The Convener: Everyone will be pleased to hear that that ends our stage 2 consideration of the bill.

Given the debate that has taken place on amendments for stage 3, it would be helpful if, particularly in the areas on which there is agreement, the committee could see those amendments as soon as possible. We can then decide whether to include any further provisions by way of amendment. I thank the minister and his officials.

Hugh Henry: Thank you, convener.

The Convener: I am pleased to report that we have secured a debate on our report, “Inquiry into the Effectiveness of Rehabilitation in Prisons”. The debate will be held on 11 May: we will share a slot with the Procedures Committee in the afternoon and will have an hour and a half. The committee put a lot of work into the inquiry and the report. Some of our recommendations are not only worthy of debate, but address new ground. The Management of Offenders etc (Scotland) Bill covers a lot of the subject matter of the report, but we can use the plenary time that has been allocated to us to put our findings on the record.
Protection of Children and Prevention of Sexual Offences (Scotland) Bill

[AS AMENDED AT STAGE 2]

CONTENTS

Section

Meeting a child following certain preliminary contact

1 Meeting a child following certain preliminary contact

Risk of sexual harm orders

2 Risk of sexual harm orders: applications, grounds and effect
3 Interpretation of section 2
4 RSHOs: variations, renewals and discharges
5 Interim RSHOs
6 Appeals
7 Offence: breach of RSHO or interim RSHO
8 Effect of conviction etc. under section 7 above or section 128 of Sexual Offences Act 2003

Abuse of children through prostitution and pornography

8A Paying for sexual services of a child
8B Causing or inciting child prostitution or pornography
8C Controlling a child prostitute or a child involved in pornography
8D Arranging or facilitating child prostitution or pornography
8E Sections 8B to 8D: involvement in pornography, etc.
8F Liability to other criminal proceedings

Unlawful intercourse with girl between 13 and 16

8G Removal of time limit for prosecution of offence

Indecent images of children

8H Indecent photographs of 16 and 17 year olds

Sexual offences prevention orders

9 Prevention of sexual offences: further provision

General

9A Minor and consequential amendments
10 Interpretation
11 Citation and commencement

Schedule 1—Offences for the purposes of section 1

SP Bill 30A

Session 2 (2005)
Schedule 2—Minor and consequential amendments
Amendments to the Bill since the previous version are indicated by sidelining in the right margin. Wherever possible, provisions that were in the Bill as introduced retain the original numbering.

Protection of Children and Prevention of Sexual Offences (Scotland) Bill
[AS AMENDED AT STAGE 2]

An Act of the Scottish Parliament to make it an offence to meet a child following certain preliminary contact and to make other provision for the purposes of protecting children from harm of a sexual nature, including provision for implementing in part Council Framework Decision 2004/68/JHA; and to make further provision about the prevention of sexual offences.

Meeting a child following certain preliminary contact

1 Meeting a child following certain preliminary contact

(1) A person (“A”) commits an offence if—

(a) having met or communicated with another person (“B”) on at least one earlier occasion, A—

(i) intentionally meets B;

(ii) travels, in any part of the world, with the intention of meeting B in any part of the world;

(iii) makes arrangements, in any part of the world, with the intention of meeting B in any part of the world, for B to travel in any part of the world;

(b) at the time, A intends to do anything to or in respect of B—

(i) during or after the meeting; and

(ii) in any part of the world,

which if done will constitute the commission by A of a relevant offence;

(ba) B is—

(i) aged under 16; or

(ii) a constable;

(c) A does not reasonably believe that B is 16 or over; and

(d) at least one of the following is the case—
Protection of Children and Prevention of Sexual Offences (Scotland) Bill

(i) the meeting or communication on an earlier occasion referred to in paragraph (a) (or, if there is more than one, one of them) has a relevant Scottish connection;

(ii) the meeting referred to in sub-paragraph (i) of that paragraph or, as the case may be, the travelling referred to in sub-paragraph (ii) of that paragraph or the making of arrangements referred to in sub-paragraph (iii) of that paragraph, has a relevant Scottish connection;

(iii) A is a British citizen or resident in the United Kingdom.

(2) In subsection (1) above—

(a) the reference to A’s having met or communicated with B is a reference to A’s having met B in any part of the world or having communicated with B by any means from or in any part of the world (and irrespective of where B is in the world);

(b) “relevant offence” means—

(i) any offence mentioned in schedule 1 to this Act;

(ii) anything done outside Scotland which is not an offence mentioned in that schedule but would be if done in Scotland; and

(c) a meeting or travelling or making of arrangements has a relevant Scottish connection if it, or any part of it, takes place in Scotland; and a communication has such a connection if it is made from or to or takes place in Scotland.

(3) A person guilty of an offence under this section is liable—

(a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;

(b) on conviction on indictment, to imprisonment for a term not exceeding 10 years or a fine or both.

(4) Subsections (6A) and (6B) of section 16B of the Criminal Law (Consolidation) (Scotland) Act 1995 (c.39) (which determines the sheriff court district in which proceedings against persons committing certain sexual acts outside the United Kingdom are to be taken) apply in relation to proceedings for an offence under this section as they apply to an offence to which that section applies.

(5) The Scottish Ministers may by order modify schedule 1 to this Act and, in particular, may add a reference to an offence to Part 1 of schedule 1, delete any such reference from that Part or alter any such reference in that Part.

(6) An order under subsection (5) above shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of the Scottish Parliament.

Risk of sexual harm orders

2 Risk of sexual harm orders: applications, grounds and effect

(1) The chief constable of a police force may apply for an order under this section (a “risk of sexual harm order”) in respect of a person who resides in the area of the police force or who the chief constable believes is in, or is intending to come to, that area if it appears to the chief constable that—

(a) the person has on at least two occasions, whether before or after the commencement of this section, done an act within subsection (3) below; and
(b) as a result of those acts, there is reasonable cause to believe that it is necessary for such an order to be made.

(2) An application under subsection (1) above may be made to any sheriff—
   (a) in whose sheriffdom the person against whom the order is sought resides;
   (b) in whose sheriffdom that person is believed by the applicant to be;
   (c) to whose sheriffdom that person is believed by the applicant to be intending to come; or
   (d) whose sheriffdom includes any place where it is alleged that that person did an act within subsection (3) below.

(2A) An application under subsection (1) above shall be made by summary application.

(2B) Such an application shall be made within—
   (a) the period of 3 months beginning with the date on which the matter mentioned in subsection (1)(a) above appears to the applicant to be the case; or
   (b) such longer period as the sheriff considers equitable having regard to all the circumstances.

(3) The acts referred to in subsections (1) and (2) above are—
   (a) engaging in sexual activity involving a child or in the presence of a child;
   (b) causing or inciting a child to watch a person engaging in sexual activity or to look at a moving or still image that is sexual;
   (c) giving a child anything that relates to sexual activity or contains a reference to such activity;
   (d) communicating with a child, where any part of the communication is sexual.

(4) On the application, the sheriff may make a risk of sexual harm order if satisfied that—
   (a) the person against whom the order is sought has on at least two occasions, whether before or after the commencement of this section, done an act within subsection (3) above; and
   (b) it is necessary to make such an order for the purpose of protecting children generally or any child from harm from that person.

(5) Such an order—
   (a) prohibits the person against whom the order has effect from doing anything described in the order;
   (b) subject to subsection (7) below, has effect for a fixed period (not less than 2 years) specified in the order.

(6) The only prohibitions that may be imposed by virtue of subsection (5) above are those necessary for the purpose of protecting children generally or any child from harm from the person against whom the order has effect.

(7) Where a sheriff makes a risk of sexual harm order in relation to a person already subject to such an order (whether made by that sheriff or another), the earlier order ceases to have effect.
3 Interpretation of section 2

For the purposes of section 2 above—

(a) the references in that section to protecting children generally or any child from harm from a person are references to protecting them or it from physical or psychological harm caused by that person doing any of the acts within subsection (3) of that section;

(b) “child” means a person aged under 16;

(c) “image” means an image produced by any means and whether of a real or imaginary subject;

(d) “sexual activity” means an activity that a reasonable person would, in all the circumstances but regardless of any person’s purpose, consider to be sexual;

(e) a communication is sexual if—

(i) any part of it relates to sexual activity (construed at large); or

(ii) a reasonable person would, in all the circumstances but regardless of any person’s purpose, consider any part of the communication to be sexual;

(f) an image is sexual if—

(i) any part of it relates to sexual activity (construed at large); or

(ii) a reasonable person would, in all the circumstances but regardless of any person’s purpose, consider any part of the image to be sexual.

4 RSHOs: variations, renewals and discharges

(1) Any of the persons within subsection (2) below may apply to the appropriate sheriff for an order varying, renewing or discharging a risk of sexual harm order.

(2) Those persons are—

(a) the person against whom the order has effect;

(b) the chief constable on whose application the order was made;

(c) the chief constable of the police force in the area of which the person against whom the order has effect resides;

(d) a chief constable who believes that that person is in, or is intending to come to, the area of the chief constable’s police force.

(3) Subject to subsection (4) below, the sheriff—

(a) if satisfied, except where the application is made by the chief constable mentioned in subsection (2)(c) above, that the application has been intimated to that chief constable; and

(b) after hearing the person making the application and (if wishing to be heard) any of the other persons mentioned in subsection (2) above,

may make any order varying, renewing or discharging the risk of sexual harm order that the sheriff considers appropriate.
(4) A risk of sexual harm order may be renewed or varied so as to impose additional prohibitions only if it is necessary to do so for the purpose of protecting children generally or any child from harm from the person against whom the order has effect (and any renewed or varied order may contain only such prohibitions as are necessary for that purpose).

(6) Section 3 above applies for the purposes of this section.

(7) In this section, “the appropriate sheriff” means a sheriff—
(a) for the sheriffdom of the sheriff who made the risk of sexual harm order;
(b) in whose sheriffdom the person against whom the order has effect resides;
(c) in whose sheriffdom that person is believed by the applicant to be; or
(d) to whose sheriffdom that person is believed by the applicant to be intending to come.

5 Interim RSHOs

(1) This section applies where an application for a risk of sexual harm order (“the main application”) has been intimated to the person against whom the application is made but has not been determined.

(2) An application for an order under this section (“an interim risk of sexual harm order”)—
(a) may be made by way of the main application; or
(b) if the main application has been made, may be made, by application to a sheriff for the sheriffdom of the sheriff to whom the main application was made, by the person who made that application.

(3) The sheriff may, if subsection (3A) applies, make an interim risk of sexual harm order prohibiting the person against whom the main application was made from doing anything described in the order.

(3A) This subsection applies if the sheriff is satisfied—
(a) except where the application is made by way of the main application, that it has been intimated to the person against whom it is made;
(b) that prima facie the person against whom the order is sought has on at least two occasions, whether before or after the commencement of section 2 above, done an act within subsection (3) of that section; and
(c) that it is just to make the order.

(4) Such an order—
(a) has effect only for a fixed period specified in the order;
(b) ceases to have effect, if it has not already done so, on the determination of the main application.

(5) The applicant or the person against whom an interim risk of sexual harm order has effect may apply to a sheriff for the sheriffdom of the sheriff who made the interim risk of sexual harm order for the order to be varied, renewed or discharged.
6 Protection of Children and Prevention of Sexual Offences (Scotland) Bill

6 Appeals

(1) An interlocutor granting, refusing, varying, renewing or discharging a risk of sexual harm order or an interim risk of sexual harm order is an appealable interlocutor.

(2) Where an appeal is taken against an interlocutor granting, varying or renewing such an order, the court may, in the appeal proceedings, suspend the interlocutor appealed against pending the disposal of the appeal.

7 Offence: breach of RSHO or interim RSHO

(1) A person, who without reasonable excuse, does anything which the person is prohibited from doing by—

(a) a risk of sexual harm order; or

(b) an interim risk of sexual harm order,

commits an offence.

(2) The orders referred to in paragraphs (a) and (b) of subsection (1) above include, respectively, orders under sections 123 and 126 of the 2003 Act (which make provision for England and Wales and Northern Ireland corresponding to that made by sections 2 and 5 above).

(3) A person guilty of an offence under this section is liable—

(a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;

(b) on conviction on indictment, to imprisonment for a term not exceeding 5 years or a fine or both.

8 Effect of conviction etc. under section 7 above or section 128 of Sexual Offences Act 2003

(1) This section applies to a person who—

(a) is convicted of an offence under section 7 above or section 128 of the 2003 Act (breach of RSHO or interim RSHO in England and Wales or Northern Ireland);

(b) is, in England and Wales or Northern Ireland, cautioned in respect of an offence under section 128 of that Act;

(c) is found not guilty of one of those offences on the grounds or by reason of insanity; or

(d) is found to be under a disability and to have done the act charged against the person in respect of one of those offences.

(2) Where the person—

(a) was a relevant offender immediately before this section applied to the person; and

(b) would (apart from this subsection) cease to be subject to the notification requirements of Part 2 of the 2003 Act while the relevant order (as renewed from time to time) has effect,

the person remains subject to those notification requirements.

(3) Where the person was not a relevant offender immediately before this section applied to the person—
(a) the person, by virtue of this section, becomes subject to the notification requirements of Part 2 of the 2003 Act from the time this section first applies to the person and remains so subject until the relevant order (as renewed from time to time) ceases to have effect; and

(b) that Part of that Act applies to the person subject to the modification set out in subsection (4) below.

(4) In that application, “relevant date” means the date on which this section first applies to the person referred to in it.

(5) In this section—

“relevant offender” has the meaning given by section 80(2) of the 2003 Act;

“relevant order” means—

(a) where the conviction or finding referred to in subsection (1)(a), (c) or (d) above is in respect of a breach of a risk of sexual harm order under section 2 above or section 123 of the 2003 Act, that order;

(b) where the caution referred to in subsection (1)(b) above is in respect of a breach of a risk of sexual harm order under section 123 of the 2003 Act, that order;

(c) where the conviction or finding referred to in subsection (1)(a), (c) or (d) above is in respect of a breach of an interim risk of harm order under section 5 above or section 126 of the 2003 Act—

(i) any risk of sexual harm order made upon the application to which the interim risk of sexual harm order relates; or

(ii) if no such risk of sexual harm order has been made, the interim risk of sexual harm order;

(d) where the caution referred to in subsection (1)(b) above is in respect of a breach of an interim risk of sexual harm order under section 126 of the 2003 Act—

(i) any risk of sexual harm order under section 123 of that Act made on the hearing of the application to which the interim risk of sexual harm order relates; or

(ii) if no such risk of sexual harm order has been made, the interim risk of sexual harm order.

Abuse of children through prostitution and pornography

8A Paying for sexual services of a child

(1) A person (“A”) commits an offence if—

(a) A intentionally obtains for himself or herself the sexual services of another person (“B”);

(b) before obtaining those services, A—

(i) makes or promises payment for those services to B or to a third person; or

(ii) knows that another person has made or promised such a payment; and

(c) either—
(i) B is aged under 18, and A does not reasonably believe that B is aged 18 or over; or
(ii) B is aged under 13.

(2) In subsection (1)(b) above, “payment” means any financial advantage, including the discharge of an obligation to pay or the provision of goods or services (including sexual services) gratuitously or at a discount.

(3) For the purposes of subsections (1) and (2) above, services are sexual if a reasonable person would, in all the circumstances but regardless of any person’s purpose, consider them to be sexual.

(4) A person guilty of an offence under this section in respect of a person aged 16 or over is liable—
   (a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;
   (b) on conviction on indictment, to imprisonment for a term not exceeding 7 years.

(5) A person guilty of an offence under this section in respect of a person aged under 16 is liable—
   (a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;
   (b) on conviction on indictment, to imprisonment for a term not exceeding 14 years.

8B Causing or inciting child prostitution or pornography

(1) A person (“A”) commits an offence if—
   (a) A intentionally causes or incites another person (“B”) to become a prostitute, or to be involved in pornography, in any part of the world; and
   (b) either—
      (i) B is aged under 18, and A does not reasonably believe that B is aged 18 or over; or
      (ii) B is aged under 13.

(2) A person guilty of an offence under this section is liable—
   (a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;
   (b) on conviction on indictment, to imprisonment for a term not exceeding 14 years.

8C Controlling a child prostitute or a child involved in pornography

(1) A person (“A”) commits an offence if—
   (a) A intentionally controls any of the activities of another person (“B”) relating to B’s prostitution or involvement in pornography in any part of the world; and
   (b) either—
      (i) B is aged under 18, and A does not reasonably believe that B is aged 18 or over; or
      (ii) B is aged under 13.
(2) A person guilty of an offence under this section is liable—
   (a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;
   (b) on conviction on indictment, to imprisonment for a term not exceeding 14 years.

**8D Arranging or facilitating child prostitution or pornography**
(1) A person (“A”) commits an offence if—
   (a) A intentionally arranges or facilitates the prostitution or involvement in pornography in any part of the world of another person (“B”); and
   (b) either—
      (i) B is aged under 18, and A does not reasonably believe that B is aged 18 or over; or
      (ii) B is aged under 13.

(2) A person guilty of an offence under this section is liable—
   (a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;
   (b) on conviction on indictment, to imprisonment for a term not exceeding 14 years.

**8E Sections 8B to 8D: involvement in pornography, etc.**
(1) For the purpose of sections 8B to 8D above, a person is involved in pornography if an indecent image of that person is recorded; and similar expressions, and “pornography”, are to be construed accordingly.

(2) A person does not commit an offence under section 8B, 8C or 8D above by reason only of doing something within section 52(1) or 52A(1) of the Civic Government (Scotland) Act 1982 (c.45).

**8F Liability to other criminal proceedings**
(1) Sections 8A to 8D above do not exempt any person from any proceedings for an offence which is punishable at common law or under any enactment other than those sections.

(2) But nothing in those sections or this section enables a person to be punished twice for the same offence.

*Unlawful intercourse with girl between 13 and 16*

**8G Removal of time limit for prosecution of offence**
Subsections (4) and (7) of section 5 of the Criminal Law (Consolidation) (Scotland) Act 1995 (c.39) (unlawful intercourse with a girl under 16) are repealed.

*Indecent images of children*

**8H Indecent photographs of 16 and 17 year olds**
(1) The Civic Government (Scotland) Act 1982 (c.45) is amended as follows.
(2) In section 52 (which makes certain conduct in relation to indecent photographs of persons under 16 an offence), in subsection (2), for “16” in both places where it occurs there is substituted “18”.

(3) After section 52A (which makes possession of indecent photographs of persons under 16 an offence) there is inserted—

“**52B  Sections 52 and 52A: exceptions for photographs of 16 and 17 year olds**

(1) If subsection (2) below applies, the accused is not guilty of an offence under section 52(1)(a) of this Act of taking or making an indecent photograph of a child.

(2) This subsection applies if—

(a) either—

(i) the photograph was of the child aged 16 or over; or
(ii) the accused reasonably believed that to be so;

(b) at the time of the offence charged or at the time when the accused obtained the photograph, the accused and the child were—

(i) married to each other; or
(ii) partners in a relationship; and

(c) either—

(i) the child consented to the photograph being taken or made; or
(ii) the accused reasonably believed that to be so.

(3) If subsection (4) below applies, the accused is not guilty of an offence under section 52(1)(b) of this Act relating to an indecent photograph of a child.

(4) This subsection applies if—

(a) either—

(i) the photograph was of the child aged 16 or over; or
(ii) the accused reasonably believed that to be so;

(b) at the time of the offence charged or at the time when the accused obtained the photograph, the accused and the child were—

(i) married to each other; or
(ii) partners in a relationship;

(c) either—

(i) the child consented to the photograph’s being taken or made; or
(ii) the accused reasonably believed that to be so; and

(d) the showing or distributing of the photograph was only to the child.

(5) If subsection (6) below applies, the accused is not guilty of an offence under section 52(1)(c) of this Act relating to an indecent photograph of a child.

(6) This subsection applies if—

(a) either—

(i) the photograph was of the child aged 16 or over; or
(ii) the accused reasonably believed that to be so;

(b) at the time of the offence charged or at the time when the accused obtained the photograph, the accused and the child were—

(i) married to each other; or

(ii) partners in a relationship;

(c) either—

(i) the child consented to the photograph’s being in the accused’s possession; or

(ii) the accused reasonably believed that to be so; and

(d) the accused had the photograph in his possession with a view to its being distributed or shown only to the child.

(7) If subsection (8) below applies, the accused is not guilty of an offence under section 52A of this Act relating to an indecent photograph of a child.

(8) This subsection applies if—

(a) either—

(i) the photograph was of the child aged 16 or over; or

(ii) the accused reasonably believed that to be so;

(b) at the time of the offence charged or at the time when the accused obtained the photograph, the accused and the child were—

(i) married to each other; or

(ii) partners in a relationship; and

(c) either—

(i) the child consented to the photograph’s being in the accused’s possession; or

(ii) the accused reasonably believed that to be so.

(9) Subsections (2), (4), (6) and (8) above apply whether the photograph showed the child alone or with the accused, but not if it showed any other person.

52C Section 52B: proof of exceptions

(1) This section applies for the purpose of determining whether a matter within a paragraph of section 52B(2), (4), (6) or (8) of this Act is the case.

(2) If sufficient evidence is adduced to raise an issue as to whether the matter is the case, it shall be held to be the case, except where subsection (3) below applies.

(3) This subsection applies where the prosecution proves beyond reasonable doubt that the matter is not the case.

(4) Otherwise, the matter shall be held not to be the case.”.

Sexual offences prevention orders

9 Prevention of sexual offences: further provision

(1) In section 105 of the 2003 Act (further provision as to sexual offences prevention orders)—
Protection of Children and Prevention of Sexual Offences (Scotland) Bill

(a) in subsection (2)—

(i) for the words from “within” to the end of paragraph (a) there is substituted—

“(aa) within whose sheriffdom the person in respect of whom the order is sought resides;

(ab) within whose sheriffdom the person is believed by the applicant to be;

(ac) to whose sheriffdom the person is believed by the applicant to be intending to come;”; and

(ii) at the beginning of paragraph (b) there is inserted “within whose sheriffdom lies”; and

(b) in subsection (4), for “(1)(g)” there is substituted “(1)(e)”. 

(2) In section 111 of that Act (appeals in relation to sexual offences prevention orders)—

(a) in paragraph (a)—

(i) the words “refusing, varying, renewing or discharging” are repealed;

(ii) after “order” where first occurring there is inserted “on an application under section 104(5) or 105(1)”; 

(iii) after “order” where secondly occurring there is inserted “or refusing, varying, renewing or discharging either such order”; 

(b) the word “and” immediately following that paragraph is repealed; and

(c) there is added at the end—

“(c) a sexual offences prevention order made in any other case and any order granting or refusing a variation, renewal or discharge of such a sexual offences prevention order are, for the purposes of appeal, to be regarded—

(i) in the case of solemn proceedings, as if they were orders of the kind referred to in section 106(1)(d) of the Criminal Procedure (Scotland) Act 1995 (c.46) (appeal against probation and community service orders);

(ii) in the case of summary proceedings, as if they were orders of the kind referred to in section 175(2)(c) of that Act (appeal against probation, community service and other orders); and

(d) where an appeal is taken by virtue of paragraph (c) above, the High Court of Justiciary may, in the appeal proceedings, suspend the order appealed against pending the disposal of the appeal.”.

(3) Section 112 of that Act (which provides for the application, with modifications, to Scotland of certain provisions of the Act relating to sexual offences prevention orders) is amended in accordance with subsections (4) and (5) below.

(4) In subsection (1)—

(a) paragraph (a) is repealed;

(b) in its place there is inserted—
“(aa) the references in subsection (2) and (3)(a) of section 104 to an offence listed in Schedule 3 or 5 shall be read as references to an offence listed at paragraphs 36 to 60 of Schedule 3;”;

(c) in paragraph (e)—

(i) the words “or interim sexual offences prevention order” are omitted;

(ii) for the words from “within” to the end of sub-paragraph (i) there is substituted—

“(ia) within whose sheriffdom the person in respect of whom the order is sought resides;

(ia) within whose sheriffdom that person is believed by the applicant to be;

(ic) to whose sheriffdom that person is believed by the applicant to be intending to come;”;

(iii) at the beginning of sub-paragraph (ii) there is inserted “within whose sheriffdom lies”;

(iv) in that sub-paragraph, for “the person in respect of whom the order is sought or has effect” there is substituted “that person”; and

(v) for “references to “the court” being” there is substituted “and, in relation to such an order, references to a court or the court shall be”;

(d) after that paragraph there is inserted—

“(ea) an application for an interim sexual offences prevention order—

(i) is made by way of the main application; or

(ii) if the main application has been made, is made, by application to a sheriff for the sheriffdom of the sheriff to whom the main application was made, by the person who made that application,

(and, in relation to such an order, references to a court or the court shall be construed accordingly);”;

(e) in paragraph (f)—

(i) for “either such order” there is substituted “a sexual offences prevention order which was made on an application under section 104(5) or 105(1) or an interim sexual offences prevention order”;

(ii) the word “or” immediately following sub-paragraph (i) is repealed;

(iii) for sub-paragraph (ii) there is substituted—

“(iia) within whose sheriffdom that person is believed by the applicant to be; or

(iiib) to whose sheriffdom that person is believed by the applicant to be intending to come;”;

(iv) for “references to “the court” being” there is substituted “and, in relation to an application made by virtue of this paragraph, references to a court or the court shall be”;

(f) after paragraph (f) there is inserted—
“(g) an application for the variation, renewal or discharge of a sexual offences prevention order which was made where subsection (2) or (3) of section 104 applies may be made only by the person in respect of whom the order has effect or the prosecutor;

(h) such an application is made—

(i) where the sexual offences prevention order sought to be varied, renewed or discharged was made by the High Court of Justiciary, to that court;

(ii) where that order was made by the sheriff, to the appropriate sheriff.”.

(5) After that subsection there is inserted—

“(1A) In subsection (1)(h)(ii), the “appropriate sheriff” is—

(a) in a case where the person in respect of whom the order has effect is, at the time of the application for its variation, renewal or discharge, resident in a sheriffdom other than the sheriffdom of the sheriff who made the order, any sheriff exercising criminal jurisdiction in the sheriffdom in which the person is resident;

(b) in any other case, any sheriff exercising criminal jurisdiction in the sheriff court district of the sheriff who made the order.”.

(6) In section 142(3) of that Act (its Scottish extent) after “93” there is inserted “, 110”.

General

9A Minor and consequential amendments
Schedule 2 to this Act, which contains minor amendments and amendments consequential on this Act, has effect.

10 Interpretation
In this Act, “the 2003 Act” means the Sexual Offences Act 2003 (c.42).

11 Citation and commencement
(1) This Act may be cited as the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005.

(2) This Act, except this section, comes into force on such day as the Scottish Ministers may by order made by statutory instrument appoint and different days may be so appointed for different purposes.

(3) An order under subsection (2) above may contain transitional, transitory or saving provision.
SCHEDULE 1
(introduced by section 1)

OFFENCES FOR THE PURPOSES OF SECTION 1

PART 1

LIST OF OFFENCES

1. Rape.
2. Abduction of woman or girl with intent to rape.
3. Assault with intent to rape or ravish.
4. Indecent assault.
5. Lewd, indecent or libidinous behaviour or practices.
6. Public indecency.
7. Sodomy.
10. An offence under section 2 of that Act (intercourse with a step child).
11. An offence under section 3 of that Act (intercourse with a child under 16 by a person in a position of trust).
12. An offence under section 5 of that Act (unlawful intercourse with a girl under 16).
13. An offence under section 6 of that Act (indecent behaviour towards girl between 12 and 16).
14. An offence under section 7 of that Act (procuring).
15. An offence under section 8 of that Act (abduction of girl under 18 for purposes of unlawful intercourse).
16. An offence under section 9 of that Act (permitting girl to use premises for intercourse).
17. An offence under section 10 of that Act (person having parental responsibilities causing or encouraging sexual activity in relation to a girl under 16).
18. An offence under section 13(5) of that Act (homosexual offences).
19. An offence under section 3 of the Sexual Offences (Amendment) Act 2000 (c.44) (abuse of position of trust).
21. An offence under section 311(1) of the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13) (non-consensual sexual acts).
22. An offence under section 313(1) of that Act (persons providing care services: sexual offences).
PART 2

GENERAL AND SUPPLEMENTARY

A reference in Part 1 of this schedule to an offence includes—

(a) a reference to an attempt, conspiracy or incitement to commit the offence; and

(b) except in paragraphs 1 to 7 of that Part, a reference to aiding, abetting, counselling or procuring the commission of that offence.

SCHEDULE 2

(introduced by section 9A)

MINOR AND CONSEQUENTIAL AMENDMENTS

The Criminal Law (Consolidation) (Scotland) Act 1995 (c.39)

1 In section 16B of the Criminal Law (Consolidation) (Scotland) Act 1995 (commission of certain sexual acts outside the United Kingdom), in subsection (7)—

(a) the word “and” immediately before paragraph (j) is repealed; and

(b) after that paragraph there is added—

“(k) an offence under section 52A of that Act (possession of indecent images of children);

(l) an offence under section 8A of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (asp 00) (paying for sexual services of a child);

(m) an offence under section 8B of that Act (causing or inciting child prostitution or pornography);

(n) an offence under section 8C of that Act (controlling a child prostitute or a child involved in pornography); and

(p) an offence under section 8D of that Act (arranging or facilitating child prostitution or pornography).”.

The Criminal Procedure (Scotland) Act 1995 (c.46)

2 In Schedule 1 to the Criminal Procedure (Scotland) Act 1995 (offences against children under 17 to which special provisions apply), after paragraph 2A there is inserted—

“2B Any offence under section 52 or 52A of the Civic Government (Scotland) Act 1982 in relation to an indecent photograph of a child under the age of 17 years.

2C Any offence under section 1, 8A, 8B, 8C or 8D of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 in respect of a child under the age of 17 years.”.

The Sexual Offences Act 2003 (c.42)

3 In Schedule 3 to the 2003 Act (offences which make a person subject to the notification requirements of Part 2 of the Act)—

(a) in paragraph 45, after “children)” there is inserted “if the child was under 16 and—

(a) the offender—

(i) was 18 or over, or
(ii) is or has been sentenced in respect of the offence to imprisonment for a term of at least 12 months, or

(b) in imposing sentence or otherwise disposing of the case, the court determines for the purposes of this paragraph that the notification requirements of Part 2 should apply to the offender”;

5

(b) in paragraph 46, after “children)” there is inserted “if the child was under 16 and—

(a) the offender—

   (i) was 18 or over, or

   (ii) is or has been sentenced in respect of the offence to imprisonment for a term of at least 12 months, or

(b) in imposing sentence or otherwise disposing of the case, the court determines for the purposes of this paragraph that the notification requirements of Part 2 should apply to the offender”;

10

(c) after paragraph 59 there is inserted—

“59A An offence under section 1 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (asp 00) (meeting a child following certain preliminary contact) if—

(a) the offender—

   (i) was 18 or over, or

   (ii) is or has been sentenced in respect of the offence to imprisonment for a term of at least 12 months, or

(b) in imposing sentence or otherwise disposing of the case, the court determines for the purposes of this paragraph that the notification requirements of Part 2 should apply to the offender.

15

59B An offence under section 8A of that Act (paying for sexual services of a child), if the victim or (as the case may be) other party was under 16 and—

(a) the offender—

   (i) was 18 or over, or

   (ii) is or has been sentenced in respect of the offence to imprisonment for a term of at least 12 months, or

(b) in imposing sentence or otherwise disposing of the case, the court determines for the purposes of this paragraph that the notification requirements of Part 2 should apply to the offender.

20

59C An offence under any of sections 8B to 8D of that Act, if the prostitute or (as the case may be) person involved in pornography was under 16 and—

(a) the offender—

   (i) was 18 or over, or

   (ii) is or has been sentenced in respect of the offence to imprisonment for a term of at least 12 months, or
(b) in imposing sentence or otherwise disposing of the case, the court determines for the purposes of this paragraph that the notification requirements of Part 2 should apply to the offender.”; and

(d) in paragraph 60, for “59” there is inserted “59C”.

Protection of Children and Prevention of Sexual Offences (Scotland) Bill
Schedule 2—Minor and consequential amendments
Protection of Children and Prevention of Sexual Offences (Scotland) Bill
[AS AMENDED AT STAGE 2]

An Act of the Scottish Parliament to make it an offence to meet a child following certain preliminary contact and to make other provision for the purposes of protecting children from harm of a sexual nature, including provision for implementing in part Council Framework Decision 2004/68/JHA; and to make further provision about the prevention of sexual offences.

Introduced by: Cathy Jamieson
On: 29 October 2004
Supported by: Peter Peacock, Hugh Henry
Bill type: Executive Bill
INTRODUCTION

1. As required under Rule 9.7.8A of the Parliament’s Standing Orders, these Revised Explanatory Notes are published to accompany the Protection of Children and Prevention of Sexual Offences (Scotland) Bill as amended at Stage 2. The Bill was introduced on 29 October 2004.

2. These Explanatory Notes have been prepared by the Scottish Executive in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

THE BILL

4. The Bill seeks to support the aims set out in the Policy Memorandum (SP Bill 30-PM) through the introduction of new criminal offences and associated orders. The Bill introduces an offence of sexual grooming of a person under 16. It introduces a new offence of purchasing sexual services from a person under 18, and amends current legislation criminalising the taking, possessing and distribution of indecent images of children so that it applies to images of people under 18 rather than under 16. It also creates new criminal offences of causing, inciting, controlling, arranging or facilitating prostitution and pornography in relation to young people under 18. Finally, the Bill also introduces risk of sexual harm orders which are designed to protect children from those who display inappropriate behaviour towards them, and the further use of sexual offences prevention orders so that they can be applied to those convicted of sex offences by the court when they are sentenced.
THE BILL – COMMENTARY ON SECTIONS

Section 1 – Meeting a child following certain preliminary contact

5. Subsection (1) makes it an offence for a person (A) intentionally to meet, travel with the intention of meeting, or make arrangements with the intention of meeting another person (B) in any part of the world, if A has met or communicated with B on at least one earlier occasion, and intends to commit a “relevant offence” against B either at the time of the meeting or after the meeting. B must be aged under 16 or a police constable. An offence is not committed if A reasonably believes B to be 16 or over. Relevant offences are set out in schedule 1 to the Bill. This schedule lists offences of a sexual nature that could be committed against children.

6. The offence is intended to cover situations where A establishes contact with B through, for example, meetings, telephone conversations or communications on the internet, and gains B’s trust and confidence so that A can arrange to meet B for the purpose of committing a “relevant offence” against him or her. The course of conduct prior to the meeting that triggers the offence may, but need not, have an explicitly sexual content.

7. The offence would be complete when, following the earlier contact, A meets or travels to meet B, or makes arrangements for B to travel to meet A with the intent to commit a relevant offence against B. The intended offence does not have to take place. One or more of the necessary elements of the offence, namely the preliminary meeting or communication(s), the subsequent intentional meeting, any part of the travelling to meet with B, or the making of arrangements for B to meet with A must have a “relevant Scottish connection” (defined in subsection (2)(c)), unless the accused is a British citizen or UK resident, in which case all of these elements may take place entirely outwith Scotland.

8. The evidence of A’s intention to commit an offence may be drawn from the communications between A and B prior to the meeting, or may be drawn from other circumstances, for example if A travels to the meeting with condoms and lubricants.

9. The provisions allow that the offence may be complete if A is communicating with and making arrangements with a police constable rather than with a child, as long as the person believes that s/he is communicating with a child. This provides for circumstances where suspicious online communication between a potential offender and a child is identified and police officers assume the role of the child in order to continue the communication with the potential offender.

10. Subsection (2)(a) provides that references in subsection (1) to meetings or communications with B include meetings or communications that take place in or across any part of the world.

11. Subsection (3) provides that the offence can be prosecuted summarily or on indictment. Anyone found guilty of the offence is liable to punishment of six months imprisonment and/or a fine not exceeding the statutory maximum (currently £5,000) under summary procedure or to an unlimited fine and/or 10 years imprisonment on indictment.
12. Subsection (4) applies subsections (6A) and (6B) of section 16B of the Criminal Law (Consolidation) (Scotland) Act 1995 to proceedings for an offence under section 1 of the Bill. The effect of this is that where acts leading to the apprehension of an accused person have taken place outside the UK, the person may be proceeded against in the sheriff court district in which the person was apprehended or is in custody or in such other sheriff court district as the Lord Advocate may determine.

13. Subsections (5) and (6) confer power on Scottish Ministers to modify the list of offences in schedule 1 by statutory instrument. The order will be subject to negative resolution procedure.

Sections 2 and 3 – Risk of sexual harm orders: applications, grounds and effects and Interpretation of section 2

14. Section 2 introduces a new civil preventative order, the risk of sexual harm order (RSHO), for which the police can apply to a sheriff court in respect of a person who has, on at least two occasions, engaged in sexually explicit conduct or communication with a child or children, and as a result there is reasonable cause to believe that the order is necessary to protect a child or children from harm arising out of future acts by that person. The RSHO is not a substitute for a criminal offence, but applies in circumstances where the behaviour of the person gives reason to believe that a child or children are at risk from an individual’s conduct or communication and intervention at this earlier stage is necessary to protect the child or children.

15. The application may be made by a chief constable to the sheriff in whose sheriffdom the person resides, is believed to be in or is intending to come to, or where the alleged acts are said to have taken place. In normal circumstances, the application must be made within three months of the second of the two incidents of sexually explicit behaviour coming to the attention of the chief constable. However, it is open to the sheriff to consider applications made outwith this timescale, if the sheriff considers this appropriate in all the circumstances. Subsection (2A) provides that the application will be made by summary application.

16. The person against whom an order is sought may or may not have a conviction for a sexual (or other) offence. The child or children to be protected must be under 16.

17. Subsection (1) explains the circumstances in which an RSHO may be sought. The acts in subsection (3) which constitute the trigger behaviour for an order all involve explicitly sexual communication or conduct with or towards a child. (The terms "image" and "sexual activity" are defined in section 3). The types of behaviour at subsections (3)(a), (b) and (d) may already amount to a criminal offence. However the trigger behaviour need not amount to criminal conduct. Subsection (3)(c) would, for example, cover a person giving condoms or a sex toy to a child. Subsection (3)(d) would cover a person sending pornographic images to a child over the internet or describing the sexual acts they would like to carry out on the child. An order would not be made unless the court is satisfied (under subsection (4)(b)) that further such acts would cause a child or children physical or psychological harm (see definition of protecting children from harm in section 3(a)).

18. For the purpose of the Bill, “image” includes photographs, cartoon strips, email attachments and drawings. The use of the words "but regardless of any person's purpose" in
sections 3(d), (e)(ii) and (f)(ii) means that an activity, or communication, or image, would only be "sexual" for the purposes of this Bill if a reasonable person, purely from the nature and circumstances of the activity, communication or image, would consider it to be sexual, without having to enquire into the motive behind it.

19. Under section 2(5), an order entitles the court to prohibit the person concerned from doing anything described in it. It cannot require the person concerned to comply with conditions requiring positive action.

20. The minimum duration of an order is 2 years.

Section 4 – RSHOs: variations, renewals and discharges

21. Section 4 provides for variations, renewals and discharges of RSHOs. Variations, renewals and discharges can be made on application to the sheriff court by the person to whom the order applies, the chief constable who applied for the original order or a chief constable of the area in which the person resides, is in or intends to move to. It would be open to a person to apply for a RSHO to be varied or discharged if the child concerned reached the age of 16.

Section 5 – Interim RSHOs

22. This section allows the police to apply for an interim RSHO where an application has been made for a full order in respect of an individual, and intimated to that individual, but has not yet been determined. The sheriff may grant an interim RSHO if satisfied prima facie that, firstly, the person carried out sexually explicit communication or conduct referred to in section 2(3) with or toward a child on at least two occasions and, secondly, that it is just to make the order. The interim order would be for a fixed period and would cease to have effect at the end of that period or, if earlier, when a decision is made on the full order.

Section 6 – Appeals

23. This section provides that a sheriff’s decision in relation to an RSHO can be appealed. The appeal will be dealt with in the first instance by the sheriff principal. An existing RSHO would continue to have effect until any appeal had been decided by a court unless it is suspended by the court.

Section 7 – Offence: breach of RSHO or interim RSHO

24. Breach of an RSHO or interim RSHO without reasonable excuse is a criminal offence that is triable either summarily (with a maximum penalty of 6 months imprisonment or a fine not exceeding £5,000 or both) or on indictment, with a maximum penalty on indictment of five years imprisonment or a fine or both.

25. Section 7 also makes it an offence under Scots law for a person to breach an RSHO or interim RSHO that was imposed in England and Wales under sections 123 or 126 of the Sexual Offences Act 2003 (e.g. if that person was in Scotland and breaches the terms of the order that was made in England and Wales).
Section 8 – Effect of conviction etc. under section 7 above or section 128 of Sexual Offences Act 2003

26. Section 8 makes provision for different types of offender to ensure that a breach of an RSHO entails compliance with the notification requirements in the 2003 Act, which require persons convicted of specified offences to notify their details to the police on a regular basis. It applies to persons who are convicted of an offence under section 7 of the Bill (breach of an RSHO or interim RSHO made in Scotland or England and Wales). It also applies to persons who have been convicted in England and Wales of a breach of an RSHO or interim RSHO that was made in England and Wales. This is to ensure that such persons are subject to the notification requirements of Part 2 of the 2003 Act as a matter of Scots law, which is necessary to deal with the possibility that such persons might move to Scotland.

27. Subsection (2) provides that where the offender was already subject to the notification requirements but would cease to be subject to those requirements at a time when the RSHO still has effect then that person should remain subject to the notification requirements until the expiry of the RSHO, including any renewals.

28. Given that a person subject to an RSHO need not have been convicted of any sexual offence before the order was made, the person would not necessarily be subject to the notification requirements in Part 2 of the 2003 Act. Subsection (3) therefore provides that if the person was not already subject to these notification requirements then that person becomes subject to those notification requirements from the time of the conviction until the RSHO ceases to have effect.

Section 8A – Paying for sexual services of a child

29. Section 8A of the Bill makes it an offence for a person (A) to purchase sexual services from another person (B) where B is under 18. The offence can be committed whether A makes the payment direct to B or to someone else, or knows that someone else has made such a payment.

30. Subsection (2) defines payment as any financial advantage, including the discharge of an obligation to pay or the provision of goods or services gratuitously or at a discount. Subsection (3) defines services as “sexual” if a reasonable person would, in all circumstances but regardless of any person’s purpose, consider them to be sexual.

31. In cases where B is 13 or over, the Crown must prove that A did not reasonably believe that B was 18 or over. Where B is under 13, the offence is committed regardless of A’s belief as to B’s age.

32. Subsections (4) and (5) set out the penalties in relation to the offence. On summary conviction, the maximum penalty available is 6 months imprisonment or a fine not exceeding the statutory maximum or both. The penalties available for conviction on indictment are determined by the age of B. Where B was aged 16 or over, the maximum penalty on indictment is 7 years imprisonment. Where B was aged under 16, the maximum penalty on indictment is 14 years imprisonment.
Section 8B – Causing or inciting child prostitution or pornography

33. Section 8B makes it an offence for a person (A) intentionally to cause or incite a person under 18 (B) to become a prostitute or to be involved in pornography in any part of the world. This offence is intended to cover situations where someone is, for example, recruiting children into prostitution or pornography. “Prostitute” will have its ordinary meaning in Scots law, namely someone who “offers her (or his) services to all and sundry”.

34. In cases where B is 13 or over, the Crown must prove that A did not reasonably believe that B was 18 or over. Where B is under 13, the offence is committed regardless of A’s belief as to B’s age. Subsection (2) provides maximum penalties of 6 months imprisonment on summary conviction and 14 years imprisonment on indictment.

Section 8C – Controlling a child prostitute or a child involved in pornography

35. Section 8C makes it an offence for a person (A) intentionally to control any of the activities of a person under 18 (B) relating to B’s prostitution or involvement in pornography in any part of the world. This offence is intended to cover situations where someone is, for example, acting as a pimp for children involved in prostitution or pornography. That person might not recruit the children, nor actually take the photographs or obtain sexual services from the children, but he or she might control what the children do and the payments given.

36. In cases where B is 13 or over, the Crown must prove that A did not reasonably believe that B was 18 or over. Where B is under 13, the offence is committed regardless of A’s belief as to B’s age. Subsection (2) provides maximum penalties of 6 months imprisonment on summary conviction and 14 years imprisonment on indictment.

Section 8D – Arranging or facilitating child prostitution or pornography

37. Section 8D makes it an offence for a person (A) intentionally to arrange or facilitate the prostitution or involvement in pornography in any part of the world of a person under 18 (B). This offence is intended to cover situations where A is, for example, arranging clients for B or providing premises for child prostitution or pornography to take place.

38. In cases where B is 13 or over, the Crown must prove that A did not reasonably believe that B was 18 or over. Where B is under 13, the offence is committed regardless of A’s belief as to B’s age. Subsection (2) provides maximum penalties of 6 months imprisonment on summary conviction and 14 years imprisonment on indictment.

Section 8E – Sections 8B to 8D: involvement in pornography, etc.

39. Subsection (1) provides a definition of being involved in pornography.

40. Subsection (2) provides that a person does not commit one of the offences in sections 8B to 8D solely by doing something within section 52(1) or 52A(1) of the Civic Government (Scotland) Act 1982. These offences relate to the taking, possession and distribution of indecent images of a child, and are amended by section 8H of this Bill to cover images of children under
18. As a result, while taking an indecent photograph of a person under 18 would be an offence under section 52(1) of the 1982 Act this would not in itself constitute the offence of causing a child to be involved in pornography. Further behaviour would have to occur before proceedings could be taken under section 8B.

Section 8F – Liability to other criminal proceedings

41. Subsection (1) sets out that sections 8A to 8D do not exempt any person from any proceedings for any other offence which is punishable at common law or under any other enactment. This means, for example, that someone could be prosecuted for causing a child to be involved in pornography and for taking indecent photographs of that child, depending on the circumstances. Similarly, someone could be prosecuted for causing a child to become a prostitute and for unlawful intercourse with a girl under 16 (an offence under section 5 of the Criminal Law (Consolidation) (Scotland) Act 1995), depending on the circumstances. However, subsection (2) provides that this does not mean that a person can be punished twice for the same offence. While it is already the case that in Scots law a person cannot be punished twice for the same offence, this subsection is included for clarity in view of the terms of subsection (1).

Section 8G – Removal of time limit for prosecution of offence

42. Section 8G removes the time limit that currently applies to proceedings for the offence under section 5(3) of the Criminal Law (Consolidation) (Scotland) Act 1995 which relates to unlawful sexual intercourse with a girl of or over the age of 13 and under the age of 16. Section 5(4) of the 1995 Act directs that no prosecution shall commence for an offence under section 5(3) more than 1 year after the commission of the offence. The apparent purpose of this subsection was to act as a safeguard preventing prosecution for offences long after they had occurred. However, the time bar did not take into account the reality of how long it often takes victims in such cases to disclose fully the circumstances of what has happened to them. The effect of the time bar has therefore been that the Crown has often been unable to prosecute such cases. Section 8G therefore removes this time bar.

Section 8H – Indecent photographs of 16 and 17 year olds

43. Section 8H amends sections 52 and 52A of the Civic Government (Scotland) Act 1982. Sections 52 and 52A of the 1982 Act provide a series of offences in relation to the taking, possession and distribution of indecent photographs of children under 16. Section 8H amends these provisions so that they cover indecent photographs of children under 18.

44. Subsection (3) adds to the 1982 Act a series of exceptions to the indecent photographs offences insofar as they relate to photographs of 16 and 17 year olds. The exceptions relate to the offences at sections 52(1)(a) to (c) and 52A - but not to 52(1)(d) – and work as follows. If the accused raises the issues set out below, the Crown would require to disprove at least one element in order for the offences to be proved. The issues that the accused would require to raise are:

- either the photograph was of a person aged 16 or over or the accused reasonably believed that to be so;
• at the time of the offence charged, or at the time when the accused obtained the photograph, the accused and the person aged 16 or 17 who is the subject of the photograph were either married to each other or were partners in a relationship;
• the person aged 16 or 17 who is the subject of the photograph consented to the photograph being made, taken or in the accused’s possession (depending on which offence has been charged) or the accused reasonably believed that to be so; and
• in relation to the offence at section 52(1)(b) of the 1982 Act (distributing or showing an indecent photograph), that distribution was only to the person aged 16 or 17 who is the subject of the photograph; and in relation to the offence at section 52(1)(c) of the 1982 Act (possessing an indecent photograph with a view to its being distributed or shown), the accused intended to distribute the photograph only to the person aged 16 or 17.

45. Furthermore, in each case, the exception only applies where the photograph shows the person aged 16 or 17 alone or with the accused, but not if it shows any other person.

Section 9 – Prevention of sexual offences: further provision

46. Section 9 of the Bill amends the 2003 Act so as to enable the courts in Scotland to impose a sexual offences prevention order (SOPO) where the court deals with the offender in respect of an offence listed in paragraphs 36 to 60 of Schedule 3 to the 2003 Act. The offences listed in paragraphs 36 to 59 are all sexual offences. Paragraph 60 covers any offence committed in Scotland where the court determines that there is a significant sexual element in the offender’s behaviour in committing the offence. There is power for Scottish Ministers to amend the list of relevant offences by a statutory instrument under section 130 of the 2003 Act.

47. A SOPO is intended to protect the public from the risks posed by sex offenders by placing restrictions on their behaviour.

48. At present, the 2003 Act provides that in Scotland a SOPO can be made only on application to a sheriff court by a chief constable in respect of an offender who has previously been dealt with in connection with an offence listed in Schedules 3 or 5 to the 2003 Act (except paragraphs 64 to 111 of Schedule 5). The list of trigger offences covers persons with convictions under both Scots law and the law of England and Wales and Northern Ireland to cover the situation in which a person with an English conviction lives in Scotland and is exhibiting sexually risky behaviour that causes concern. The list of offences also includes any offence committed in Scotland where the court determines that there is a significant sexual element in the offender’s behaviour in committing the offence. The court must be satisfied that an order is necessary to protect the public or an individual from serious sexual harm from the defender.

49. This kind of SOPO, granted on the application of the police (a “police SOPO”) under the 2003 Act replaced the power conferred on the police to apply for sex offender orders that were introduced in the Crime and Disorder Act 1998 for Scotland, England and Wales and Northern Ireland.
50. Separately, the 2003 Act also enabled the courts in England and Wales to impose a SOPO on conviction – a “court SOPO”. This court SOPO replaced the sex offender restraining order for England and Wales that had been introduced in 2000. The court there may impose a SOPO when it deals with an accused following a conviction for an offence listed in Schedule 1 or a finding that he or she is not guilty of such an offence by reason of insanity or that he or she is under a disability but has done the act charged. Included within Schedule 1, as a trigger offence for consideration of a SOPO, is any offence where the court determines that there is a significant sexual element in the offender’s behaviour in committing the offence, as recommended in the report of the Expert Panel on Sex Offending “Reducing the Risk – Improving The Response To Sex Offending”. Under the 2003 Act, court SOPOs were not available in Scotland.

51. Section 9 of the Bill therefore amends the 2003 Act so as to enable the Scottish courts to impose a SOPO on conviction, or on finding that a person is not guilty of an offence by reason of insanity or that he or she is under a disability but has done the act charged. It does this by amending section 112 of the 2003 Act which sets out the way in which the existing SOPO provisions apply to Scotland. Section 112 is amended so as to remove the current disapplication to Scotland of the sentencing court’s power to impose a SOPO on conviction (section 9(3)). The new court SOPO can be imposed by the sheriff court when exercising criminal jurisdiction or by the High Court. Section 9(1) amends section 111 of the 2003 Act to make provision for appeals against the new Scottish court SOPOs. The amendment to section 111 provides that the appeal process for the court SOPO is to be equivalent to the appeal process for other community justice disposals, such as probation and community service orders.

52. It is not necessary to apply to the court to make a SOPO at the point of sentence although the prosecutor may ask the court to consider making an order in appropriate cases.

53. As with the existing police SOPOs and court SOPOs for England and Wales, in order to make a Scottish court SOPO, the court must form a view that the offender presents a risk of serious sexual harm to the public and that an order is necessary to provide protection from this. The evidence presented in the trial is likely to be a key factor in the formation of this judgement, together with the offender’s previous convictions, of which the sheriff would have a copy. Courts may also ask social enquiry report writers to consider the suitability of a SOPO on a non-prejudicial basis.

54. In line with the provisions for existing SOPOs, a Scottish court SOPO can contain only those prohibitions on the behaviour of the offender that are necessary for the purpose of protecting the public or any particular members of the public from serious sexual harm from the offender (section 107(2) of the 2003 Act). It cannot require the offender to comply with conditions requiring positive action. Prohibitions could include, for example, preventing an offender from contacting victims, or from taking part in sporting activities that involve close contact with children, or from living in a household with girls under 16. Also, in line with the existing provisions for SOPOs in the 2003 Act, the Scottish court SOPO will also have the effect of making the offender subject to the notification requirements of Part 2 of the 2003 Act for the duration of the order. This will apply even if the offender is already subject to notification, if notification would end during the currency of the order (section 107 of the 2003 Act). The notification period runs from the date that the order is served on the offender (not from the date of conviction) – see section 107(5) of the 2003 Act. The minimum duration for an order is five years (section 107(1)(b) of the 2003 Act). There is no upper limit.
55. Breach of a court SOPO, without reasonable excuse, would be a criminal offence. An accused convicted of such an offence on summary conviction would be liable to a term of imprisonment of up to six months or to a fine or both; an offender convicted on indictment would be liable to a term of imprisonment of up to five years (section 113 of the 2003 Act).

56. Section 9 of the Bill amends the 2003 Act so as to bring the procedure for applying for SOPOs in Scotland more closely into line with the normal jurisdictional arrangements applicable to orders made under civil law. The effect of this change is that an order can only be applied for in a sheriffdom where the person who would be subject to the order resides, is believed to be or is intending to come to, or where the alleged acts are said to have taken place. Section 9 also amends the 2003 Act so that an application for an interim SOPO must be made in the same sheriffdom as the main application.

Section 9A – Minor and consequential amendments

57. Section 9A introduces to the Bill schedule 2, which contains a number of minor and consequential amendments as follows.

58. The offences at section 52A of the 1982 Act and sections 8A to 8D of the Bill are added to section 16B of the Criminal Law (Consolidation) (Scotland) Act 1995 (commission of certain sexual acts outside the United Kingdom). The effect of this insertion is that any act done by a British citizen or UK resident in a country or territory outside the UK which constituted an offence in that country and would also have been one of these offences if it had been done in Scotland shall constitute that offence, and proceedings can be taken in Scotland.

59. The offences at sections 52 and 52A of the 1982 Act and sections 1 and 8A to 8D of the Bill are added to Schedule 1 to the Criminal Procedure (Scotland) Act 1995, in cases where the offences relate to children under 17 years of age. This provides the additional powers of arrest without warrant specified in section 21 of the 1995 Act and also allows child protection procedures to be undertaken.

60. Under section 48 of the Criminal Procedure (Scotland) Act 1995 a convicting court has the power to refer a child who was the victim of a Schedule 1 offence to the reporter to the children’s panel. This additional protection would extend to any child living in the same household as the victim of one of these offences and any child living in the same household as a person convicted of one of the offences. The reporter could then refer to a children’s hearing without the need to establish grounds of referral. Any specific measures needed to protect the child could be arranged by the children’s hearing.

61. In addition to a referral by a convicting court at the time of the crime, inclusion of these offences in Schedule 1 would mean that children who are or become or are likely to become members of the same household as either the victim or the perpetrator, later on after the conviction, can be referred by a reporter to a hearing under section 52(2)(d), (e) or (f) of the Children (Scotland) Act 1995, even where there was no subsequent conviction with regard to those children.
62. It is important to note, however, that it is for the court to decide whether referral to the children’s panel is appropriate in any particular case.

63. Schedule 2 also makes a number of insertions to Schedule 3 to the Sexual Offences Act 2003 (offences which trigger certain provisions in Part 2 of that Act, notably the sex offender notification requirements). Paragraphs 45 and 46 of Schedule 3, which refer to offences under sections 52 and 52A of the 1982 Act, are amended by schedule 2 to the Bill so that the offences will apply for the purposes of Schedule 3 only if the child was under 16 and the offender was either 18 or over or was sentenced in respect of the offence to at least 12 months imprisonment.

64. The offence at section 1 of the Bill is added to Schedule 3 of the 2003 Act in cases where the offender was 18 or over or has been sentenced in respect of the offence to at least 12 months imprisonment.

65. The offences at sections 8A to 8D of the Bill are added to Schedule 3 of the 2003 Act in cases where the victim was under 16 and the offender was 18 or over or has been sentenced in respect of the offence to at least 12 months imprisonment.

66. In respect of each of these offences, however, Schedule 2 gives a discretion to the court so that it may determine that the notification requirements of Part 2 of the 2003 Act should apply in cases where the specified conditions do not apply.
INTRODUCTION

1. As required under Rule 9.7.8B of the Parliament’s Standing Orders, this Revised Financial Memorandum is published to accompany the Protection of Children and Prevention of Sexual Offences (Scotland) Bill as amended at Stage 2. The Bill was introduced on 29 October 2004. It has been prepared by the Scottish Executive to assist the reader of the Bill and help inform debate on it. It does not form part of the Bill and has not been endorsed by the Parliament.

COSTS ON THE SCOTTISH ADMINISTRATION

2. Discussions with the police and the Crown Office and Procurator Fiscal Service suggest that the introduction of a new grooming offence is not likely to produce a significant net increase in the numbers of prosecutions. In most cases where suspicious activity is reported to the police there are already prosecutions in serious cases for related offences such as lewd and libidinous behaviour, or in less serious cases what appears to be ill-advised behaviour is deterred by the police enquiries. Nevertheless there is a potential gap in the law and for the purposes of estimating financial costs it is assumed that there will be some prosecutions that would not otherwise have taken place. It is not possible to produce a firm estimate of such prosecutions, but for these purposes we have illustrated the effects of 50 extra prosecutions for the grooming offence per annum. In practice the number may well be significantly lower than this number. The police advise that at present there are less than 100 enquiries throughout Scotland each year, and as is noted above, many of these are either already prosecuted on other charges or there is no evidence of criminal behaviour.

3. It is also difficult to predict how many RSHOs and SOPOs might be imposed. Again discussions with police and COPFS suggest that 10-20 applications for each type of order would be a reasonable estimate.

4. For the purposes of this memorandum, we have estimated that there will be 50 extra prosecutions for the offences in relation to child prostitution and pornography.

5. The costs set out below are based on average costs from 2002/03.
Grooming offence

6. The introduction of this offence should not involve additional police costs as reports or indications of such behaviour are already investigated by the police.

7. The average cost of a summary court case is £1,260 including prosecution costs and the average indictment cost is £9,650. It is anticipated that 20% of these cases will proceed on indictment. Based on the estimate of 50 prosecutions per annum, this would therefore incur total court costs of £146,900.

8. There will also be additional legal aid costs. The average legal aid cost for a summary case would be £675; while the average for a solemn case would be £4,000. Based on the estimate of 50 prosecutions per annum, estimated total legal aid costs would therefore be £67,000. Appeals against convictions would also have an impact on legal aid.

9. If an offender is sentenced to a term of imprisonment there may also be costs to the Scottish Prison Service. Based on 2003-4 figures the average annual cost per prisoner place is £33,244. This figure is the Scottish Prison Service’s annual costs divided by the annual average number of prisoners. It is not the marginal cost of an extra prisoner.

Risk of sexual harm orders

10. For the purposes of this financial memorandum we anticipate that there will be about 10-20 applications per annum. The average cost to the Scottish Courts Service of a summary application is £1,260. In addition to these costs there may also be the need for additional social enquiry reports at a cost of £250 per report. There are also implications for Legal Aid and this is estimated at £2000 per case. Breaches and applications for variations would incur similar costs. There should not be any additional police costs as reports or indications of such behaviour are already investigated by the police. It is important to note that these orders may also generate savings as they would prevent offending and the costs associated with investigating, prosecuting offences, and providing support for victims.

Sexual offences prevention orders (SOPOs)

11. The extension in the use of Sexual Offence Prevention Orders, (SOPOs), to allow them to be imposed at time of sentence should not lead to any significant cost implications as the cases will already have been investigated and heard. However it is possible that there may be some marginal lengthening of relevant court hearings to consider whether to make a SOPO. Set against this, it is also noted that the imposition of a court SOPO should produce savings where a police SOPO would otherwise have been applied for, as there will not need to be a separate hearing with associated costs.

Offences in relation to child prostitution and pornography

12. The introduction of these offences – and the extension of the indecent images offences - will incur the same costs per case as those incurred with the new grooming offence. There may also be additional costs to the police of investigating these cases, although the actual cost to the
police will depend on the circumstances of each case and as such it is not possible to give a figure.

**Unlawful intercourse with girl between 13 and 16**

13. The removal of the time limit for this offence is unlikely to result in any additional costs, as these offences will be being investigated already.

**Schedule 2 – Minor and consequential amendments**

14. The additions to the Sexual Offences Act 2003 at paragraph 3 of schedule 2 may result in additional offenders becoming subject to the notification requirements of Part 2 of the 2003 Act. However, we would expect the policing of serious sex offenders to be a central part of normal policing, and as such it should not require any additional specific funding.

**COSTS ON LOCAL AUTHORITIES**

15. The introduction of the new grooming offence should not have any impact on the costs on local authorities other than in relation to costs associated with social enquiry reports. The introduction of RSHOs may have some impact on the work of social work departments as they may be called upon to participate in risk assessment. Similarly the use of SOPOs as a court disposal may also have some marginal effect in that courts may ask for social enquiry reports where they might not otherwise have done so, at a cost of £250 per report. In general though given the nature of the offences dealt with in this context it is likely that criminal justice social work departments will already be involved in these cases and that the new orders will represent additional tools to be employed rather than additions to their caseload.

16. The introduction of the new child prostitution and pornography offences – and the extension of the indecent images offences - will also incur costs in relation to social enquiry reports. If an increased number of cases are able to be prosecuted under section 5 of the Criminal Law (Consolidation) (Scotland) Act 1995 as a result of the removal of the time limit, this too will result in increased costs in relation to social enquiry reports, although the number of cases is likely to be small.

17. The additions to the Criminal Procedure (Scotland) Act 1995, at paragraph 2 of schedule 2, may result in additional costs in relation to child protection. However, it is likely that some of the children involved would already have come to the attention of social work services and as such, any increase in costs is likely to be marginal.

**COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES**

18. Individuals who are convicted of the new offences will be expected to pay any fine imposed on them by the court as a result of that conviction. There are no costs for other bodies or businesses.
### SUMMARY OF COSTS

**Grooming offence**

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of prosecutions</td>
<td>50</td>
</tr>
<tr>
<td>Average summary court case cost</td>
<td>£1,935</td>
</tr>
<tr>
<td>Average indictment cost</td>
<td>£13,650</td>
</tr>
<tr>
<td>Police costs</td>
<td>No additional costs – already investigating these incidents</td>
</tr>
<tr>
<td>Social work costs (inc SERs)</td>
<td>Would already be involved in cases of this nature. If additional SERs required this would be an average cost of £250 per case</td>
</tr>
<tr>
<td>Average prison costs per person pa</td>
<td>£33,244 but see explanation in text above</td>
</tr>
</tbody>
</table>

| **TOTAL SUMMARY CASE** (based on 40 prosecutions and excluding prison costs) | £87,400       |
| **TOTAL INDICTMENT** (based on 10 prosecutions and excluding prison costs)   | £139,000      |
| **TOTAL per annum excluding prison costs**                                      | £226,400      |

**Child prostitution and pornography offences (including extension of indecent images offences)**

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of prosecutions</td>
<td>50</td>
</tr>
<tr>
<td>Average summary court case cost</td>
<td>£1,935</td>
</tr>
<tr>
<td>Average indictment cost</td>
<td>£13,650</td>
</tr>
<tr>
<td>Police costs</td>
<td>Depends on complexity of case and availability of evidence</td>
</tr>
<tr>
<td>Social work costs (inc SERs)</td>
<td>£250 per case</td>
</tr>
<tr>
<td>Average prison costs per person pa</td>
<td>£33,244 but see explanation in text above</td>
</tr>
</tbody>
</table>

| **TOTAL SUMMARY CASE** (based on 40 prosecutions and excluding prison costs) | £87,400 + police costs |
| **TOTAL INDICTMENT** (based on 10 prosecutions and excluding prison costs)   | £139,000 + police costs |
| **TOTAL per annum excluding prison costs**                                      | £226,400 + police costs |

**RSHOs**

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of applications (inc variations etc)</td>
<td>10 – 20</td>
</tr>
<tr>
<td>Average summary application case cost</td>
<td>£3,260 including court costs and legal aid</td>
</tr>
<tr>
<td>Police investigation costs</td>
<td>No additional costs – already investigating these incidents</td>
</tr>
<tr>
<td>Social work costs (inc SERs)</td>
<td>No additional costs – already involved in managing these cases (if extra SERs are required this would be at the average cost of £250)</td>
</tr>
</tbody>
</table>

| **TOTAL PER CASE**                               | £3,550       |
| **Total for 10 orders**                          | £35,500      |
| **Total for 20 orders**                          | £71,000      |
During stage 2 of the Protection of Children and Prevention of Sexual Offences (Scotland) Bill, the Committee raised a number of issues which I undertook to consider further. This letter sets out my response to the Committee on these issues.

**RSHOs following previous criminal proceedings**

At our second stage 2 session, the Committee sought clarity on whether behaviour resulting in a criminal conviction could subsequently be used as the basis for an RSHO. As RSHOs are civil preventative orders rather than criminal orders, there is nothing to rule out using behaviour which has already been dealt with in the criminal courts as the basis of an application for an RSHO. However, under these particular circumstances, it seems more likely that a chief constable would choose to apply for, or a court would choose to impose, a Sexual Offences Prevention Order.

It will, however, be open to the courts to make an RSHO based on behaviour for which criminal proceedings have been taken, but for which there was no conviction, and I believe that this is an important feature of these orders. There may be cases where there is insufficient evidence to prove beyond reasonable doubt that a criminal offence has been committed, but where there are nevertheless sufficient grounds to warrant the protection of children. In these cases, if it can be proved on the balance of probabilities that the inappropriate behaviour took place and that there is a risk of sexual harm to a child or children, I believe it is right that an RSHO should be imposed to protect the children involved.

**Chief Constables’ considerations before making an RSHO**

The Committee asked whether the RSHO provisions should be amended to state explicitly the factors which the chief constable should take into account before reaching a conclusion as to whether an application for an RSHO was appropriate. As the factors which the chief constable should take into account, and the bodies which he will consult, will vary depending on the circumstances of each particular case, it would seem more appropriate to include this in guidance to chief constables rather than putting it on the face of the Bill itself.

**Retention of information on interim RSHOs**

The Committee sought reassurance on whether or not the police would continue to hold records on interim RSHOs in cases where they were discovered to be based on malicious claims and where a full order was therefore not made. All information held on computer databases must comply with the Data Protection Act 1998. Information on the Scottish Intelligence Database must also be held in accordance with the Code of Practice and the Manual of Standards for the Recording and Dissemination of Intelligence Material. These documents underpin and regulate police activities in this area, and include a robust review and weeding policy endorsed by the Information Commissioner as best practice in relation to the 1998 Act. If the police found that information held on any police computer system was based on a malicious or vexatious allegation, it would be reviewed immediately and would be deleted.

It is possible that, in some cases, information might be held in relation to a malicious or vexatious allegation in order for the police to put together a case against the person making the allegations. However, in such cases, the information will only be retained on the basis...
that the allegation was malicious and that the subject of the interim RSHO is therefore a witness to this case. In these circumstances, information about the interim RSHO would not be disclosed in an Enhanced Disclosure check.

**Breach of the peace**

The Committee sought assurance that it would be open to the courts to refer an offender to the sex offenders register in all cases where the court considered that to be appropriate. As I explained to the Committee, paragraph 60 of schedule 3 to the Sexual Offences Act 2003 makes it clear that if the court, in imposing sentence in relation to any offence other than one that is expressly mentioned in the schedule, considers that the offender’s behaviour in committing the offence had a significant sexual aspect, the court can impose the notification requirements of the 2003 Act on that offender. The Committee were particularly concerned about cases of breach of the peace where there is a sexual aspect. Paragraph 60 of schedule 3 to the 2003 Act would cover such cases. The Committee may be aware of a recent case at Glasgow Sheriff Court, where the accused pled guilty to breach of the peace and was, as a result, placed on the sex offenders register.

**Subsection (2) of Amendment 61**

Amendment 61 sets out that (subsection (1)) prosecution under any of the “Abuse of children through prostitution and pornography” offences does not exempt any person from any proceedings for any other offence, but that (subsection (2)) this should not be regarded as enabling a person to be punished twice for the same offence. The Committee queried the necessity of subsection (2), given that it is already the case in Scots law that no one can be punished twice for the same offence.

Our legal advice is that 61(2) is required in view of what is said at 61(1). Section 61(2) would not be required on its own. However, when viewed alongside 61(1), it makes it clear that just because the Crown can bring proceedings under various statutory and common law provisions does not mean that persons can be punished twice for the same offence.

**Sexual Services**

We discussed whether the Bill should cover sexual services other than prostitution. I am considering this further and will return to the Committee shortly.

**Exceptions to indecent photographs offences**

We also discussed whether the proposed exceptions to the indecent photographs offences were appropriate. The Committee’s view was that the exceptions required more precision. Again, I am considering this further and will return to the Committee shortly.

**Proposed stage 3 amendment to section 1 offence**

Finally, the Committee will wish to be aware that we intend to lodge a further amendment to the section 1 offence at stage 3. As currently drafted, an offence is committed if following earlier meetings or communications, a person meets or arranges to meet a child with the intention of committing a relevant offence against that child. A list of relevant offences is provided in the schedule to the Bill.
However, Crown Office have expressed concerns that, while the evidence might make it clear that an accused person intended to engage in sexual activity with the child, it might be difficult for the Crown to prove the particular offence that the accused intended to commit.

It is therefore our intention to lodge an amendment which would remove the schedule from the Bill. Rather than providing that the person intended to commit a relevant offence, section 1 will then be amended to provide that the person intended to engage in sexual activity with the child. As “child” is defined for this section as a person under the age of 16, any sexual activity with a child would be an offence.

I hope that the Committee find this helpful.

Hugh Henry MSP
Deputy Minister for Justice
At Stage 2 of the Bill I undertook to come back to the Committee with a more detailed explanation of the procedures that will be put in place to ensure that information is shared effectively where someone is subject to an RSHO and works, or seeks to work, in a child care position.

As I indicated, we are already working on implementing the Bichard recommendations. Key in these is the development of a strengthened vetting/barring system in which all relevant information and intelligence, including the existence of RSHOs, will be taken into account in deciding whether someone should be barred from working with children. An important feature of the new system will be ongoing updating and review of the status of an individual in this regard as new information comes to light. Where the status changes, as well as the individual, employers and regulatory bodies will be notified. As we move to implement this system, working closely with colleagues across the UK to avoid the development of any cross border loopholes which those unsuitable to work with children could exploit, we will need to consider current legislation in this area and further legislative requirements which may be necessary to make the system work. The aim is to introduce the new system from 2007 and we are confident this will meet the concerns raised on ensuring relevant information on those deemed to be a risk to children is effectively shared and updated.

Against this background, we plan to develop guidance with the police as an interim measure to ensure systematic consideration of the need to disclose information in respect of an individual being considered for, or issued with, an RSHO. Broadly this will require the police to:

- Immediately log as intelligence where they have concerns about an individual which might make them a risk to children. This intelligence would be released as part of an Enhanced Disclosure check should the individual apply for, or be moved to, a child care position.
- In building the case to apply for an RSHO and to ensure the ability to monitor compliance when issued, the police will be expected to ascertain the individual's access to and dealings with children, including employment or other activities.
- Where an RSHO is issued, the police will consider whether it would be appropriate for the existence of the RSHO to be disclosed (without the need for a further Disclosure enquiry), for example to an employer. The subject of the RSHO being employed in a child care position would be grounds for this information to be disclosed.
- In the case of a subsequent Disclosure enquiry in relation to employment in a child care position, a chief constable will consider on a case by case basis what information should be released as part of the Enhanced Disclosure. If an RSHO has been issued, the fact that it demonstrates concern over a risk to a child or children, would be grounds for this information to be released.

I believe this meets the concern that organisations must be made aware of relevant information, in this case an RSHO, so that they can play their part in ensuring children are protected. To support this further, we will also issue guidance to organisations explaining RSHOs, encouraging them to assess whether they move someone from working with children, or dismiss them as a result of this information, and reminding them of their duty to refer an individual to the Scottish Ministers if they do so for consideration for inclusion on the Disqualified from Working with Children List.
We believe such interim measures will help ensure relevant information is made available to maximise the safeguards to children until such time as we have the post-Bichard comprehensive vetting/barring system in place.

Hugh Henry MSP
Deputy Minister for Justice
The Minister for Justice, Cathy Jamieson, wrote to you in November 2004 setting out the subordinate legislative powers conferred on Scottish Ministers by the above Bill. The Subordinate Legislation Committee provided a report on these proposals to the Justice 1 Committee at stage 1.

As you will recall, the Bill creates a new offence of “grooming” a child for the purpose of committing a sexual offence. As the Bill stands, the offence would occur when, following prior meetings or communication with a child under 16, a person then meets or travels to meet that child with the intention of committing a “relevant offence” against the child. “Relevant offences” are set out in schedule 1 to the Bill. This schedule lists offences of a sexual nature that could be committed against children.

The Bill confers power on Scottish Ministers to modify the list of offences in schedule 1 by statutory instrument. This would allow additional offences to be added in the light of experience or if new relevant offences are created. The Bill provides for any order made under this section to be subject to annulment in pursuance of a resolution of the Parliament.

However, concerns have been expressed by Crown Office that, while the evidence might make it clear that an accused person intended to engage in sexual activity with the child, it might be difficult for the Crown to prove the particular offence that the accused intended to commit. It is therefore our intention to lodge an amendment at stage 3 which would remove schedule 1 from the Bill together with the related powers to amend the schedule by statutory instrument. Rather than providing that the person intended to commit a relevant offence, section 1 will then be amended so that the Crown requires to prove that the person intended to engage in sexual activity with the child.

The Committee will wish to be aware that, if these amendments are accepted, the only subordinate legislative powers conferred by the Bill will be in respect of commencement orders.

I hope that the Committee finds this helpful.

Hugh Henry MSP
Deputy Minister for justice
SUBORDINATE LEGISLATION COMMITTEE

EXTRACT FROM THE MINUTES

17th Meeting, 2005 (Session 2)

Tuesday 24th May 2005

Present:

Dr Sylvia Jackson (Convener)         Mr Stewart Maxwell
Christine May                       Mike Pringle
Murray Tosh

Apologies were received from Mr Adam Ingram and Gordon Jackson.

**Protection of Children (Scotland) Bill:** The Committee considered correspondence from the Deputy Minister for Justice, Hugh Henry MSP and welcomed the Executive’s undertaking to bring forward an amendment at Stage 3.
The Convener: Agenda item 3 is on the correspondence that we have received from the Deputy Minister for Justice, Hugh Henry, about the Protection of Children and Prevention of Sexual Offences (Scotland) Bill. The letter indicates that the Executive is to lodge an amendment at stage 3 that will remove from the bill schedule 1, together with the related power. The committee will remember that we were concerned about that Henry VIII power being subject to the negative procedure. The Executive will look at the “relevant offence”. Instead of listing particular sexual offences—or using that phrase—the Executive will look more generally at a sexual offence, which will make the whole thing easier for the procurator fiscal to interpret.

We should welcome the information that we have received from the minister because it addresses our concern and it seems to be a useful way of proceeding.

Christine May: I agree that we should welcome the correspondence and I am sure that the committee does welcome it. It looks as if the proposed amendment will make the bill workable and that it addresses some legal concerns. However, we have not seen the text of the amendment and we would want to flag up that fact. We also do not know that the amendment will be accepted, but if the text of the amendment deals with the matter in the way in which the minister has described, the committee will argue for the amendment to be accepted, assuming that it is appropriate for members of this committee to do that.

I think that I am going around in circles but you will know what I mean. We have to flag up that, although we are content that this amendment should be made, we have not seen the text and so we cannot say whether it addresses our concerns.

The Convener: We will not be reporting to the lead committee because of the timing. We will have to be alert to when the amendment comes up in the stage 3 debate in the chamber.
Protection of Children and Prevention of Sexual Offences (Scotland) Bill

Marshalled List of Amendments selected for Stage 3

The Bill will be considered in the following order—

Sections 1 to 11                           Schedules 1 and 2
Long Title

Amendments marked * are new (including manuscript amendments) or have been altered.

Section 1

Cathy Jamieson

1 In section 1, page 1, line 15, leave out <do anything to or in respect> and insert <engage in unlawful sexual activity involving B or in the presence>

Cathy Jamieson

2 In section 1, page 1, leave out line 18

Cathy Jamieson

3 In section 1, page 2, line 14, leave out from beginning to <Scotland;> in line 17

Cathy Jamieson

4 In section 1, page 2, line 20, at end insert—

<( ) For the purposes of subsection (1)(b), it is not necessary to allege or prove that A intended to engage in a specific activity.>

Cathy Jamieson

5 In section 1, page 2, line 31, leave out subsections (5) and (6)

Section 2

Pauline McNeill

36 In section 2, page 3, line 2, at end insert—

<( ) Before making an application under subsection (1) above, the chief constable shall consult—

(a) any local authority in whose area the person against whom the order is sought—

(i) resides; or
(ii) is believed to be; and
(b) such other persons as the chief constable considers appropriate.>

Margaret Mitchell
37 In section 2, page 3, line 28, at end insert—
<( ) For the purposes of subsection (4)(a) above, any occasion in relation to which the act
within subsection (3) above resulted in the person against whom the order is sought
being charged with a criminal offence and being found not guilty of that offence is not
to be counted as one of the two or more occasions on which an act within subsection (3)
above was done.>

Stewart Stevenson
38 In section 2, page 3, line 39, at end insert—
<(7A) On making a risk of sexual harm order the sheriff may, if the sheriff considers it
justified in the circumstances, refer the case of the person against whom the order has
effect to the Scottish Ministers.

(7B) The Scottish Ministers shall include an individual referred to them under subsection
(7A) above in the list kept under section 1(1) of the Protection of Children (Scotland)
Act 2003 (asp 5).

(7C) On so including an individual in the list the Scottish Ministers shall—
(a) provide the individual who is so included with notice of that fact; and
(b) if they are aware that the individual is working in a child care position for an
organisation at the time of the determination, provide the organisation with such
notice.

(7D) For the purposes of subsection (7C) above, “child care position” has the same meaning
as in the Protection of Children (Scotland) Act 2003 (asp 5).>

Margaret Mitchell
39 In section 2, page 3, line 39, at end insert—
<( ) A risk of sexual harm order shall be served on the person against whom the order has
effect by a sheriff officer.>

Section 3

Cathy Jamieson
6 In section 3, page 4, leave out lines 10 and 11

Cathy Jamieson
7 In section 3, page 4, line 13, leave out <(construed at large)>

Cathy Jamieson
8 In section 3, page 4, line 14, leave out <but regardless of any person’s purpose>
Margaret Mitchell
40 In section 3, page 4, line 14, leave out from <but> to end of line 15 and insert <regard the communication to be sexual for that person’s own gratification;>

Cathy Jamieson
9 In section 3, page 4, line 17, leave out <(construed at large)>

Cathy Jamieson
10 In section 3, page 4, line 18, leave out <but regardless of any person’s purpose>

Margaret Mitchell
41 In section 3, page 4, line 18, leave out from <but> to end of line 19 and insert <regard the communication to be sexual for that person’s own gratification.>

Section 5

Mr Kenny MacAskill
42 In section 5, page 5, line 31, leave out <just> and insert <in the interests of justice>

Margaret Mitchell
43 In section 5, page 5, line 33, leave out <has effect only for a fixed period> and insert <subject to subsection (4A) below, has effect for such period (not exceeding 3 months) as may be>

Margaret Mitchell
44 In section 5, page 5, line 35, at end insert—

<(4A) The sheriff may, if the main application has not been determined by the time the interim order would otherwise cease to have effect, extend the period for which the order has effect by a period not exceeding 3 months.>

Margaret Mitchell
45 In section 5, page 5, line 38, at end insert—

<( ) An interim risk of sexual harm order shall be served on the person against whom the order has effect by a sheriff officer.>

Mr Kenny MacAskill
46 In section 5, page 5, line 38, at end insert—

<( ) Where an interim risk of sexual harm order has been discharged or ceases to have effect without the making of a risk of sexual harm order, the interim order shall be treated as never having been made.>
Section 7

Cathy Jamieson

11 In section 7, page 6, line 13, leave out subsection (2) and insert—

<(2) Where an order made under section 123 or 126 of the 2003 Act (which make provision for England and Wales and Northern Ireland corresponding to that made by sections 2 and 5 above) prohibits a person from doing a thing throughout the relevant place, the person commits an offence if the person, without reasonable excuse, does the thing in Scotland.

(2A) For the purpose of subsection (2) above, the “relevant place” is—

(a) where the order was made in England and Wales, England and Wales;
(b) where the order was made in Northern Ireland, Northern Ireland.>

After section 8

Pauline McNeill

47 After section 8, insert—

<Disclosure of RSHO in criminal proceedings

Where a person against whom a risk of sexual harm order has effect is being prosecuted for a criminal offence, the existence of the order shall not be disclosed to the court unless the judge considers it justified in the circumstances.>

Section 8A

Mr Kenny MacAskill

48 In section 8A, page 7, line 36, leave out <or herself> and insert <, herself or a third person>

Cathy Jamieson

12 In section 8A, page 8, line 7, leave out from <services> to the end of line 9 and insert <“sexual services” are—

( ) the performance of sexual activity; or
( ) the performance of any other activity that a reasonable person would, in all the circumstances, consider to be for the purpose of providing sexual gratification, and a person’s sexual services are obtained where what is obtained is the performance of such an activity by the person.>

Mr Kenny MacAskill

49 In section 8A, page 8, line 8, leave out from <, in> to the end of line 9 and insert <consider that

(a) whatever the circumstances or any person’s purpose in relation to them, they are because of their nature sexual; or
(b) because of their nature they may be sexual and because of the circumstances or the purpose of any person in relation to them (or both), they are sexual.>
In section 8A, page 8, line 15, after <aged> insert <13 or over but>

In section 8A, page 8, line 19, at end insert—

<( ) A person guilty of an offence under this section in respect of a person aged under 13 is liable—
(a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;
(b) on conviction on indictment, to imprisonment for a term up to and including life.>

Section 8B

In section 8B, page 8, line 22, leave out <prostitute> and insert <provider of sexual services>

Section 8C

In section 8C, page 8, line 35, leave out <prostitution> and insert <provision of sexual services>

Section 8D

In section 8D, page 9, line 7, leave out <prostitution or> and insert—

<( ) provision of sexual services in any part of the world by; or
( )>

After section 8D

After section 8D, insert—

<Sections 8B to 8D: definition of sexual services
For the purpose of sections 8B to 8D above, services are sexual if a reasonable person would consider that—
(a) whatever the circumstances or any person’s purpose in relation to them, they are because of their nature sexual; or
(b) because of their nature they may be sexual and because of the circumstances or the purpose of any person in relation to them (or both), they are sexual.>
Section 8E

Cathy Jamieson

16 In section 8E, page 9, line 20, at end insert—

<(1A) In those sections, “provider of sexual services” means a person (“B”) who, on at least one occasion and whether or not compelled to do so, offers or provides B’s sexual services to another person in return for payment or a promise of payment to B or a third party; and “provision of sexual services” is to be construed accordingly.

(1B) In subsection (1A) above, “payment” means any financial advantage, including the discharge of an obligation to pay or the provision of goods or services (including sexual services) gratuitously or at a discount.

(1C) For the purpose of subsections (1A) and (1B) above, “sexual services” are—

(a) the performance of sexual activity; or

(b) the performance of any other activity that a reasonable person would, in all the circumstances, consider to be for the purpose of providing sexual gratification, and a person’s sexual services are offered or provided to another person where such an activity is offered to be performed or performed with or for the other person.>

Section 8H

Marlyn Glen

54 In section 8H, page 10, line 14, leave out from beginning to <relationship;> in line 17

Pauline McNeill

55 In section 8H, page 10, line 16, after <to> insert <or civil partners of>

Mr Kenny MacAskill

56 In section 8H, page 10, line 16, leave out from <or> to <relationship;> in line 17 and insert—

<(  ) living with each other as if they were husband and wife;
(  ) civil partners of each other; or
(  ) living with each other in a relationship which has the characteristics of the relationship between husband and wife except that the persons are of the same sex;>

Cathy Jamieson

17 In section 8H, page 10, line 17, leave out <a> and insert <an established>

Marlyn Glen

57 In section 8H, page 10, leave out lines 27 to 30

Pauline McNeill

58 In section 8H, page 10, line 29, after <to> insert <or civil partners of>
Mr Kenny MacAskill
59 In section 8H, page 10, line 29, leave out from <or> to end of line 30 and insert—

  <( ) living with each other as if they were husband and wife;
  ( ) civil partners of each other; or
  ( ) living with each other in a relationship which has the characteristics of the relationship between husband and wife except that the persons are of the same sex;>

Cathy Jamieson
18 In section 8H, page 10, line 30, leave out <a> and insert <an established>

Marlyn Glen
60 In section 8H, page 11, leave out lines 2 to 5

Pauline McNeill
61 In section 8H, page 11, line 4, after <to> insert <or civil partners of>

Mr Kenny MacAskill
62 In section 8H, page 11, line 4, leave out from <or> to end of line 5 and insert—

  <( ) living with each other as if they were husband and wife;
  ( ) civil partners of each other; or
  ( ) living with each other in a relationship which has the characteristics of the relationship between husband and wife except that the persons are of the same sex;>

Cathy Jamieson
19 In section 8H, page 11, line 5, leave out <a> and insert <an established>

Marlyn Glen
63 In section 8H, page 11, line 18, leave out from beginning to <relationship;> in line 21

Pauline McNeill
64 In section 8H, page 11, line 20, after <to> insert <or civil partners of>

Mr Kenny MacAskill
65 In section 8H, page 11, line 20, leave out from <or> to <relationship;> in line 21 and insert—

  <( ) living with each other as if they were husband and wife;
  ( ) civil partners of each other; or
  ( ) living with each other in a relationship which has the characteristics of the relationship between husband and wife except that the persons are of the same sex;>
Cathy Jamieson
20 In section 8H, page 11, line 21, leave out <a> and insert <an established>

Mr Kenny MacAskill
66 In section 8H, page 11, line 27, at end insert—

<(  ) For the purposes of this section, a child consents if he or she agrees by choice and has the freedom and capacity to make that choice.>

Section 10

Cathy Jamieson
21 In section 10, page 14, line 26, at end insert—

<“sexual activity” means an activity that a reasonable person would, in all the circumstances, consider to be sexual; and a reference to engaging in sexual activity includes (other than in section 2(3)(b) above)—

(a) a reference to an attempt or conspiracy to engage in such activity; and

(b) a reference to aiding, abetting, counselling, procuring or inciting another person to engage in such activity.>

Schedule 1

Cathy Jamieson
22 Leave out schedule 1

Schedule 2

Cathy Jamieson
23 In schedule 2, page 16, line 37, leave out <the child was under 16 and>

Cathy Jamieson
24 In schedule 2, page 16, line 39, at beginning insert <the child was under 16 and>

Cathy Jamieson
25 In schedule 2, page 17, line 4, leave out from <for> to end of line 5 and insert <that it is appropriate that the offender be regarded, for the purposes of Part 2 of this Act, as a person who has committed an offence under this paragraph>

Cathy Jamieson
26 In schedule 2, page 17, line 6, leave out <the child was under 16 and>

Cathy Jamieson
27 In schedule 2, page 17, line 8, at beginning insert <the child was under 16 and>
Cathy Jamieson
28 In schedule 2, page 17, line 13, leave out from <for> to end of line 14 and insert <that it is appropriate that the offender be regarded, for the purposes of Part 2 of this Act, as a person who has committed an offence under this paragraph>.

Cathy Jamieson
29 In schedule 2, page 17, line 24, leave out from <for> to end of line 25 and insert <that it is appropriate that the offender be regarded, for the purposes of Part 2 of this Act, as a person who has committed an offence under this paragraph>.

Cathy Jamieson
30 In schedule 2, page 17, line 27, leave out from first <the> to end of line.

Cathy Jamieson
31 In schedule 2, page 17, line 28, at beginning insert <the victim or (as the case may be) other party was under 16 and>.

Cathy Jamieson
32 In schedule 2, page 17, line 33, leave out from <for> to end of line 34 and insert <that it is appropriate that the offender be regarded, for the purposes of Part 2 of this Act, as a person who has committed an offence under this paragraph>.

Cathy Jamieson
33 In schedule 2, page 17, line 35, leave out from <the> to end of line 36.

Cathy Jamieson
34 In schedule 2, page 17, line 37, at beginning insert <the provider of sexual services or (as the case may be) person involved in pornography was under 16 and>.

Cathy Jamieson
35 In schedule 2, page 18, line 2, leave out from <for> to <offender> in line 3 and insert <that it is appropriate that the offender be regarded, for the purposes of Part 2 of this Act, as a person who has committed an offence under this paragraph>.
Protection of Children and Prevention of Sexual Offences (Scotland) Bill

Groupings of Amendments for Stage 3

Note: The time limits indicated are those set out in the timetabling motion to be considered by the Parliament before the Stage 3 proceedings begin. If that motion is agreed to, debate on the groups above each line must (subject to Rules 9.8.4A and 9.8.5A of Standing Orders) be concluded by the time indicated, although the amendments in those groups may still be moved formally and disposed of later in the proceedings.

Group 1: Definition of “sexual activity”, “sexual services” etc.
1, 2, 3, 4, 5, 6, 7, 8, 40, 9, 10, 41, 12, 49, 13, 14, 52, 53, 16, 21, 22

Debate to end no later than 25 minutes after proceedings begin

Group 2: Applications for and making of RSHOs
36, 37

Group 3: RSHOs – referral to Scottish Ministers
38

Group 4: Serving of RSHOs and interim RSHOs
39, 45

Debate to end no later than 50 minutes after proceedings begin

Group 5: Interim RSHOs
42, 43, 44, 46

Group 6: Offence – breach of RSHO or interim RSHO
11

Group 7: Disclosure of RSHOs in criminal proceedings
47

Group 8: Offence of paying for sexual services of a child
48, 50, 51

Debate to end no later than 1 hour 15 minutes after proceedings begin

Group 9: Indecent photographs of 16 and 17 year olds – excepted relationships
54, 55, 56, 17, 57, 58, 59, 18, 60, 61, 62, 19, 63, 64, 65, 20

Group 10: Indecent photographs of 16 and 17 year olds – consent
66
Group 11: Circumstances in which offender is subject to 2003 Act notification requirements 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35

Debate to end no later than 1 hour 55 minutes after proceedings begin
EXTRACT FROM THE MINUTES OF PROCEEDINGS

Vol. 3, No. 8 Session 2

Meeting of the Parliament

Thursday 2 June 2005

Note: (DT) signifies a decision taken at Decision Time.

Business Motion: Ms Margaret Curran, on behalf of the Parliamentary Bureau, moved S2M-2901—that the Parliament agrees that, during Stage 3 of the Protection of Children and Prevention of Sexual Offences (Scotland) Bill, debate on groups of amendments shall, subject to Rule 9.8.4A, be brought to a conclusion by the time limits indicated (each time limit being calculated from when the Stage begins and excluding any periods when other business is under consideration or when the meeting of the Parliament is suspended or otherwise not in progress):

Group 1 – 25 mins
Groups 2 to 4 – 50 mins
Groups 5 to 8 – 1 hour 15 mins
Groups 9 to 11 – 1 hour 55 mins

The motion was agreed to.

Protection of Children and Prevention of Sexual Offences (Scotland) Bill - Stage 3: The Bill was considered at Stage 3.

The following amendments were agreed to without division: 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 13, 14, 52, 16, 55, 58, 18, 61, 19, 64, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34 and 35.

The following amendments were agreed to (by division)—

8  (For 94, Against 14, Abstentions 0)
12 (For 85, Against 21, Abstentions 0)
17 (For 98, Against 6, Abstentions 1)

The following amendments were disagreed to (by division)—

39  (For 21, Against 88, Abstentions 0)
43  (For 45, Against 65, Abstentions 0)
44  (For 44, Against 66, Abstentions 0)
45  (For 20, Against 87, Abstentions 2)
46  (For 44, Against 64, Abstentions 0)
48  (For 41, Against 58, Abstentions 0)
66  (For 44, Against 63, Abstentions 0)
The following amendments were moved and, with the agreement of the Parliament, withdrawn: 36, 38, 42, 47 and 54.

Amendments 37, 50, 51, 53, 56, 57, 59, 60, 62, 63 and 65 were not moved and amendments 40, 41 and 49 were pre-empted.

The Presiding Officer extended the time-limits under Rule 9.8.4A (a).

**Protection of Children and Prevention of Sexual Offences (Scotland) Bill - Stage 3:** The Deputy Minister for Justice (Hugh Henry) moved S2M-2771—That the Parliament agrees that the Protection of Children and Prevention of Sexual Offences (Scotland) Bill be passed.

After debate, the motion was agreed to (DT).
Scottish Parliament

Thursday 2 June 2005

[THE DEPUTY PRESIDING OFFICER opened the meeting at 09:15]

Business Motion

The Deputy Presiding Officer (Murray Tosh):
Good morning. The first item of business is consideration of business motion S2M-2901, in the name of Margaret Curran, on behalf of the Parliamentary Bureau, setting out a timetable for stage 3 consideration of the Protection of Children and Prevention of Sexual Offences (Scotland) Bill. I invite any member who wishes to speak on this motion to press their request-to-speak button now.

Motion moved,

That the Parliament agrees that, during Stage 3 of the Protection of Children and Prevention of Sexual Offences (Scotland) Bill, debate on groups of amendments shall, subject to Rule 9.8.4A, be brought to a conclusion by the time limits indicated (each time limit being calculated from when the Stage begins and excluding any periods when other business is under consideration or when the meeting of the Parliament is suspended or otherwise not in progress):

- Group 1 – 25 mins
- Groups 2 to 4 – 50 mins
- Groups 5 to 8 – 1 hour 15 mins
- Groups 9 to 11 – 1 hour 55 mins.

–[Ms Margaret Curran.]

The Deputy Presiding Officer: Mr MacAskill, do you wish to speak?

Mr Kenny MacAskill (Lothians) (SNP): I am sorry. No, I do not wish to speak on this motion.

The Deputy Presiding Officer: It is always better to be clear about these things.

Motion agreed to.
The Deputy Presiding Officer (Trish Godman): The next item of business this afternoon is stage 3 of the Protection of Children and Prevention of Sexual Offences (Scotland) Bill. For the first part of stage 3 proceedings, members should have the following: the bill; the marshalled list, which contains all amendments selected for debate; and the groupings.

I will allow an extended voting period of two minutes for the first division. Thereafter, I will allow a voting period of one minute for the first division after debate on a group. All other divisions will be 30 seconds.

Section 1—Meeting a child following certain preliminary contact

The Deputy Presiding Officer: Group 1 concerns the definition of “sexual activity” and “sexual services”. I point out that if amendment 8 is agreed to, amendment 40 will be pre-empted; if amendment 10 is agreed to, amendment 41 will be pre-empted; and if amendment 12 is agreed to, amendment 49 will be pre-empted. Amendment 1, in the name of the minister, is grouped with amendments 2 to 8, 40, 9, 10, 41, 12, 49, 13, 14, 52, 53, 16, 21 and 22.

The Deputy Minister for Justice (Hugh Henry): These amendments do a number of things, but the effect of all the Executive amendments in this group is to provide clear and consistent definitions of “sexual activity” and “sexual services” for the bill.

We propose to change the way in which the grooming offence is constructed. As the provisions were drafted originally, the grooming offence would be complete if, following prior communication or meetings, the accused met or arranged to meet a child with the intention of committing a relevant offence. A list of sexual offences was included as relevant offences in schedule 1. However, the Crown expressed concerns about that approach. Its concern was that the court might require it to prove precisely which of the relevant offences the accused intended to commit. We recognise that that might create a loophole that would allow an accused to escape conviction if the Crown were not able to specify the exact offence that the accused had in mind—for example, whether it was to be rape or some other sexual assault.
Amendment 1 and consequential amendments propose a new approach, whereby the offence will be complete if, following prior communication or meetings, the accused meets or arranges to meet a child with the intention of engaging in unlawful sexual activity with the child. The approach is different from the one that is taken in England and Wales, but we think that it will work well in Scotland. The Crown will be required to prove that the accused intended to engage in unlawful sexual activity involving, or in the presence of, the child. However, the Crown will not be required to prove the specific activity in which the accused intended to engage.

In order to make that change, we must provide a definition of “sexual activity” that will apply to the grooming offence. The bill contains such a definition for risk of sexual harm orders, but amendment 21 will provide a new definition. The focus of the definition remains on whether a reasonable person who took into account all the circumstances of the case would consider the activity to be sexual. However, the approach also allows the purpose of the accused’s activity to be taken into account alongside other circumstances, such as the nature of the activity.

Kenny MacAskill and Margaret Mitchell lodged amendments that attempt to take the approach that I described, but the Executive’s proposed definition will go further, by including a range of associated activities, such as an attempt or conspiracy to engage in sexual activity and aiding and abetting another person in relation to engaging in sexual activity. The proposed new definition will be applicable consistently to all references to “sexual activity” in the bill.

Amendments 49 and 53, in the name of Kenny MacAskill, would simply lift the definition of “sexual” that applies in England and Wales, whereas the Executive amendments fit with the unique, Scottish approach that we have taken in the bill. During this morning’s debate, Stewart Stevenson suggested that Kenny MacAskill had adopted a new Labour approach; this afternoon, Kenny MacAskill is trying to promote for Scotland an approach that was designed for England and Wales. The Executive’s approach is more appropriate to a Scottish bill.

Executive amendments will amend provisions that refer to “prostitute” and “prostitution” so that they refer instead to “the provision of sexual services”.

As I said at stage 2, the approach means that we will be able to catch not only those who knowingly pay for sexual services from young people or arrange for young people to work in prostitution but those who exploit young people—particularly, but not exclusively, young women—in so-called work such as lap dancing, pole dancing, stripping and operating telephone sex lines. Any kind of sexual service will be covered by the bill. To do that, we must ensure that we are happy with the bill’s definition of “sexual services”. Therefore, other Executive amendments in the group will provide a consistent definition of “sexual services” throughout the bill, which can easily be based on the new definition of “sexual activity” that will apply throughout the bill. Amendment 16 sets out exactly what is meant by “sexual services”.

I am sympathetic to the aims of Kenny MacAskill and Margaret Mitchell in lodging their amendments, but I strongly argue that the Executive amendments will go further. I hope that Kenny MacAskill and Margaret Mitchell will agree that the Executive amendments will address the matters about which they were concerned and ensure that there is a single, clear, consistent definition in the bill. I hope that on that basis they will not move their amendments.

I move amendment 1.

Margaret Mitchell (Central Scotland) (Con): I welcome the new, more straightforward approach that the Executive has proposed, whereby unlawful sexual activity will be an offence and there will be no need to have recourse to schedule 1. As the minister rightly suggested, I lodged amendment 40, which relates to a communication that is sexual, and amendment 41, which relates to an image that could be regarded as sexual, because I was concerned about the interpretation of section 2.

Amendments 40 and 41 seek to protect anyone who is involved in teaching sex education, including professionals such as teachers or doctors, from malicious or false claims. They make it absolutely clear that for a communication to be sexual there must be the crucial element of sexual gratification—a term that is in line with the minister’s own definition in amendment 12, which includes a reference to sexual gratification. I seek further assurance from the minister that professionals who are involved in sex education will not be left vulnerable by our failing to include a requirement to prove that a communication has been for personal sexual gratification.

The Deputy Presiding Officer: I call Kenny MacAskill. I apologise—I will start again. I call Bruce McFee to speak to amendment 49 and other amendments in the group.

Mr Bruce McFee (West of Scotland) (SNP): Thank you, Presiding Officer. I am not new Labour, which will be useful for me.

Amendments 8 and 10, in the name of the minister, seek to make matters clearer, but amendments 40 and 41, in the name of Margaret Mitchell, would do anything but. By introducing the
criterion that for a communication to be sexual a reasonable person must in all circumstances regard it to be sexual and for a person’s own gratification could open up a Pandora’s box. What if the communication is clearly for the gratification of a third party? We have heard much evidence about the operation of paedophile rings and the preparation of children to be abused by third parties. The bill hammers down that escape route and it is not worth while potentially opening it up again.

Amendments 49 and 53, in the name of Kenny MacAskill, seek to implement recommendations that were made by the Law Society of Scotland. It seeks to convert what is at present an objective test into a subjective one, so that even if an individual does not look likely to commit a sexual offence but is intent on committing one, that will still be covered. Amendment 53 is consequential on amendment 49.

Dr Sylvia Jackson (Stirling) (Lab): The Subordinate Legislation Committee had concerns about section 1(5), which confers powers on the minister to modify schedule 1 by order, subject to negative resolution. We thought that if that power stayed, the provision should be amended to the affirmative procedure. However, as we heard from the minister, the Executive undertook to reconsider the matter, and it has lodged amendment 22, which will remove schedule 1, and amendment 5, which will remove section 1(5), so we are pleased.

Hugh Henry: I have nothing much to add, except to say to Margaret Mitchell that the point that she raised will be addressed later in the discussion.

Amendment 1 agreed to.

Amendments 2 to 5 moved—[Hugh Henry]—and agreed to.

Section 2—Risk of sexual harm orders: applications, grounds and effect

The Deputy Presiding Officer: Amendment 36, in the name of Pauline McNeill, is grouped with amendment 37.

Pauline McNeill (Glasgow Kelvin) (Lab): I make clear from the outset that I lodged amendment 36 as a probing amendment, because without it there would have been no discussion of the implications of section 2 at stage 3. The Justice 1 Committee felt strongly that Parliament’s attention should be drawn to section 2, because in order to protect children we are taking strong measures. We want to ensure that Parliament is absolutely satisfied that the right balance has been struck.

A chief constable will be able to apply to the sheriff court for a risk of sexual harm order if certain criteria are met, after which the sheriff will grant an order if he or she thinks that one is necessary. A sheriff can use the order to take any action that he or she thinks is necessary to protect a child. It is important to establish that, although the orders are a serious measure, they will be a civil measure and therefore the decision to grant one will be made on the balance of probabilities, not using the usual criminal test. Further, the conduct to which the chief constable may refer in the application for an order might be criminal behaviour, even though there might not be enough evidence to proceed with a criminal trial.

The key point of which I want members to be aware is that the RSHO is a far-reaching measure. We all know that we need our system to go further to protect children, but we must also do our best to satisfy the criterion of protecting the rights and interests of the accused, who in our system are innocent until proven guilty. The suggestion in amendment 36 is that not only the chief constable should be involved in assessing whether an application for an order should be made, but other people who may have important relevant information. In evidence to the Justice 1 Committee, social work organisations suggested that they have important information on, for example, those on their sex offenders list, whose previous convictions would not exclude them from a risk of sexual harm order. The organisations felt that they should have an input into the chief constables’ decisions on applications.

I am satisfied that the Executive has got the measure right, but if I had not lodged amendment 36, many members would not be aware of the matter. The bottom line is that the provision puts a lot of faith in chief constables, given that they alone will decide whether applications should be made. I am sure that, like me, all members have a lot of faith in chief constables, but we must consider the possibility that they may make a wrong decision. If that happens, by the time that the application gets to the sheriff court, because the decision is to be made on the balance of probability, there might be a domino effect and an innocent person might be subject to an order.

I lodged amendment 36 to ensure that members have an opportunity to speak on section 2, although I know that we will talk about interim RSHOs later. Amendment 36 is simply a probing amendment, so I will seek agreement to withdraw it at the appropriate time.

I move amendment 36.

Margaret Mitchell: I have a lot of sympathy with the intent behind amendment 36.
I lodged amendment 37, which is also a probing amendment, to gain further and more specific information about the circumstances in which evidence or other information that has been submitted during a trial that has resulted in a not guilty verdict could be used as the evidence of one of the two acts that are necessary to trigger an application for a risk of sexual harm order. I ask the minister to elaborate on the exact circumstances in which he envisages such evidence being used.

Stewart Stevenson (Banff and Buchan) (SNP): Certain aspects of section 2 were discussed at stage 2, during which I lodged an amendment that sought to address issues relating to doctors, teachers and the publishing industry. I did not lodge a similar amendment for stage 3 because we agreed not to accept my amendment at stage 2, as the minister had suggested another way of dealing with the issue. In essence, the issue was that, under section 2(3)(c), one of the acts that can trigger an RSHO is

“giving a child anything that relates to sexual activity or contains a reference to such activity”.

Of course, such references may be made as part of sex education or advice in a magazine or newspaper. I accept that section 2(4)(b) states that the sheriff must be satisfied that

“it is necessary to make such an order for the purpose of protecting children generally or any child”.

However, it would be helpful if the minister were able to indicate firmly on the record that teachers who are discussing matters sexual with children for their protection and not for any other purpose, doctors who, in matters of sexual health, are talking to children or indeed giving them things that are sexual in nature, and responsible publishers such as D C Thomson, which I know we can trust in that regard and which has expressed some concerns to me, have the kind of assurances that will enable them to feel in no way inhibited in continuing to do the beneficial things that they do, which, in a narrow sense, could be caught by the provisions in the bill.

15:15

Hugh Henry: I understand what Pauline McNeill and Margaret Mitchell are attempting to achieve with the amendments in their names, but I cannot support those amendments. I turn first to amendment 36, in the name of Pauline McNeill. It would be wrong to be prescriptive about whom a chief constable should consult in considering an application for an RSHO. Every case will be different, and it will be necessary to consult different parties in each individual case. If the bill required some parties to be consulted but not others, it could be assumed that it is not necessary to consult the others, even though it most certainly could be necessary in some cases. I would prefer that we issue guidance on the act setting out for chief constables the criteria that they should take into account in considering an application for a RSHO. The guidance will also list those whom they should consider consulting before making an application. That is a more appropriate way of dealing with that than setting it out in the bill.

What is made explicit in the bill, however, is that applications should be made only in cases where the chief constable considers that inappropriate behaviour has occurred on at least two occasions and that the person in question poses a risk of sexual harm to a child or to children generally. Pauline McNeill is right to point out the seriousness of the measure, to indicate that it could be far reaching, but she recognises that it is right for us to take action to protect children from serious harm.

Stewart Stevenson raises a point that was touched on earlier by Margaret Mitchell, to do with concerns expressed in relation to sex education, sexual health advice or indeed what may be included in some teenage magazines, and the fear that teachers, doctors and journalists or editors might be caught by the provisions in the bill. I want to put it on record and to give the assurance that groups or individuals communicating with a child about sexual matters for the purposes of sex education or health education will not result in an application for a risk of sexual harm order. However, I would not want that to be taken as carte blanche for irresponsible and inappropriate activity, either by any individual in those professions or by any groups. Responsible people behaving in a responsible manner and acting appropriately for the purposes of their profession would not be exposed to the risk of an application for a risk of sexual harm order. However, with that would go the warning that anyone who behaved inappropriately would leave themselves open to the risk of action, should that be appropriate.

Before applying for an order, the chief constable would have to believe that the person in question posed a risk of sexual harm. Before making an order, the sheriff would also have to be convinced that the person presented a risk of sexual harm to a child or to children. Those who are properly providing advice to young people should therefore continue to do so. They will not be caught by the provisions. I state in the clearest terms that it is not our intention to interfere with such advice or prevent it from being given. It is also worth noting that similar provisions were introduced for England, Wales and Northern Ireland in the Sexual Offences Act 2003 without any specific exceptions for those providing advice.
I understand the intention behind amendment 37, in the name of Margaret Mitchell, but it would not be wise to accept the amendment. Let us consider for example a person who is accused of committing a sexual offence against a child and is found not guilty of that offence. As members will be aware, such a verdict does not prove that the offence did not take place. It means rather that the case was not proved beyond reasonable doubt. However, it might still be possible to conclude on the balance of probability that the incident took place and we believe that if it was combined with a further such incident, it should be admissible for the purposes of making an application for a RSHO, not ruled out by virtue of the previous criminal trial.

Phil Gallie (South of Scotland) (Con): The minister said that doubts still remain about someone who is found not guilty in a trial. My understanding, which perhaps stretches the point, was that that might be the case if a court returned a not proven verdict but, surely, someone who is found not guilty is not guilty.

Hugh Henry: I have tried to explain that point, but I will go back over it. Phil Gallie is right in that if someone is found not guilty, it means that the case was not proved beyond reasonable doubt. The point that I am trying to make is that it might be possible to conclude on the balance of probability that an incident took place. We are talking about two different tests—a criminal test and a civil test—and saying that it is right that we should be able to take into account something that, on the balance of probability, we believe to have happened. To repeat the point, it is only right that the police and the courts should be able to take into account all sexually inappropriate behaviour against children to protect a child from further risk and there might be circumstances in which an incident that resulted in a not guilty finding should be used as part of an application for an RSHO.

Margaret Mitchell: Amendment 37 is a probing amendment to aid understanding of how that would work. What would happen if someone was found not guilty because the case was time barred, but sufficient evidence had been gathered to give cause for concern? Could that be a circumstance in which it would be legitimate to use the incident?

Hugh Henry: There could be a range of reasons why someone was found not guilty or action was not proceeded with. I emphasise that we would not be taking criminal proceedings against such a person for the incident, as we would not be saying that they had committed a criminal offence—that brings us back to Phil Gallie’s question—but saying that there was reason to believe that they posed a risk of sexual harm to children. In those circumstances, it is our duty to protect the children who are involved, which is why we are proceeding as we are.

Pauline McNeill: I accept that we could be too prescriptive about who is to be consulted and I withdraw amendment 36 on the understanding that, as the bill stands, the only person who has the right to gather information is the chief constable—no one else is mentioned in the bill—and on the understanding that the minister will produce guidance, which is the most sensible way to proceed. I hope that, in due course, the relevant committee will get to see the guidance that is issued.

Amendment 36, by agreement, withdrawn.
Amendment 37 not moved.

The Deputy Presiding Officer: Group 3 is on RSHOs and referral to Scottish ministers. Amendment 38, in the name of Stewart Stevenson, is in a group on its own.

Stewart Stevenson: The minister will know of the concerns that voluntary and other bodies that work with children have about the bill, as those concerns form a theme that has run through discussion of the bill. Under previous legislation, those bodies are required to obtain from Disclosure Scotland information that tells them whether people are fit and proper to work with children. The difficulty is that when an RSHO is granted there is no process whereby that information is provided to Disclosure Scotland and is therefore available to anyone who performs checks on people. My amendment 38 seeks to provide sheriffs with the power to refer cases to the Scottish ministers and to ask them to consider whether someone against whom an RSHO has been granted should be added to Disclosure Scotland’s list of people who are unsuitable to work with children. The amendment would leave open the process of referring back to the sheriff any appeal of the decision that is made.

I will describe a scenario that illustrates the concerns that YouthLink Scotland and the organisations that it represents have about the administrative procedure by which it will be possible, under the provisions of the bill, eventually to get someone with an RSHO on the list at Disclosure Scotland. Of course, the minister may well disagree with aspects of the scenario, in which case I will be happy to hear from him. It is a complicated issue.

When the court grants an RSHO, the person’s employer—that includes a person who is responsible for a volunteer—will be notified, if that is appropriate. It is then up to the employer to consider what action is appropriate. If the RSHO requires that the person must not work with children, the onus is on the employer to take the
necessary action. In the case of small employers or bodies, the person might have to be fired because there are no positions that do not involve working with children. The bill gives no statutory right for the employer to fire the person. Under employment legislation, the option is open for them to dismiss the person. That would be subject to review in the normal way and people could challenge it. Only after the person has been fired would they end up on Disclosure Scotland’s list.

I describe the situation as I understand it. There may be other views, but it appears that there is a huge onus on organisations, and particularly on small ones. Such organisations were alarmed about the burden that was placed on them by the need for them to check with Disclosure Scotland when they employ people who will work with children, although they are now reassured. However, the core of the concern is that unless the matter is put on a statutory basis, failings in the system will put children at risk. It will certainly make things more complicated for voluntary bodies and there is concern that they might withdraw or reduce their commitment.

Unless we put the matter on a statutory basis that enables us, in the quickest and most effective way, to put people against whom RSHOs have been granted on to Disclosure Scotland’s list of people who are unsuitable to work with children, we will have a problem. I hope that the minister will reassure us that we will not put children at risk by leaving the gap and that there is another way forward, or that he will accept the amendment. I will be interested to hear what he has to say. We have not resolved the matter yet and this is the last chance saloon for us to do so.

I move amendment 38.

15:30

**Hugh Henry:** I agree with Stewart Stevenson that we should do nothing that puts children at risk. I whole-heartedly agree that if RSHOs are sought against people who work in child care positions, their employers should be told about it. We are working on the implementation of the Bichard recommendations, and when they are fully implemented, employers will be notified as a matter of course where appropriate. However, that new system is still a couple of years down the line. I acknowledge that in the meantime we need an interim system that will work effectively to ensure that in appropriate circumstances employers are told if an RSHO is sought against one of their employees. That would allow the employer to consider whether they need to take action. There is therefore no real difference between small and large organisations or what currently pertains to legislation.

I will be quite clear about this: I do not believe that an automatic referral to the list of people who are disqualified from working with children is an option. Amendment 38 is defective in a number of ways. It does not link in with the legislative scheme for including people on the list of those disqualified from working with children that was established under the Protection of Children (Scotland) Act 2003. That means that the procedure for putting someone on the list, such as giving the person an opportunity to make representation, giving notice of inclusion, rights of appeal and so on, would not apply. The Protection of Children (Scotland) Act 2003 sets out the criteria that the courts must take into account before referring a person for automatic inclusion on the list, but amendment 38 sets out no such criteria.

**Margaret Mitchell:** The minister said that the Bichard recommendations will not be implemented for some time, so there will be interim guidance. Is that not justification for supporting Stewart Stevenson’s amendment, because it would provide that added protection now?

**Hugh Henry:** To repeat two points, I said that we need an interim system that will work effectively and that will allow employers to consider whether they need to take action, and I believe that there is a fundamental defect in the amendment. Not only are we taking steps to put in interim measures, but it would be wrong to introduce a measure that we believe to be defective.

It is true that the current legislation allows for referral from the courts as a result of criminal conviction and anyone referred in that way is automatically placed on the list. However, to give the sheriff the power to refer for automatic inclusion on the list, with all the consequences for an individual’s livelihood, on the basis of a civil order that can be time bound and quite specific, would raise important issues under the European convention on human rights. An administrative procedure that works within the current Protection of Children (Scotland) Act 2003 is the most effective way to achieve the outcome that we seek, which is getting the information to the employer and putting the person on the list in cases where that is appropriate.

We will develop guidance, along with the police, to ensure systematic consideration of the need to disclose information in respect of an individual being considered for or issued with an RSHO. In building the case to apply for an RSHO, the police will be expected to ascertain the individual’s access to and dealings with children, including employment or other voluntary activities. Where an RSHO is made, the police will consider whether it would be appropriate for the existence of the
RSHO to be disclosed to the employer or to a voluntary organisation. If the subject of the RSHO is employed in a child care position or works with children in a voluntary capacity, that would certainly be grounds for the information to be disclosed.

To ensure that organisations are not left wondering what to do when they are told about an RSHO, we will issue guidance explaining RSHOs and encouraging organisations to assess whether it would be appropriate to move the person from working with children or to dismiss them as a result of the information. The guidance will remind organisations of their duty, if they take action, to refer the person to Scottish ministers for consideration for inclusion on the list. Even if the person is not placed on the list, if a subsequent disclosure check is made, the fact that an RSHO demonstrates concern about a risk to a child or children would be grounds for information about its existence to be released. So whether a person is currently working with children in a paid or unpaid capacity, or applies to work with children, I am confident that information about the existence of the RSHO will be and can be released to their employer, prospective employer or voluntary organisation.

Stewart Stevenson: Is the minister saying that, under all circumstances, all RSHOs pertaining to children will prohibit or inhibit someone from working, or from doing things that would end up known to Disclosure Scotland?

Hugh Henry: I think that that would be a logical conclusion. There might be circumstances that do not come to mind at the moment where that might not happen. That would be the logical conclusion, however.

I am confident that the employer or voluntary organisation will have sufficient guidance to know how to deal with the information. Some might view the requirements as an additional burden on organisations. In reality, however, employers and voluntary groups must assess the risk to children from their workers when they recruit or when any concern comes to light. I hope that child care organisations will be reassured, and that Stewart Stevenson, given those assurances, will accept that his amendment should be withdrawn.

Stewart Stevenson: I am slightly worried about a lack of clarity on the question whether the RSHO would, where appropriate to children, always end up on the register.

The Minister for Justice (Cathy Jamieson): For the avoidance of doubt, if someone is working in a child care position and an RSHO is sought against them, that information will immediately be notified to the scheme. It will then be available for the organisations concerned. That person’s suitability to work with children would then require to be reassessed. Their employer would be notified of any change in status.

Stewart Stevenson: That is crystal clear. I make the general observation that, in seeking to introduce risk of sexual harm orders, we are acknowledging the fact that the criminal justice system cannot completely cover the risks in the ways that we would wish. That is why we agree with the Executive as a matter of policy in supporting the introduction of RSHOs.

I am delighted that the minister has assured us that, in all instances, the RSHO, where it concerns children, will end up being noted on the list. People making inquiries of Disclosure Scotland will therefore not fail to see that a relevant RSHO is in place. That is at the core of what we are trying to achieve. On that basis, and with that assurance, I seek to withdraw the amendment.

Amendment 38, by agreement, withdrawn.

The Deputy Presiding Officer: Group 4 is on the serving of RSHOs and interim RSHOs. Amendment 39, in the name of Margaret Mitchell, is grouped with amendment 45.

Margaret Mitchell: Amendments 39 and 45 seek to ensure that there can be absolutely no doubt that the subject of an interim or full RSHO realises and is aware that the order has been served on them. That is necessary, given the sensitive nature of such orders and in recognition of the fact that, if an order is breached, the subject of that order is automatically guilty of a criminal sexual offence. That in turn can have far-reaching consequences regarding disclosure, employment and public hostility. It is important to make the crucial distinction in how the orders are served and to ensure that they are served by sheriff officers.

I move amendment 39.

Hugh Henry: The bill was amended at stage 2 so that it now specifies that an application for an RSHO "shall be made by summary application."

As such, the normal sheriff court summary rules will apply. Those rules already contain provisions on the service of court orders. We expect specific summary application rules to be made in due course to provide further detail about how persons will be notified of the existence of RSHOs.

Such court rules have recently been made in connection with antisocial behaviour orders. The rules require that an ASBO must either be given to a person who is in court when the order is made or be sent to the person by recorded delivery or registered post. I am of the view that a similar provision would be suitable for RSHOs.
a sheriff officer to serve the order on the person in all circumstances is both costly and unnecessary. In any event, the appropriate place for rules about the service of court orders is the summary application rules. Margaret Mitchell’s amendment 39 is therefore unnecessary.

The Deputy Presiding Officer: Before I call Margaret Mitchell I ask members to be just a little bit quieter. Miss Mitchell, please wind up and indicate whether you intend to press or withdraw your amendment.

Margaret Mitchell: I will press amendment 39, because I think there has been a failure on the part of the minister to recognise that there is a difference between breaching an antisocial behaviour order for something such as vandalism and breaching an RSHO with the sexual connotations that it has. For that reason I remain convinced that RSHOs should be served by sheriff officers.

The Deputy Presiding Officer: The question is, that amendment 39, in the name of Margaret Mitchell, be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For

Aitken, Bill (Glasgow) (Con)
Ballance, Chris (South of Scotland) (Green)
Ballard, Mark (Lothians) (Green)
Brocklebank, Mr Ted (Mid Scotland and Fife) (Con)
Byrne, Ms Rosemary (South of Scotland) (SSP)
Davidson, Mr David (North East Scotland) (Con)
Douglas-Hamilton, Lord James (Lothians) (Con)
Ferguson, Alex (Galloway and Upper Nithsdale) (Con)
Fox, Colin (Lothians) (SSP)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gallie, Phil (South of Scotland) (Con)
Goldie, Miss Annabel (West of Scotland) (Con)
Harvie, Patrick (Glasgow) (Green)
Johnstone, Alex (North East Scotland) (Con)
Milne, Mrs Nanette (North West Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Ruskell, Mr Mark (Mid Scotland and Fife) (Green)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Tosh, Murray (West of Scotland) (Con)

Against

Adam, Brian (Aberdeen North) (SNP)
Alexander, Ms Wendy (Paisley North) (Lab)
Arbuckle, Mr Andrew (Mid Scotland and Fife) (LD)
Ballance, Dennis (Dumbarton) (Lab)
Baker, Richard (North East Scotland) (Lab)
Barrie, Scott (Dunfermline West) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Canavan, Dennis (Falkirk West) (Ind)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Craige, Cathie (Cumbernauld and Kilsyth) (Lab)
Crawford, Bruce (Mid Scotland and Fife) (SNP)
Curran, Ms Margaret (Glasgow Baillieston) (Lab)
Deacon, Susan (Edinburgh East and Musselburgh) (Lab)
Eddie, Helen (Dunfermline East) (Lab)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Ewing, Mrs Margaret (Moray) (SNP)
Fabiani, Linda (Central Scotland) (SNP)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
Finnie, Ross (West of Scotland) (LD)
Gibson, Rob (Highlands and Islands) (SNP)
Gillon, Karen (Clydesdale) (Lab)
Glen, Marilyn (North East Scotland) (Lab)
Gorrie, Donald (Central Scotland) (LD)
Graham, Christine (South of Scotland) (SNP)
Henry, Hugh (Paisley South) (Lab)
Home Robertson, John (East Lothian) (Lab)
Hughes, Janis (Glasgow Rutherglen) (Lab)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Mr Adam (South of Scotland) (SNP)
Jackson, Dr Sylvia (Stirling) (Lab)
Jackson, Gordon (Glasgow Govan) (Lab)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)
Jamieson, Margaret (Kilmarnock and Loudoun) (Lab)
Kerr, Mr Andy (East Kilbride) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Lochhead, Richard (North East Scotland) (SNP)
Lyon, George (Argyll and Bute) (LD)
MacAskill, Mr Kenny (Lothians) (SNP)
Macdonald, Lewis (Aberdeen Central) (Lab)
Macintosh, Mr Kenneth (Eastwood) (Lab)
Maclean, Kate (Dundee West) (Lab)
Macmillan, Maureen (Highlands and Islands) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
Marwick, Tricia (Mid Scotland and Fife) (SNP)
Mather, Jim (Highlands and Islands) (SNP)
Matheson, Michael (Central Scotland) (SNP)
Maxwell, Mr Stewart (West of Scotland) (SNP)
May, Christine (Central Fife) (Lab)
Mcaveety, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Mr Tom (Hamilton South) (Lab)
McConnell, Mr Jack (Motherwell and Wishaw) (Lab)
McFee, Mr Bruce (West of Scotland) (SNP)
McMahon, Michael (Hamilton North and Bellshill) (Lab)
McNeil, Mr Duncan (Greenock and Inverclyde) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
McNutty, Des (Clydebank and Milngavie) (Lab)
Morgan, Alasdair (South of Scotland) (SNP)
Morrison, Mr Alasdair (Western Isles) (Lab)
Muldoon, Bristow (Livingston) (Lab)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Murray, Dr Elaine (Dumfries) (Lab)
Neil, Alex (Central Scotland) (SNP)
Oldfather, Irene (Cunninghame South) (Lab)
Peacock, Peter (Highlands and Islands) (Lab)
Peatfield, Cathy (Falkirk East) (Lab)
Pringle, Mike (Edinburgh South) (LD)
Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)
Radcliffe, Nora (Gordon) (LD)
Robison, Shona (Dundee East) (SNP)
Robson, Euan ( Roxburgh and Berwickshire) (LD)
Scott, Tavish (Shetland) (LD)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Smith, Iain (North East Fife) (LD)
Smith, Margaret (Central Scotland) (LD)
Stevenson, Stewart (Banff and Buchan) (SNP)
Stone, Mr Jamie (Caithness, Sutherland and Easter Ross) (LD)
Sturgeon, Nicola (Glasgow) (SNP)
Swinburne, John (Central Scotland) (SSCUP)
Turner, Dr Jean (Strathkelvin and Bearsden) (Ind)
Wallace, Mr Jim (Orkney) (LD)
Amendment 39 disagreed to.

Section 3—Interpretation of section 2

Amendments 6 and 7 moved—[Hugh Henry]—and agreed to.

The Deputy Presiding Officer: Amendment 8, in the name of the minister, has already been debated with amendment 1. I remind members that if amendment 8 is agreed to, amendment 40 will be pre-empted.

Amendment 8 moved—[Hugh Henry].

The Deputy Presiding Officer: The question is, that amendment 8 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For

Adam, Brian (Aberdeen North) (SNP)
Alexander, Ms Wendy (Paisley North) (Lab)
Arbuckle, Mr Andrew (Mid Scotland and Fife) (LD)
Bailie, Jackie (Dumbarton) (Lab)
Baker, Richard (North East Scotland) (Lab)
Ballance, Chris (South of Scotland) (Green)
Ballard, Mark (Lothians) (SNP)
Barrie, Scott (Dunfermline West) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Byrne, Ms Rosemary (South of Scotland) (SSP)
Canavan, Dennis (Falkirk West) (Ind)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Craighie, Cathie (Cumbernauld and Kilsyth) (Lab)
Crawford, Bruce (Mid Scotland and Fife) (SNP)
Curran, Ms Margaret (Glasgow Baillieston) (Lab)
Deacon, Susan (Edinburgh East and Musselburgh) (Lab)
Eadington, John (West of Scotland) (Con)
Ewing, Mrs Margaret (Moray) (SNP)
Fain, Sandra (South of Scotland) (SNP)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
Finnie, Ross (West of Scotland) (LD)
Fox, Colin (Lothians) (SSP)
Gibson, Rob (Highlands and Islands) (SNP)
Gillan, Karen (Clydesdale) (Lab)
Glen, Marlyn (North East Scotland) (Lab)
Gorrie, Donald (Central Scotland) (LD)
Graham, Christine (South of Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Henry, Hugh (Paisley South) (Lab)
Home Robertson, John (East Lothian) (Lab)
Hughes, Janis (Glasgow Rutherglen) (Lab)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Mr Adam (South of Scotland) (SNP)
Jackson, Dr Sylvia (Stirling) (Lab)
Jackson, Gordon (Glasgow Govan) (Lab)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)

Against

Adam, Brian (Aberdeen North) (SNP)
Alexander, Ms Wendy (Paisley North) (Lab)
Arbuckle, Mr Andrew (Mid Scotland and Fife) (LD)
Bailie, Jackie (Dumbarton) (Lab)
Baker, Richard (North East Scotland) (Lab)
Ballance, Chris (South of Scotland) (Green)
Ballard, Mark (Lothians) (SNP)
Barrie, Scott (Dunfermline West) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Byrne, Ms Rosemary (South of Scotland) (SSP)
Canavan, Dennis (Falkirk West) (Ind)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Craighie, Cathie (Cumbernauld and Kilsyth) (Lab)
Crawford, Bruce (Mid Scotland and Fife) (SNP)
Curran, Ms Margaret (Glasgow Baillieston) (Lab)
Deacon, Susan (Edinburgh East and Musselburgh) (Lab)
Eadington, John (West of Scotland) (Con)
Ewing, Mrs Margaret (Moray) (SNP)
Fain, Sandra (South of Scotland) (SNP)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
Finnie, Ross (West of Scotland) (LD)
Fox, Colin (Lothians) (SSP)
Gibson, Rob (Highlands and Islands) (SNP)
Gillan, Karen (Clydesdale) (Lab)
Glen, Marlyn (North East Scotland) (Lab)
Gorrie, Donald (Central Scotland) (LD)
Graham, Christine (South of Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Henry, Hugh (Paisley South) (Lab)
Home Robertson, John (East Lothian) (Lab)
The Deputy Presiding Officer: The result of the division is: For 94, Against 14, Abstentions 0.

Amendment 8 agreed to.

Amendment 9 moved—[Hugh Henry]—and agreed to.

The Deputy Presiding Officer: If amendment 10 is agreed to, amendment 41 will be pre-empted.

Amendment 10 moved—[Hugh Henry]—and agreed to.

The Deputy Presiding Officer: The result of the division is: For 94, Against 14, Abstentions 0.

The result of the division is: For 94, Against 14, Abstentions 0.

Amendment 8 agreed to.

Amendment 9 moved—[Hugh Henry]—and agreed to.

The Deputy Presiding Officer: If amendment 10 is agreed to, amendment 41 will be pre-empted.

Amendment 10 moved—[Hugh Henry]—and agreed to.

Section 5—Interim RSHOs

15:45

The Deputy Presiding Officer: Group 5 is on interim RSHOs. Amendment 42, in the name of Kenny MacAskill, is grouped with amendments 43, 44 and 46.

Stewart Stevenson: Amendments 42 and 46 originated from the Law Society of Scotland—[Interruption.]

The Deputy Presiding Officer: Members will need to be just a little bit quieter. That would be helpful to the speaker and to us up here.

Stewart Stevenson: It is a good thing that we are talking about RSHOs rather than ASBOs.

The amendments in Kenny MacAskill’s name are intended to bring the wording in the bill more closely into line with the way in which other legislation is worded. The effect of amendment 42, therefore, is technical.

Amendment 46, however, relates to an important policy issue. If an interim RSHO is taken as the precursor to a full hearing of the case for the granting of an RSHO but it is not followed up by such a hearing, the person who was subject to the RSHO is entitled to have their character returned to the state that it was in at the outset. We know perfectly well that, in this delicate and difficult area of public policy, malicious accusations are made from time to time. It is right that those accusations be tested, because we cannot tell at the outset whether they are malicious. If an interim RSHO is granted and it transpires that the basis on which it was granted was false and, therefore, no full order will be granted, the person concerned is entitled to have their character returned to a lily-white state.

The SNP will support Margaret Mitchell’s amendments, which relate to the setting of periods.

I move amendment 42.

Margaret Mitchell: It is nice to start on a note of unity. The Conservatives will be supporting the amendments in Kenny MacAskill’s name, which were inspired by the Law Society of Scotland, on the basis that the addition by amendment 42 of the term “in the interests of justice” would make the process more transparent and that amendment 46 is fair and reasonable.

Amendment 43 stipulates that the interim order should be in place for a maximum of three months, rather than the unspecified fixed period in the bill, and amendment 44 would ensure that, where an application has been made for extending the period of the order’s effect, that period should be limited to a maximum of an additional three months.

Hugh Henry: I have listened to Stewart Stevenson, who spoke to Kenny MacAskill’s amendments, and to Margaret Mitchell, but I am unconvinced that their amendments are necessary. Despite Stewart Stevenson’s comments on amendment 42, I cannot for the life of me see the difference between saying it is “just” to do something and saying that it is “in the interests of justice” to do something.

However, not being a lawyer, I thought that I should have the matter checked out. After all, Kenny MacAskill, who comes from that noble profession, might well have some insight into it that I did not have. When I asked our lawyers to double and triple-check that I was not missing anything, they said that they could not see any significant difference between the two terms. Indeed, they believe that our formulation is more appropriate.

The effect of both formulations is the same. The sheriff cannot make an interim RSHO unless he is satisfied that it is “in the interests of justice” to make the order. I hope that that is clear; indeed, I think that users of the legislation will certainly consider the matter to be clear. Perhaps members of the Law Society of Scotland will argue over the matter on cold, dark, wet nights when they have nothing better to do, but I do not think that amendment 42 is necessary.

I am also not convinced that amendment 46 is necessary. When the committee and I discussed the matter at stage 2, the committee agreed that an amendment was unnecessary. I believe that, even in cases in which an RSHO is not granted, the type of behaviour that leads to the application is sufficiently serious for the information to be kept.

The police hold what might be regarded as soft information about people for a variety of reasons.
Indeed, it is vital that they do so; after all, if they have suspicions about someone, we rely on them to retain intelligence about that person to assist them in preventing potential crimes.

Moreover, there are various reasons why an RSHO might not be made. For example, it might not be possible to prove that the alleged behaviour took place. The sheriff might not be convinced by the evidence before the court that the person is a risk to children. I am sure that we would agree that, if a sheriff is not convinced of such things, he should not make an RSHO. However, that does not mean that the police should not be able to retain information about the person’s behaviour if they still suspect that the person might be a risk. If they retain information on such behaviour, it is surely ludicrous not to retain the fact that an interim RSHO had once been made. What happens if the person in question engages again in sexually inappropriate behaviour with the child? If information about previous behaviour is not retained, it will appear as though that is the first incident of such behaviour.

Stewart Stevenson: Although one might argue that that is the effect of amendment 46, the intention behind it is certainly not to expunge from the record the information that leads the police to apply for an interim RSHO. After all, if, because of repeated malicious accusations from the same source, such information had turned out to be false, one would wish to retain that fact.

With all due respect, however, I should say that that issue is quite different from that of deleting from available records the fact that an interim RSHO had been granted. I would be interested to hear the minister confirm whether he has been advised that the effect of amendment 46 would be that the police were required to delete that information. That is neither the intention behind the amendment nor the understanding that I or the Law Society have.

Hugh Henry: I accept Stewart Stevenson’s comments about the intention behind amendment 46. However, we are worried that it could have the undesired effect that I have set out. I will come later to his point about malicious and vexatious allegations.

Because it would not be possible to make another application for an RSHO until the person behaved in such a way again, a child could be put at more risk. Even worse, if a person were to move to another police force area and behave in such a way, the police in that area would be entirely unaware that that person had already come to the police’s attention for those reasons. Indeed, we have had some cases in which people have moved between police force areas but information has not been properly transferred and the people have gone on to commit serious offences.

The Justice 1 Committee expressed concerns at stage 2 about cases in which full orders are not made because it had become apparent that an allegation had been malicious or vexatious. I explained in a letter to the committee that information about the complainant and the interim order would not be retained in such cases. A robust reviewing and weeding policy underpins the retention of police intelligence, and information found to be based on malicious or vexatious allegations would be deleted. The only circumstances in which information might be kept would be if it allowed the police to put together a case against the person making vexatious allegations. Stewart Stevenson has correctly drawn attention to the fact that we might need to be able to act on behalf of the person who is the victim of such vexatious or malicious allegations. However, I assure members that, in such cases, the information would be retained purely on the basis that the subject of the allegation was a witness to the case.

Moving on to amendments 43 and 44, in the name of Margaret Mitchell, I make it quite clear that an interim RSHO cannot be sought unless it is accompanied by the main application or unless the main application has already been made. An interim RSHO has effect only for the fixed period specified in the order and will cease to have effect, if it has not already done so, on the determination of the main application. The normal sheriff court summary time limits will apply to the determination of the main application, so it would not be possible for interim RSHOs to apply for long periods without the sheriff court considering whether a full application should be made. I hope, therefore, that Margaret Mitchell will agree that her amendments are unnecessary, that she is reassured by what I have said and that she will not move amendments 43 and 44.

Stewart Stevenson: I shall seek leave to withdraw amendment 42, on the basis that we can let the lawyers fight it out and see whether the minister gets any invitations to Drumsheugh Gardens.

I shall press amendment 46, however, because I am not satisfied with what I have heard. It seems that I am being told that, if interim RSHO information is retained, that information will be available to chief constables other than the one who applied for the interim order, yet the intelligence that led to the granting of the interim order would not be available. I am not at all convinced that that is a reasonable line of argument and that it is not possible to share intelligence across Scottish police forces without the fact being recorded that an interim RSHO has been made. I shall certainly protect our position by moving amendment 46 when the time comes.
Amendment 42, by agreement, withdrawn.
Amendment 43 moved—[Margaret Mitchell].

The Deputy Presiding Officer: The question is, that amendment 43 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For
Adam, Brian (Aberdeen North) (SNP)
Aitken, Bill (Glasgow) (Con)
Baird, Shiona (North East Scotland) (Green)
Ballance, Chris (South of Scotland) (Green)
Ballard, Mark (Lothians) (Green)
Brocklebank, Mr Ted (Mid Scotland and Fife) (Con)
Byrne, Ms Rosemary (South of Scotland) (SSP)
Crawford, Bruce (Mid Scotland and Fife) (SNP)
Davidson, Mr David (North East Scotland) (Con)
Douglas-Hamilton, Lord James (Lothians) (Con)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Fabiani, Linda (Central Scotland) (SNP)
Fergusson, Alex (Galloway and Upper Nithsdale) (Con)
Fox, Colin (Lothians) (SSP)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gallie, Phil (South of Scotland) (Con)
Gibson, Rob (Highlands and Islands) (SNP)
Goldie, Miss Annabel (West of Scotland) (Con)
Graham, Christine (South of Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Mr Adam (South of Scotland) (SNP)
Johnstone, Alex (North East Scotland) (Con)
Leckie, Carolyn (Central Scotland) (SSP)
Lochhead, Richard (North East Scotland) (SNP)
MacAskill, Mr Kenny (Lothians) (SNP)
Marwick, Tricia (Mid Scotland and Fife) (SNP)
Mather, Jim (Highlands and Islands) (SNP)
Maxwell, Mr Stewart (West of Scotland) (SNP)
McFee, Mr Bruce (West of Scotland) (SNP)
Milne, Mrs Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Morgan, Alasdair (South of Scotland) (SNP)
Neil, Alex (Central Scotland) (SNP)
Robison, Shona (Dundee East) (SNP)
Russell, Mr Mark (Mid Scotland and Fife) (Green)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Eleanor (Highlands and Islands) (Green)
Scott, John (Ayr) (Con)
Stevenson, Stewart (Banff and Buchan) (SNP)
Sturgeon, Nicola (Glasgow) (SNP)
Swinburne, John (Central Scotland) (SSCUP)
Tosh, Murray (West of Scotland) (Con)
Turner, Dr Donald (Bearsden) (Ind)
White, Ms Sandra (Glasgow) (SNP)

AGAINST
Alexander, Ms Wendy (Paisley North) (Lab)
Arbuckle, Mr Andrew (Mid Scotland and Fife) (LD)
Bailie, Jackie (Dumbarton) (Lab)
Baker, Richard (North East Scotland) (Lab)
Barrie, Scott (Dunfermline West) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Canavan, Dennis (Dalkirk West) (Ind)
Chisholm, Mary (Edinburgh North and Leith) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Curran, Ms Margaret (Glasgow Baillieston) (Lab)
Deacon, Susan (Edinburgh East and Musselburgh) (Lab)
Eadie, Helen (Dunfermline East) (Lab)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
Finnie, Ross (West of Scotland) (LD)
Gillon, Karen (Clydesdale) (Lab)
Glen, Marilyn (North East Scotland) (Lab)
Gorrie, Donald (Central Scotland) (LD)
Henry, Hugh (Paisley South) (Lab)
Home Robertson, John (East Lothian) (Lab)
Hughes, Janis (Glasgow Rutherglen) (Lab)
Jackson, Dr Sylvia (Stirling) (Lab)
Jackson, Gordon (Glasgow Govan) (Lab)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)
Jamieson, Margaret (Kilmarnock and Loudoun) (Lab)
Kerr, Mr Andy (East Kilbride) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Lyon, George (Argyll and Bute) (LD)
Macdonald, Lewis (Aberdeen Central) (Lab)
Macintosh, Mr Kenneth (Eastwood) (Lab)
Maclean, Kate (Dundee West) (Lab)
Macmillan, Maureen (Highlands and Islands) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
May, Christine (Central Fife) (Lab)
McAveety, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Mr Tom (Hamilton South) (Lab)
McConnell, Mr Jack (Motherwell and Wishaw) (Lab)
McMahon, Michael (Hamilton North and Bellshill) (Lab)
McNeill, Mr Duncan (Greenock and Inverclyde) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
McNulty, Des (Clydebank and Milngavie) (Lab)
Morrison, Mr Alasdair (Western Isles) (Lab)
Muldoon, Bristow (Livingston) (Lab)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Munro, John Farquhar (Ross, Skye and Inverness West) (LD)
Murray, Dr Elaine (Dumfries) (Lab)
Oldfather, Irene (Cunninghame South) (Lab)
Peacock, Peter (Highlands and Islands) (Lab)
Peattie, Cathy (Falkirk East) (Lab)
Pringle, Mike (Edinburgh South) (LD)
Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)
Radcliffe, Nora (Gordon) (LD)
Robson, Euan ( Roxburgh and Berwickshire) (LD)
Scott, Tavish (Shetland) (LD)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Smith, Iain (North East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Stone, Mr Jamie (Caithness, Sutherland and Easter Ross) (LD)
Wallace, Mr Jim (Orkney) (LD)
Watson, Mike (Glasgow Cathcart) (Lab)
Whitefield, Karen (Airdrie and Shotts) (Lab)
Wilson, Allan (Cunninghame North) (Lab)

The Deputy Presiding Officer: The result of the division is: For 45, Against 65, Abstentions 0.

Amendment 43 disagreed to.

Amendment 44 moved—[Margaret Mitchell].

The Deputy Presiding Officer: The question is, that amendment 44 be agreed to. Are we agreed?

Members: No.

16:00
The Deputy Presiding Officer: There will be a division.
The question is, that amendment 45 be agreed to. Are we agreed?

The result of the division is: For 44, Against 66, Abstentions 0.

Amendment 44 disagreed to.

Amendment 45 moved—[Margaret Mitchell].

The question is, that amendment 45 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For

Aitken, Bill (Glasgow) (Con)
Baird, Shiona (North East Scotland) (Green)
Ballance, Chris (South of Scotland) (Green)
Ballard, Mark (Lothians) (Green)
Brocklebank, Mr Ted (Mid Scotland and Fife) (Con)
Byrne, Ms Rosemary (South of Scotland) (SSP)
Crawford, Bruce (Mid Scotland and Fife) (SNP)
Davidson, Mr David (North East Scotland) (Con)
Douglas-Hamilton, Lord James (Lothians) (Con)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Fabian, Linda (Central Scotland) (SNP)
Fergusson, Alex (Galloway and Upper Nithsdale) (Con)
Fox, Colin (Lothians) (SSP)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gallie, Phil (South of Scotland) (Con)
Gibson, Rob (Highlands and Islands) (SNP)
Goldie, Mr John (Banff and Buchan) (LD)
Graham, Christine (South of Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Mr Adam (South of Scotland) (SNP)
Johnstone, Alex (North East Scotland) (Con)
Leckie, Carolyn (Central Scotland) (SSP)
Lochhead, Richard (North East Scotland) (SNP)
MacAskill, Mr Ken (Lothians) (SNP)
Marwick, Tricia (Mid Scotland and Fife) (SNP)
Mather, Jim (Highlands and Islands) (SNP)
Maxwell, Mr Stewart (West of Scotland) (SNP)
McFee, Mr Bruce (West of Scotland) (SNP)
Mille, Mrs Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Morgan, Alasdair (South of Scotland) (SNP)
Neil, Alex (Central Scotland) (SNP)
Robison, Shona (Dundee East) (SNP)
Russell, Mr Mark (Mid Scotland and Fife) (Green)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Eleanor (Highlands and Islands) (Green)
Scott, John (Ayr) (Con)
Stevenson, Stewart (Banff and Buchan) (SNP)
Sturgeon, Nicola (Glasgow) (SNP)
Swinburne, John (Central Scotland) (SSCUP)
Tosh, Murray (West of Scotland) (Con)
Turner, Dr Jean (Strathkelvin and Bearsden) (Ind)
White, Ms Sandra (Glasgow) (SNP)

Against

Alexander, Ms Wendy (Paisley North) (Lab)
Arbuckle, Mr Andrew (Mid Scotland and Fife) (LD)
Bailie, Jackie (Dumbarton) (Lab)
Baker, Richard (North East Scotland) (Lab)
Barrie, Scott (Dunfermline West) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Canavan, Dennis (Falkirk West) (Ind)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Craige, Cathie (Cumbernauld and Kilsyth) (Lab)
Curran, Ms Margaret (Glasgow Baillieston) (Lab)
Eddie, Helen (Dunfermline East) (Lab)
Ewing, Mrs Margaret (Moray) (SNP)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
Finnie, Ross (West of Scotland) (LD)
Gillon, Karen (Clydesdale) (Lab)
Glen, Marilyn (North East Scotland) (Lab)
Gorrie, Donald (Central Scotland) (LD)
Henry, Hugh (Paisley South) (Lab)
Home Robertson, John (East Lothian) (Lab)
Hughes, Janis (Glasgow Rutherglen) (Lab)
Jackson, Dr Sylvia (Stirling) (Lab)
Jackson, Gordon (Glasgow Govan) (Lab)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)
Jamieson, Margaret (Kilmarnock and Loudoun) (Lab)
Kerr, Mr Andy (East Kilbride) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Lyon, George (Argyll and Bute) (LD)
Macdonald, Lewis (Aberdeen Central) (Lab)
Macintosh, Mr Kenneth (Eastwood) (Lab)
Maclean, Kate (Dundee West) (Lab)
Macmillan, Maureen (Highlands and Islands) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
May, Christine (Central Fife) (Lab)
McAteety, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Mr Tom (Hamilton South) (Lab)
McConnell, Mr Jack (Motherwell and Wishaw) (Lab)
McMahon, Michael (Hamilton North and Bellshill) (Lab)
McNeil, Mr Duncan (Greenock and Inverclyde) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
McNulty, Des (Clydebank and Milngavie) (Lab)
Morrison, Mr Alasdair (Western Isles) (Lab)
Muldoon, Bristow (Livingston) (Lab)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Munro, John Farquhar (Ross, Skye and Inverness West) (LD)
Murray, Dr Elaine (Dumfries) (Lab)
Oldfather, Irene (Cunninghame South) (Lab)
Peacock, Peter (Highlands and Islands) (Lab)
Peattie, Cathy ( Falkirk East) (Lab)
Pringle, Mike (Edinburgh South) (LD)
Putris, Jeremy (Tweddleld, Ettrick and Lauderdale) (LD)
Radcliffe, Nora (Gordon) (LD)
Robson, Euan (Roxburgh and Berwickshire) (LD)
Scott, Tavish (Shetland) (LD)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Smith, Iain (North East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Stone, Mr Jamie (Caithness, Sutherland and Easter Ross) (LD)
Wallace, Mr Jim (Orkney) (LD)
Watson, Mike (Glasgow Cathcart) (Lab)
Whitefield, Karen (Airdrie and Shotts) (Lab)
Wilson, Allan (Cunninghame North) (Lab)

The Deputy Presiding Officer: The result of the division is: For 44, Against 66, Abstentions 0.

Amendment 44 disagreed to.

Amendment 45 moved—[Margaret Mitchell].

The Deputy Presiding Officer: The question is, that amendment 45 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For

Aitken, Bill (Glasgow) (Con)
Baird, Shiona (North East Scotland) (Green)
Ballance, Chris (South of Scotland) (Green)
Ballard, Mark (Lothians) (Green)
Brocklebank, Mr Ted (Mid Scotland and Fife) (Con)
Davidson, Mr David (North East Scotland) (Con)
Douglas-Hamilton, Lord James (Lothians) (Con)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Fabbian, Linda (Central Scotland) (SNP)
Fergusson, Alex (Galloway and Upper Nithsdale) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gallie, Phil (South of Scotland) (Con)
Goldie, Miss Annabel (West of Scotland) (Con)
Harvie, Patrick (Glasgow) (Green)
The result of the division is: For 20, Against 87, Abstentions 2.

Amendment 45 disagreed to.

Amendment 46 moved—[Stewart Stevenson].

The Deputy Presiding Officer: The question is, that amendment 46 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For

Aitken, Bill (Glasgow) (Con)
Baird, Shiona (North East Scotland) (Green)
Ballance, Chris (South of Scotland) (Green)
Ballard, Mark (Lothians) (Green)
Brocklebank, Mr Ted (Mid Scotland and Fife) (Con)
Byrne, Ms Rosemary (South of Scotland) (SSP)
Crawford, Bruce (Mid Scotland and Fife) (SNP)
Davidson, Mr David (North East Scotland) (Con)
Douglas-Hamilton, Lord James (Lothians) (Con)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Ewing, Mrs Margaret (Moray) (SNP)
Fabiani, Linda (Central Scotland) (SNP)
Ferguson, Alex (Galloway and Upper Nithsdale) (Con)
Fox, Colin (Lothians) (SSP)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gallie, Phil (South of Scotland) (Con)
Gibson, Rob (Highlands and Islands) (SNP)
Goldie, Miss Annabel (West of Scotland) (Con)
Grahame, Christine (South of Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Hyslop, Fiona (Lothians) (SNP)
Johnstone, Alex (North East Scotland) (Con)
Milne, Mrs Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Ruskel, Mr Mark (Mid Scotland and Fife) (Green)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Eleanor (Highlands and Islands) (Green)
Scott, John (Ayr) (Con)
Tosh, Murray (West of Scotland) (Con)

Against

Alexander, Ms Wendy (Paisley North) (Lab)
Arbuckle, Mr Andrew (Mid Scotland and Fife) (LD)
Bailie, Jackie (Dumbarton) (Lab)
Baker, Richard (North East Scotland) (Lab)
Barrie, Scott (Dunfermline West) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brown, Robert (Glascow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Canavan, Denis (Falkirk West) (Ind)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Cragie, Cathie (Cumbernauld and Kilsyth) (Lab)
Crawford, Bruce (Mid Scotland and Fife) (SNP)
Curran, Ms Margaret (Glasgow Baillieston) (Lab)
Deacon, Susan (Edinburgh East and Musselburgh) (Lab)
Eadie, Helen (Dunfermline East) (Lab)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Ewing, Mrs Margaret (Moray) (SNP)
Fabiani, Linda (Central Scotland) (SNP)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
Finnie, Ross (West of Scotland) (LD)
Gibson, Rob (Highlands and Islands) (SNP)
Gillon, Karen (Clydesdale) (Lab)
Glen, Marilyn (North East Scotland) (Lab)
Gorrie, Donald (Central Scotland) (LD)
Grahame, Christine (South of Scotland) (SNP)
Henry, Hugh (Paisley South) (Lab)
Home Robertson, John (East Lothian) (Lab)
Hughes, Janis (Glasgow Rutherglen) (Lab)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Mr Adam (South of Scotland) (SNP)
Jackson, Dr Sylvia (Stirling) (Lab)
Jackson, Gordon (Glasgow Govan) (Lab)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)
Gallie, Phil (South of Scotland) (Con)
Gibson, Rob (Highlands and Islands) (SNP)
Goldie, Miss Annabel (West of Scotland) (Con)
Grahame, Christine (South of Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Hyslop, Fiona (Lothians) (SNP)
Johnstone, Alex (North East Scotland) (Con)
Leckie, Carolyn (Central Scotland) (SSP)
Lochhead, Richard (North East Scotland) (SNP)
MacAskill, Mr Kenny (Lothians) (SNP)
MacAskill, Mr Kenny (Lothians) (SNP)
Mulligan, Mrs Mary (Linekithgow) (Lab)
Munro, John Farquhar (Ross, Skye and Inverness West) (LD)
Murray, Dr Elaine (Dumfries) (Lab)
Neil, Alex (Central Scotland) (SNP)
Oldfather, Irene (Cunningham South) (Lab)
Peacock, Peter (Highlands and Islands) (Lab)
Peattie, Cathy (Falkirk East) (Lab)
Pringle, Mike (Edinburgh South) (LD)
Putris, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)
Radcliffe, Nora (Gordon) (LD)
Robison, Shona (Dundee East) (SNP)
Robison, Euan ( Roxburgh and Berwickshire) (LD)
Scott, Tavish (Shetland) (LD)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Smith, Iain (North East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Sturgeon, Nicola (Glasgow) (SNP)
Swindun, James, (Central Scotland) (SSCUP)
Turner, Dr Jean (Strathkelvin and Bearsden) (Ind)
Wallace, Mr Jim (Orkney) (LD)
Watson, Mike (Glasgow Cathcart) (Lab)
White, Ms Sandra (Glasgow) (SNP)
Whitefield, Karen (Airdrie and Shotts) (Lab)
Wilson, Allan (Cunningham North) (Lab)

Abstentions

Byrne, Ms Rosemary (South of Scotland) (SSP)
Fox, Colin (Lothians) (SSP)
Oldfather, Irene (Cunninghame South) (Lab)
Peacock, Peter (Highlands and Islands) (Lab)
Peattie, Cathy (Falkirk East) (Lab)
Pringle, Mike (Edinburgh South) (LD)
Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)
Radcliffe, Nora (Gordon) (LD)
Robson, Euan ( Roxburgh and Berwickshire) (LD)
Scott, Tavish (Shetland) (LD)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Smith, lain (North East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Wallace, Mr Jim (Orkney) (LD)
Watson, Mike (Glasgow Cathcart) (Lab)
Whitefield, Karen (Airdrie and Shotts) (Lab)
Wilson, Allan (Cunninghame North) (Lab)

The Deputy Presiding Officer: The result of the division is: For 44, Against 64, Abstentions 0.

Amendment 46 disagreed to.

Section 7—Offence: breach of RSHO or interim RSHO

The Deputy Presiding Officer: Group 6 is on breaches of RSHOs or interim RSHOs. Amendment 11, in the name of the minister, is in a group on its own.

Hugh Henry: The purpose of amendment 11 is to make it clear that RSHOs made in England, Wales or Northern Ireland under the Sexual Offences Act 2003 will apply in Scotland and that a breach of those orders in Scotland will be a criminal offence.

The 2003 act allows RSHOs to be made in England, Wales or Northern Ireland. The intention behind the 2003 act is that, unless the orders are expressly limited to a particular geographical area, they will apply in each of the other jurisdictions and that a breach of an order in one of the other jurisdictions will be an offence there. However, it is not clear that the orders would apply in Scotland, as the provisions in the 2003 act do not extend to Scotland. The amendments puts that beyond doubt.

Of course, orders that apply to a particular area or premises—for example, a particular school or sports centre—will not be breachable in Scotland. If the conditions in the order apply only to a particular area or premises, they will be breached only if the person does what he or she is restricted from doing in that particular place. However, orders that apply generally will apply in Scotland. For example, if a condition is not to go within a certain distance of any school, a criminal offence will be committed if that condition is breached in Scotland, even if the order was made in England.

I want to be absolutely certain that, if people who come to Scotland from other parts of the United Kingdom put our children at risk, we will have the powers to deal with them. It is also important that those who are the subject of an RSHO in Scotland cannot break the conditions of the order in other parts of the UK.
For those reasons, we are working with the Scotland Office and the Home Office on an order under section 104 of the Scotland Act 1998 to put it beyond doubt that RSHOs that are made in Scotland will apply in other parts of the UK and that breaching such orders will be an offence in the jurisdiction in which the breach takes place. I am pleased to be able to confirm that I have agreement in principle from the Parliamentary Under-Secretary of State for Scotland that such a section 104 order will be laid. I hope that the Parliament will agree that amendment 11 is necessary.

I move amendment 11.

Amendment 11 agreed to.

After section 8

The Deputy Presiding Officer: Group 7 is on the disclosure of RSHOs in criminal proceedings. Amendment 47, in the name of Pauline McNeill, is in a group on its own.

Pauline McNeill: Amendment 47 is a probing amendment, which I lodged because I was not wholly satisfied during stages 1 and 2 that the existence of an RSHO could not be referred to in a criminal trial. In my view, the presumption against disclosing such information should be similar to that which applies to previous convictions, as the information could be prejudicial to the jury’s decision. The key issue about disclosure is that, as legislators, we need to be clear about what we intend by the bill. I want to be clear about the purpose of the RSHOs and how such orders will connect with the rest of the criminal justice system. I will be pleased if the minister can clarify what will happen in such circumstances.

I move amendment 47.

Hugh Henry: I am sympathetic to the intention behind amendment 47, as it is important that criminal proceedings are not prejudiced by information about the accused that is not relevant to the case. However, the relevancy of the information is the key issue. If a person is prosecuted for breaching an RSHO, it will of course be necessary for the existence of the RSHO to be disclosed to the court. Without such information, the trial would be meaningless.

In general, however, the Crown Office advises that the normal rules of evidence will apply to the disclosure of the existence of an RSHO. In other words, the court will not allow the existence of an RSHO to be disclosed unless it is satisfied that that is relevant to the case. Even if the accused is being prosecuted for a sexual offence, the Crown Office advises that the fact that an RSHO had been imposed previously would be unlikely to be relevant to proving that the behaviour in question had taken place. Indeed, even if the accused is being prosecuted as a result of one of the incidents that led to the imposition of the RSHO, the fact that the RSHO had been imposed is still unlikely to have any relevance to the trial.

In a criminal trial, the court would be required to consider whether there is sufficient evidence to prove beyond reasonable doubt that the incident had taken place and that the accused was responsible. The fact that, in civil proceedings, the court had considered that there was sufficient evidence to prove on the balance of probabilities that the incident had taken place would be completely and utterly irrelevant. If the Crown attempts to lead irrelevant evidence in a criminal trial, it will be prevented from doing so by the judge. Therefore, I am confident that the normal court procedure and rules of evidence will ensure that irrelevant information about the existence of an RSHO will not be disclosed to the court during a criminal trial.

I am confident that amendment 47 is not necessary and I hope that Pauline McNeill will accept that reassurance.

Pauline McNeill: I am extremely happy with that answer, which is the one that I wanted on both counts. We now have clarity on the issue and I think that we have the right relationship between the RSHO and criminal proceedings. On that basis, I am happy to seek the Parliament’s approval to withdraw amendment 47.

Amendment 47, by agreement, withdrawn.

Section 8A—Paying for sexual services of a child

The Deputy Presiding Officer: Group 8 concerns the offence of paying for sexual services of a child. Amendment 48, in the name of Kenny MacAskill, is grouped with amendments 50 and 51.

Stewart Stevenson: In view of the time, I will be very brief. Amendment 48 aims to catch someone who is seeking to buy the sexual services of a child for someone else and to ensure that, notwithstanding the fact that it may be possible to catch them elsewhere in the legal code, the offences prescribed in the bill are applicable to a third person who buys sexual services on behalf of someone else. The amendment is a simple, logical extension of the protections that the bill provides.

I move amendment 48.

Margaret Mitchell: We will support the Law Society-inspired amendment in Kenny MacAskill’s name, which covers a potential loophole in the bill by including a reference to a third party.

My amendments 50 and 51 seek to ensure consistency in the approach in Scots law to the offence of having sex with a child under the age of
13. At present, unlawful sexual intercourse with a girl of that age can attract a maximum sentence of life imprisonment under section 5 of the Criminal Law (Consolidation) (Scotland) Act 1995. However, under section 8A of the bill, if payment or promise of payment is made in return for sexual intercourse with a child under 13 years of age, the maximum penalty is 14 years’ imprisonment. The amendments seek to ensure that the offence in the bill carries a penalty as severe as the penalty for which the 1995 act provides.

Hugh Henry: First, I will address the amendment in Kenny MacAskill’s name, to which Stewart Stevenson spoke. I do not believe that the amendment is necessary. I argue that the behaviour that Kenny MacAskill is trying to catch in the amendment is already likely to be an offence. If a person is deliberately assisting another to purchase the sexual services of a child, that person could be charged with aiding and abetting or conspiracy to purchase the sexual services of a child. Alternatively, if the person is deliberately arranging for the child to become involved in the provision of sexual services, so as to provide those services to another, that person could be caught by the offence at section 8D of the bill, which concerns arranging or facilitating.

Secondly, I turn to the amendments in Margaret Mitchell’s name. I am not convinced that it is sensible to add another level of penalties in the bill for offences relating to those aged under 13. I am aware that the equivalent Westminster legislation includes a life penalty in cases where the offence was committed against a child under 13, but there are important differences between the Westminster legislation and ours. Whereas Margaret Mitchell’s amendment takes in all the offences relating to under-13s, the Westminster legislation takes a two-tier approach, so that a life penalty is available only in cases where the sexual services constitute certain aggravated behaviour relating to the penetration of the body of the child.

We have widened the reach of the bill so that a range of sexual services is covered. Although we agree that paying for sexual intercourse with an under-13 may justify a life sentence, I am not convinced that everything that is found to fall within the definition of sexual services would justify a life penalty. In any event, it is important to reassure members that, in cases where someone has sexual intercourse with a child under 13, whether or not payment has been made, it will often be more appropriate to take proceedings under another offence. Section 5 of the Criminal Law (Consolidation) (Scotland) Act 1995, for example, makes provision for the offence of unlawful sexual intercourse with a girl under the age of 13 and provides a maximum penalty of life imprisonment. It will, of course, be for the Crown to decide in each case which offence the accused should be prosecuted under. I hope that Margaret Mitchell will be reassured by my comments and will not move her amendments.
The Deputy Presiding Officer: Amendment 12, in the name of the minister, has already been debated with amendment 1. I remind members that, if amendment 12 is agreed to, amendment 49 will be pre-empted.

Amendment 12 moved—[Hugh Henry].

The Deputy Presiding Officer: The question is, that amendment 12 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

FOR

Aitken, Bill (Glasgow) (Con)
Alexander, Ms Wendy (Paisley North) (Lab)
Arbuckle, Mr Andrew (Mid Scotland and Fife) (LD)
Bailie, Jackie (Dumbarton) (Lab)
Baker, Richard (North East Scotland) (Lab)
Barrie, Scott (Dunfermline West) (Lab)
Boayck, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Curran, Ms Margaret (Glasgow Baillieston) (Lab)
Eddie, Helen (Dunfermline East) (Lab)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
Finnie, Ross (West of Scotland) (LD)
Gillan, Karen (Clydesdale) (Lab)
Glen, Marilyn (North East Scotland) (Lab)
Gorrie, Donald (Central Scotland) (LD)
Henry, Hugh (Paisley South) (Lab)
Home Robertson, John (East Lothian) (Lab)
Hughes, Janis (Glasgow Rutherglen) (Lab)
Jackson, Dr Sylvia (Stirling) (Lab)
Jackson, Gordon (Glasgow Govan) (Lab)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)
Kerr, Mr Andy (East Kilbride) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Lyon, George (Argyll and Bute) (LD)
Macdonald, Lewis (Aberdeen Central) (Lab)
Macintosh, Mr Kenneth (Eastwood) (Lab)
Macmillan, Maureen (Highlands and Islands) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
May, Christine (Central Fife) (Lab)
McAveety, Mr Frank (Glasgow Shettleston) (Lab)
McConnell, Mr Jack (Motherwell and Wishaw) (Lab)
McCabe, Mr Tom (Hamilton South) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
McSorley, Des (Clydebank and Milngavie) (Lab)
Macleod, Lewis (Lothians) (Lab)
Mulligan, Mrs Mary (Linthgow) (Lab)
Munro, John Farquhar (Ross, Skye and Inverness West) (LD)
Murray, Dr Elaine (Dumfries) (Lab)
Oldfather, Irene (Cunninghame South) (Lab)
Peacock, Peter (Highlands and Islands) (Lab)
Pettie, Cathy (Falkirk East) (Lab)
Pringle, Mike (Edinburgh South) (LD)
Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)
Radcliffe, Nora (Gordon) (LD)
Robison, Euan (Ross, Skye and Inverness West) (Lab)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Smith, Iain (North East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Wallace, Mr Jim (Orkney) (LD)
Watson, Mike (Glasgow Cathcart) (Lab)
Whitefield, Karen (Ardrie and Shotts) (Lab)
Wilson, Allan (Cunninghame North) (Lab)

The Deputy Presiding Officer: The result of the division is: For 41, Against 58, Abstentions 0.

Amendment 48 disagreed to.
Section 8C—Controlling a child prostitute or a child involved in pornography

Amendment 14 moved—[Hugh Henry]—and agreed to.

Section 8D—Arranging or facilitating child prostitution or pornography

Amendment 52 moved—[Hugh Henry]—and agreed to.

After section 8D

Amendment 53 not moved.

Section 8E—Sections 8B to 8D: involvement in pornography, etc

Amendment 16 moved—[Hugh Henry]—and agreed to.

Section 8H—Indecent photographs of 16 and 17 year olds

The Deputy Presiding Officer: Amendment 54, in the name of Marlyn Glen, is grouped with amendments 55, 56, 17, 57 to 59, 18, 60 to 62, 19, 63 to 65 and 20. I will list the considerable number of amendments that might be pre-empted. If amendment 54 is agreed to, I will not call amendments 55, 56 or 17. If amendment 56 is agreed to, I will not call amendment 17. If amendment 57 is agreed to, I will not call amendments 58, 59 and 18. If amendment 59 is agreed to, I will not call amendment 18. If amendment 60 is agreed to, I will not call amendments 61, 62 and 19. If amendment 62 is agreed to, I will not call amendment 19. If amendment 63 is agreed to, I will not call amendments 64, 65 and 20. If amendment 65 is agreed to, I will not call amendment 20.

I ask Marlyn Glen to move amendment 54 and to speak to the other amendments in the group—if she can be heard, because a lot of talking is going on. Mr Stevenson might have had a point when he mentioned antisocial behaviour orders. I ask members to keep quiet, please.

Marlyn Glen (North East Scotland) (Lab):

Section 8H is a difficult section. I want to clarify a few points about the amendments in my name and I welcome the opportunity that that presents for the Parliament to have a debate on complex issues.

The bill seeks to protect children. It is relatively easy for us all to sign up to a measure that will protect vulnerable children and I applaud the bill’s intention to give protection from abuse to young people up to the age of 18. However, tension arises because the age of sexual consent is 16, whereas the upper threshold of childhood in the bill is 18. It was right to ratify the European
achieving the consent”.

However, the bill’s purpose is to combat sexual exploitation; its purpose is not to regulate the sexual life of young people. There was no intention to undermine the rights of young people who are over the age of consent—people to whom we usually refer as “consenting adults”—and who act within a legitimate, non-exploitative relationship. There is no call to change the age of consent. Young people, as well as older people, have the right to a private life. Section 8H deals with the private, consensual use of images; it does not address wider issues of pornography. We must deliver consistent, clear messages about sexual health and self-esteem, but it is highly questionable whether legislation offers an effective means of doing so.

My amendments 54, 57, 60 and 63 relate to the exceptions for photographs of 16 and 17-year-olds that are taken in private and with consent. The amendments would remove the exemption for people who are “married to each other” or “partners in a relationship”, because there are real questions about whether the existence of a relationship gives protection. The bill is not gender specific, but it is widely recognised that young women in some relationships are vulnerable as a result of a gender-specific imbalance of power. The YWCA Scotland’s excellent display in the garden lobby at Holyrood this week makes that point.

The logical, legal and moral implications of the matter need much further consideration—more than we can give in this debate. There should be a wide discussion on the matter. We should concentrate on working to give young people, particularly young women, the confidence and self-esteem that they need if they are to value themselves and make informed decisions. The approach of the amendments in my name is supported by Council framework decision 2004/68/JHA, which provides that

“Even where the existence of consent has been established, it shall not be considered valid, if for example superior age, maturity, position, status, experience or the victim’s dependency on the perpetrator has been abused in achieving the consent”.

I hope that the minister will give a commitment to keep the workings of section 8H under proper and timely review and to come back to the Justice 1 Committee and the Parliament so that we may consider how the approach that the amendments propose works in practice and whether further adjustments are necessary.

I take the opportunity to support amendment 61, in Pauline McNeill’s name. It is essential that the Executive is consistent in treating marriage and civil partnerships on a par in legislation. I welcome the fact that that is being done in other bills that are before Parliament and I support amendment 61 on that equal opportunity basis.

I understand the intention behind amendment 65, in the name of Kenny MacAskill, but do not support it. It sets out to introduce an exemption for those in a civil partnership, but unfortunately not on a par with that for those in a marriage. It also seeks to introduce an exemption for people who are living together, but since 16 and 17-year-olds who are in relationships often do not live together, the amendment is not helpful. Further, it uses the unfortunately clumsy description of a same-sex relationship that has

“the characteristics of the relationship between husband and wife”

rather than the characteristics of the relationship of civil partnership, so I do not support amendment 65.

I look forward to hearing members’ speeches, in particular the minister’s speech, and to what I hope will be a much wider-ranging discussion in the near future.

I move amendment 54.

Pauline McNeill: I will speak to amendments 55, 58, 61 and 64 in my name and other amendments in the group. As Martyn Glen indicated, my amendments are about the reference to civil partnerships in the bill. We have the Civil Partnership Act 2004, so if we are going to include exemptions for relationships, we should also refer to civil partnerships. I oppose amendment 65, in the name of Kenny MacAskill, because attempts to refer to other types of relationship that are not defined in law are convoluted and difficult. It is appropriate that we adopt terms that are already used in our legislation.

As indicated, and with your permission, Presiding Officer, I will say something on behalf of the Justice 1 Committee about the process, because it is worthy of putting on the record. The Justice 1 Committee was advised in December that the Executive intended to lodge amendments at stage 2, which we understood to be the result of United Nations protocols and a Council framework decision to combat the sexual exploitation of children and child pornography. It is important to note that those place obligations on the Parliament.
We wrote to the Minister for Parliamentary Business a few days before the beginning of stage 2 to say that we had still not seen the amendments. At that time, we thought that they were fairly uncontroversial and straightforward. For the most part they were, with the exception of the amendment that Marlyn Glen has referred to.

I realise that we have European Union obligations, and that the timescale is not entirely within our hands, but lessons can be learned. It cuts across everything that we stand for if there is no proper scrutiny or consultation on such subjects. The Justice 1 Committee feels that, as there was no consultation on the amendments that were made at stage 2, and there is no policy memorandum, there is nothing to enable us to say that we know that the right decision has been made because we have consulted on it. That option is not open to us, although it normally would be. The Executive is conscious of that point, and I know that it sympathises with our position, but we need to examine the situation for future reference. We must examine whether other options are available so that it is possible to fulfil our obligations and have the proper scrutiny and standard of consultation that we expect.

The impact of not being able to consult is this: while on balance the Justice 1 Committee agreed with the Executive on putting a list of exceptions in the bill, including one to exempt 16-year-olds in relationships in particular circumstances, there was also a case for not including it. On balance, my view is that if we get a review from the Executive, I am happy to support the provisions, but there is a case for saying that if we feel that we must protect vulnerable 16 and 17-year-olds if indecent images are taken of them, we must ensure that the exceptions that we have are right. We must be wary of exempting people who are in a relationship when the vast majority of people in that age group will not be in a relationship.

As a committee, we have not tested the amendments that were made at stage 2 as members would expect us to have done. That is not necessarily the fault of the Executive, but Parliament should be aware of the situation. I hope that the Executive will accede to Marlyn Glen’s request to examine the exceptions at some point in the future, to ensure that those that we pass into law are the right ones and that we have them for the right reasons.

16:30

Stewart Stevenson: Without question, the sections that were added at stage 2 are the part of the bill that most taxed the Justice 1 Committee, the minister and his officials, to the extent that the minister, unusually and helpfully—at least, it appeared to be helpful at the time—came back after stage 2 with an options paper that had six options. We spent a considerable time having an open-minded discussion about the paper, the aim of which was to help resolve both his and our dilemmas.

I support Pauline McNeill’s comment on behalf of the committee that it would have been helpful to have had more information earlier and more time to consult more widely on the issue. I say that without necessarily having the expectation that more information and time would have led us ineluctably to a single clear solution and determination—the issue ain’t easy. However, the point is that in the bill, we have accepted in principle that 16 and 17-year-olds require a degree of protection in sexual matters. For the first time, we will create an offence of being the procurer or user of prostitution, for cases in which a 16 or 17-year-old is involved. We do that because we recognise that 16 and 17-year-olds still have maturing to do and deserve our protection. I am delighted with that change, and in the long term I seek the extension of the measure so that the offence in relation to prostitution that involves people of any age will be committed by the person who buys, not the person who provides. However, that is for another time.

Given that we have established the principle that 16 and 17-year-olds need a degree of protection in sexual matters, the question is what degree of protection we should afford them. In relation to the taking of indecent photographs, it is not unreasonable that a couple should be able to indulge in that activity—we would not necessarily wish to encourage it, but we would not want to prohibit it. However, the issue is what happens to the material that is created and what risk there is that it will move outside the relationship and be available to and exploited by others. The issue of where the balance lies is a judgment call for each member.

There is no easy answer, although a number of options are on the table. If the Executive supports Marlyn Glen’s amendments, we are minded to go with that. We have lodged a set of amendments that were suggested by the Law Society of Scotland with the aim of clarifying the matter. I accept and acknowledge the merit in Marlyn Glen’s comments about the wording of our amendments. We will wait and see what the Executive says, because we—and, I suspect, ministers—remain somewhat uncertain on the issue. The important point is that, post hoc, we do not close our minds to considering the effects of the measures. We should be prepared to say that we got the matter wrong, given that it will be all of us who got it wrong, not one individual or one political party.
Hugh Henry: I begin by dealing with the issue of process that Pauline McNeill raised on behalf of the Justice 1 Committee. I have apologised to Pauline McNeill for the difficult situation in which we placed the committee in trying to scrutinise and come to a conclusion on the issue. I am happy to put that apology on record again. I accept that, because of our delay in producing amendments, the committee was unable to give them adequate scrutiny or to carry out full and proper consultation, which has caused complications and difficulties. We would not want to act like that as a matter of course; indeed, for a range of bills we have striven to ensure that that has not happened. However, as Stewart Stevenson said, some of the complexities and difficulties in trying to work out what was best caused us to pause or delay, and that had a knock-on effect on the committee. I regret that that caused some problems.

At stage 2, we introduced amendments that extended the current offences in relation to indecent images of children. As a result of those amendments, offences concerning taking, possessing and distributing indecent images would apply to images of young people aged under 18 rather than just to images of people aged under 16. As Stewart Stevenson said, we considered a range of options, which we attempted to discuss. I am not sure that, in attempting to be helpful to committee members, we did not further complicate the problem and introduce further uncertainties. As Stewart Stevenson recognised, it is difficult to know exactly what is right in this matter and to strike a balance; nevertheless, we have to make a decision. Despite some of the earlier uncertainty, we are certain that the balance that we are striking is the correct one. I will return to that.

I want to clarify a point that Stewart Stevenson raised. He said that, if Marlyn Glen was minded to press her amendments and if we were minded to accept them, he would be content to support them. We believe that Marlyn Glen’s amendments are at the other end of the spectrum from Kenny MacAskill’s amendments; therefore, it would be illogical to see the two sets of amendments as doing the same thing. Indeed, Marlyn Glen said that she could not support Kenny MacAskill’s amendments for that reason. Therefore, there is a certain illogicality in Stewart Stevenson’s position.

We recognise that 16 and 17-year-olds are above the age of sexual consent and that they can quite lawfully engage in sexual activity and have certain rights in relation to what they can do in their private lives. Nevertheless, as members have said, it is right to remember that those young people are still at an age at which they are vulnerable and deserve our protection. As Stewart Stevenson said, we have recognised that vulnerability in other aspects of the bill; therefore, there is no inconsistency in that respect. The question for Parliament is how we can balance the rights of 16 and 17-year-olds with the protection that they need and deserve.

Margaret Mitchell: Does the minister accept that part of the problem with section 8H is in establishing the definition of an established relationship and that the Law Society amendments that have been lodged in Kenny MacAskill’s name provide the best definition of the type of relationship that we think the exemption should cover?

Hugh Henry: No. I think that those amendments introduce a degree of restriction that we have attempted to avoid. We have sought to reflect the fact that marriage is a recognised relationship and so is worthy of exemption. I will talk later about civil partnerships, and we will recognise Pauline McNeill’s amendments, which help to clarify the status of such partnerships. However, it is for the courts to examine all the circumstances and to decide not just what constitutes a relationship but what constitutes—in the wording that the Executive amendment uses—an established relationship. It is possible to be in a relationship that is only a day or two days old. That would be a relationship, but that might not be sufficient to justify the kind of exemption that we are talking about. That is why we want to talk about established relationships that have a degree of permanence.

Kenny MacAskill’s amendments go a step further and say that the exemption from the offence will apply only if the couple are husband and wife, civil partners or “living with each other in a relationship which has the characteristics of the relationship between husband and wife except that the persons are of the same sex”.

As Marlyn Glen said, the phrase “living with each other” does not reflect the reality of the lives of many 16 and 17-year-olds who are in relationships but neither married nor living together. They might have a relationship of a year or two’s standing but still live with their parents, or they might live in separate towns. Kenny MacAskill’s amendments 56, 59, 62 and 65 would introduce a degree of restriction on the exempted relationships that does not adequately reflect reality for 16 and 17-year-olds. We must strike a balance, as Stewart Stevenson said, and the Executive has struck a balance that is appropriate in the circumstances.

The exceptions are cases in which the young person is 16 or over and has consented to be in the picture, the picture is for the private use of the accused and is not being shown to anyone else and the accused and the young person in the picture are married or are partners in a relationship. In those circumstances, the accused will be exempt from criminal liability. The
introduction of the exceptions resulted in discussion, and the committee was rightly concerned about the difficulty of defining relationships and the need to tighten up what is meant by being “partners in a relationship”. That is why we have lodged amendments that seek to give a degree of clarity by referring to an established relationship.

We considered whether we had achieved the correct balance between rights and protection and considered a range of possibilities similar to those that we are examining today. It is our duty to give 16 and 17-year-olds as much protection as we can without overly impinging on their rights to a private life.

The Deputy Presiding Officer (Murray Tosh): Minister, I am beginning to be a bit concerned about the timetable. I would appreciate it if you were able to bring debate on the group to a close early.

Hugh Henry: I will pursue the matter quickly.

Unlike Marlyn Glen, I do not accept that it is enough simply for the young person to consent to the taking or possession of the indecent photograph and, as I have said, Kenny MacAskill’s amendments 56, 59, 62 and 65 are much more restrictive. Having given the matter further thought, we have come to the view that a requirement for an established relationship will give us the correct balance, and I believe that the exceptions are realistic. Amendments 17 to 20, in the name of Cathy Jamieson, make that proposal. The reference to partners in an established relationship will, of course, include same-sex relationships, regardless of whether they have been formalised into a civil partnership. However, it is important that we recognise such relationships formally, so I am happy to support Pauline McNeill’s amendments 55, 58, 61 and 64.

Marlyn Glen: I press the minister on whether he has listened to the request to review and monitor what happens with the provisions.

Hugh Henry: That is the next point that I was going to make. It is my intention to review the use of the offences over the next couple of years to ensure that we have got the exceptions right. That would apply to any bill that the Parliament passes—we always want to ensure that legislation is right and works appropriately; however, in this case, I put on record my assurance that we will report to the Parliament our findings if there are any unanticipated complications.

I hope that that reassures members. The Executive’s intention, like that of other members of the Parliament, is to get the bill right. I hope that Marlyn Glen and Kenny MacAskill will be content not to press their amendments.

The Deputy Presiding Officer: I will allow a brief speech from Patrick Harvie.

Patrick Harvie (Glasgow) (Green): I am grateful for the time and aware that there is not much of it. I speak in favour of Marlyn Glen’s amendments and urge her to press them. I speak not as a member of the committee that has dealt with the bill, but as one with a background in supporting young people in their sexual health and sexual rights.

There is a great danger that the bill, which is intended to address abuse and exploitation, will end up legislating against something of which people merely disapprove. Stewart Stevenson is right to say that 16 and 17-year-olds are entitled to a degree of protection on sex and sexuality. We have a responsibility to offer such protection when abuse and exploitation are the target, but the effect of section 8H will be to catch consensual, non-abusive behaviour of which some people might simply disapprove.

As Marlyn Glen said, young people are less likely to be in relationships. They are much less likely to be in established relationships, as the Executive’s amendments have it, but they are over the age of consent. We are talking about 16 and 17-year-olds, who are entitled to have sex lives without interference. They are entitled to make mistakes and to do things of which we disapprove. That is what consent is all about. The minister recognises that they are over the age of consent and are entitled to lead their own sex lives, so why should the state decide to intervene merely because they have made a choice to use their mobile phones to take a few snaps of each other in a perfectly innocent and non-exploitative way?

I am also uncomfortable with the emphasis on marriage and civil partnerships in the provisions, because it seems to imply that for people to have sex lives outside those forms of relationship is to be frowned upon. It is not our business to frown upon that. Consent is consent. We run the risk of legislating because of disapproval rather than legislating against abuse or exploitation. Again, I urge Marlyn Glen to consider pressing her amendments.

16:45

Marlyn Glen: One of the difficulties with this part of the debate is that the committee did not have time to examine whether section 8H cuts across the rights that young people have. I am aware of the difficulty that members—not only members of the committee—have in making decisions on the amendments in group 9. However, I listened carefully to the minister’s response and I accept his assurances. I will seek the Parliament’s approval to withdraw amendment 54. I hope that
we will return to have a more wide-ranging debate at a later date.

Amendment 54, by agreement, withdrawn.

Amendment 55 moved—[Pauline McNeill]—and agreed to.

Amendment 56 not moved.

Amendment 17 moved—[Hugh Henry].

The Deputy Presiding Officer: The question is, that amendment 17 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For
Adam, Brian (Aberdeen North) (SNP)
Alexander, Ms Wendy (Paisley North) (Lab)
Arbuckle, Mr Andrew (Mid Scotland and Fife) (LD)
Bailie, Jackie (Dumbarton) (Lab)
Baker, Richard (North East Scotland) (Lab)
Barrie, Scott (Dunfermline West) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brecklebank, Mr Ted (Mid Scotland and Fife) (Con)
Brown, Robert (Gloucester) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Byrne, Ms Rosemary (South of Scotland) (SSP)
Canavan, Dennis (Falkirk West) (Ind)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Crawford, Bruce (Mid Scotland and Fife) (SNP)
Curran, Ms Margaret (Glasgow Baillieston) (Lab)
Davidson, Mr David (North East Scotland) (Con)
Deacon, Susan (Edinburgh Central) (Lab)
Eadie, Helen (Dunfermline East) (Lab)
Ewing, Mrs Margaret (Moray) (SNP)
Fabiani, Linda (Central Scotland) (SNP)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
Fergusson, Alex (Galloway and Upper Nithsdale) (Con)
Finnie, Ross (West of Scotland) (LD)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gallie, Phil (South of Scotland) (Con)
Gibson, Rob (Highlands and Islands) (SNP)
Glen, Marilyn (North East Scotland) (Lab)
Godman, Trish (West Renfrewshire) (Lab)
Goldie, Miss Annabel (West of Scotland) (Con)
Grahame, Christine (South of Scotland) (SNP)
Henry, Hugh (Paisley South) (Lab)
Home Robertson, John (East Lothian) (Lab)
Hughes, Janis (Glasgow Rutherglen) (Lab)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Mr Adam (South of Scotland) (SNP)
Jackson, Dr Sylvia (Stirling) (Lab)
Jackson, Gordon (Glasgow Govan) (Lab)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)
Jamieson, Margaret (Kilmarnock and Loudoun) (Lab)
Johnstone, Alex (North East Scotland) (Con)
Kerr, Mr Andy (East Kilbride) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Lochhead, Richard (North East Scotland) (SNP)
Lyon, George (Argyll and Bute) (LD)
MacAskill, Mr Kenny (Lothians) (SNP)
Macdonald, Lewis (Aberdeen Central) (Lab)
Macintosh, Mr Kenneth (Eastwood) (Lab)

Against
Maclean, Kate (Dundee West) (Lab)
Macmillan, Maureen (Highlands and Islands) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
Marwick, Tricia (Mid Scotland and Fife) (SNP)
Mather, Jim (Highlands and Islands) (SNP)
Matheson, Michael (Central Scotland) (SNP)
May, Christine (Central Fife) (Lab)
McAveety, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Mr Tom (Hamilton South) (Lab)
McFee, Mr Bruce (West of Scotland) (SNP)
McMahon, Michael (Hamilton North and Bellshill) (Lab)
McNeil, Mr Duncan (Greenock and Inverclyde) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
McNulty, Des (Clydebank and Milngavie) (Lab)
Milne, Mrs Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Monteilh, Mr Brian (Mid Scotland and Fife) (Con)
Morgan, Alasdair (South of Scotland) (SNP)
Morrison, Mr Alasdair (Western Isles) (Lab)
Muldoon, Bristow (Livingston) (Lab)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Munro, John Farquhar (Ross, Skye and Inverness West) (LD)
Murray, Dr Elaine (Dumfries) (Lab)
Neil, Alex (Central Scotland) (SNP)
Oldfather, Irene (Cunninghame South) (Lab)
Peacock, Peter (Highlands and Islands) (Lab)
Peattie, Cathy (Falkirk East) (Lab)
Pringle, Mike (Edinburgh South) (LD)
Purvis, Jeremy (Tweedbridge, Ellistown and Lauderdale) (LD)
Radcliffe, Nora (Gordon) (LD)
Robison, Shona (Dundee East) (SNP)
Robson, Euan ( Roxburgh and Berwickshire) (LD)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Scott, Tavish (Shetland) (LD)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Smith, lain (North East Fife) (LD)
Smith, Margaret (Edinburgh West) (Con)
Stevenson, Stewart (Banff and Buchan) (SNP)
Sturgeon, Nicola (Glasgow) (SNP)
Swinburne, John (Central Scotland) (SSCUP)
Turner, Dr Jean (Strathkelvin and Bearsden) (Ind)
Wallace, Mr Jim (Orkney) (LD)
Watson, Mike (Glasgow Cathcart) (Lab)
White, Ms Sandra (Glasgow) (SNP)
Whitefield, Karen (Airdrie and Shotts) (Lab)
Wilson, Allan (Cunninghame North) (Lab)

Abstentions
Leckie, Carolyn (Central Scotland) (SSP)

The Deputy Presiding Officer: The result of the division is: For 98, Against 6, Abstentions 1.

Amendment 17 agreed to.

Amendment 57 not moved.

Amendment 58 moved—[Pauline McNeill]—and agreed to.

Amendment 59 not moved.
Amendment 18 moved—[Hugh Henry]—and agreed to.
Amendment 60 not moved.
Amendment 61 moved—[Pauline McNeill]—and agreed to.
Amendment 62 not moved.
Amendment 19 moved—[Hugh Henry]—and agreed to.
Amendment 63 not moved.
Amendment 64 moved—[Pauline McNeill]—and agreed to.
Amendment 65 not moved.
Amendment 20 moved—[Hugh Henry]—and agreed to.

The Deputy Presiding Officer: Group 10 is on consent in relation to indecent photographs of 16 and 17-year-olds. There is very little time, so I ask members to make the very briefest of speeches. Amendment 66, in the name of Kenny MacAskill, is in a group on its own.

Stewart Stevenson: Amendment 66 seeks to make it clear that the child can give consent on the usual legal basis.

I move amendment 66.

Hugh Henry: I understand the argument but I believe that amendment 66 is unnecessary. It is essential that those who consent as a result of misunderstanding, pressure or threats are not taken to have consented as a matter of law. It is also true that the bill as currently drafted does not contain a definition of consent. However, because a specific definition is not provided, the reference to consent in the current provisions relies on the existing meaning of consent under Scots law. The Scottish courts have made it clear that consent must be freely given by a person who is capable of understanding the implications of doing so. Case law has established that it should not be the direct result of violence or of the accused having taken advantage of an age difference between himself and the victim or of his position of responsibility for that victim. I am therefore confident that the standard Scots law meaning of consent will be sufficient to ensure that young people are protected, and I do not believe amendment 66 is necessary.

The Deputy Presiding Officer: The question is, that amendment 66 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

While the clock is ticking, I advise members that we have gone past the time that is allowed, so I exercise my discretion under rule 9.8.4A(a) to extend the time for the consideration of amendments. That will impact on the time that is available for the stage 3 debate. I might need to take one or two members out of that debate or impose very tight speaking times. We have one more group of amendments to consider and we need to allocate some time for that.
Schedule 2

MINOR AND CONSEQUENTIAL AMENDMENTS

The Deputy Presiding Officer: Group 11 is on circumstances in which the offender is subject to 2003 act notification requirements. Amendment 23, in the name of the minister, is grouped with amendments 24 to 35.

Hugh Henry: The amendments seek to make changes to the way in which sexual services, indecent images and grooming offences are listed in schedule 3 of the 2003 act. Listing in that schedule means that part 2 of the 2003 act applies to the offence. That has several implications, including the imposition of the notification requirements of the sex offenders register. A number of offences are already listed in schedule 3 without qualification, which means that conviction for those offences will result in the automatic imposition of the notification requirements.

We added new offences to schedule 3 at stage 2, although we did so with some qualifications. We specified that the notification requirements would be imposed automatically only in cases where the victim was under 16 and the offender was either 18 or over or had been sentenced to a minimum of 12 months’ imprisonment. In order to ensure that no one who should be on the sex offenders register escapes it, we also added a catch-all provision to each offence, so that the court could impose the notification requirements in other cases if it considered it appropriate to do so.

Our catch-all provisions did not, however, allow the court to have discretion in all cases. Because of the way in which those provisions were drafted, the court could have discretion only in cases where the victim was under 16. In effect, if the victim was 16 or over, the court would have no powers to impose a notification requirement on the offender under any circumstances. That was not how we had intended those catch-all provisions to work. The amendments in the group change the way in which sexual services, indecent images and grooming offences are listed in schedule 3 without qualification, which means that the catch-all provisions will apply in all cases regardless of the age of the victim.

There is another technical difficulty with the amendments that were agreed to at stage 2. As they are currently drafted, the catch-all provisions refer specifically to the notification requirements of the 2003 act. That might cast doubt on whether all the other provisions in part 2 of that act would apply, despite the fact that they would apply to the other offences that are listed in schedule 3 to the bill. We want to be clear, for example, that the court can impose a sexual offences prevention order on an offender who had been convicted of taking indecent photographs of a child, but who was only 17.
I move amendment 23.

Amendment 23 agreed to.

Amendments 24 to 35 moved—[Hugh Henry]—and agreed to.

Protection of Children and Prevention of Sexual Offences (Scotland) Bill

The Deputy Presiding Officer (Murray Tosh): The next item of business is a debate on motion S2M-2771, in the name of Cathy Jamieson, that the Protection of Children and Prevention of Sexual Offences (Scotland) Bill be passed.

16:57

The Minister for Justice (Cathy Jamieson): I spent many years working in child protection, working with young victims of abuse. I have seen at first hand the damage that can be caused by those appalling crimes. Like other members, I have heard directly from victims. I have heard their testimony, not just about how the physical harm that they sustained has affected them, but—even once their physical wounds have healed—about how the emotional and psychological trauma continue for years to come.

That is why we must do all that we can to stop that abuse happening to our children. That is why we must ensure that the law allows for early intervention to prevent predatory sex offenders from targeting our children. If they manage to commit their despicable crimes, we must ensure that the law will deal with them in an appropriately robust manner. The Protection of Children and Prevention of Sexual Offences (Scotland) Bill aims to do just that. That is why I am pleased to bring the bill to Parliament today.

I thank the Justice 1 Committee and its officials, as well as our own Executive officials, for their hard work. I pay particular tribute to the Deputy Minister for Justice, Hugh Henry, for his attention to detail during the passage of the bill, at both stage 1 and stage 2. We always try to listen to what committees say as we take legislation through Parliament. We have listened to the views of the Justice 1 Committee, and we have amended provisions in accordance with those views. That has been important. It has also been important that, as we have gone through the process, we have taken account of the views of those who work in child protection. I am pleased that the new provisions that I hope we will agree to today will add to our ability to help to protect our children effectively.

The bill that is now before the Parliament goes further than ever before in its aim of protecting young people from sexual harm. As we have heard, the bill now includes a range of offences to tackle the sexual exploitation of young people under the age of 18. First, it criminalises those who purchase sexual services from someone under the age of 18. As we heard, that could
include any form of sexual service, including prostitution, lap-dancing or sex chat lines. The bill extends the current law on indecent pictures of children so that it applies to young people under 18, rather than only to those under 16—with some exceptions to ensure both that the civil liberties of the young people involved are protected and that we give young people protection when necessary.

Finally, the bill creates offences to deal with those who recruit young people into pornography and the provision of sexual services, as well as those who make the arrangements for those activities to take place. Even if those people are not obtaining the sexual services or taking, possessing or distributing the indecent pictures themselves, we will ensure that they are brought to justice for the harm that they do to our young people, however indirectly. There is no place in our society for the exploitation of young people. I believe that the bill will go a long way towards tackling exploitation and making Scotland a safer place for our youngsters.

I put on record my thanks to the Justice 1 Committee, given the comments that Pauline McNeill and others made about the time that was available to it to deliberate on difficult and sensitive issues. The committee had to weigh up the balance between rights and protection and the balance between adults’ rights and the rights of children and young people. It had to come to a decision, irrespective of the shortage of time. In essence, the committee had to do what a number of child protection professionals have to do daily, which is to consider the evidence before them and take a decision that they believe to be in the best interests of children and young people. Our job as legislators is to put in place a framework to help those professionals to protect our children and young people, which the bill does, whether they are children in their local play park, teenagers in an internet chat room or young people in a relationship who are vulnerable to being recruited into some form of exploitation.

No one can turn back the clock to undo the damage that has been done to children and young people in the past, but we must do everything that we can to do better in the future and to ensure that in Scotland our children have every possible protection. I therefore commend the bill to Parliament.

I move,

That the Parliament agrees that the Protection of Children and Prevention of Sexual Offences (Scotland) Bill be passed.

17:02

Stewart Stevenson (Banff and Buchan) (SNP): We have trod a relatively long and very twisty road to get to this stage. Passing the bill will increase protection for children. A number of issues remain unresolved, but that is not to say that those issues were capable of being resolved in the bill or in legislation at all.

If I take issue with anything that the minister said, I do so about one thing only and as a matter of emphasis. The minister said that the bill will help professionals to protect children. That is excellent and, of course, I support it. However, we must consider in what other ways we can protect children and what other people have to be involved in that.

One thing that is outside the legislative framework but to which we have to turn our minds as politicians is helping children to protect children from sexual exploitation. When the high-tech crime unit came to show us some of the things that happen in the world of the internet, even those of us who spent an entire career in computers found that there were gaping holes in our knowledge, understanding and experience; I saw things of which I had not previously been aware in any way, shape or form. The development of new technologies, particularly in various areas of communication, is extremely rapid. Given that we are probably not the users of the technologies that create the greatest risks for children, the only way in which we can improve substantially the protection of children is to help children to protect children, because they understand the technologies. I hope that the Executive will not feel that the job is done when, at 5.30 or thereabouts, we pass the bill. There is more to do.

Another area of challenge to which we have to turn our minds is that which always occurs in relation to offending of a sexual nature: we have to raise our game on detection, prosecution, incarceration, treatment and rehabilitation. We know that we see but a tiny portion of the offending that goes on in sexual matters and that, of that tiny portion, we successfully prosecute only a tiny portion. It is suggested that less than 5 per cent of rapes end up in a conviction. I had to say “suggested”, because I do not think that we can put our hands on our hearts and say that we have an absolutely reliable figure; we can rely only on the fact that we do not fully know.

The same will be true in relation to many of the offences that we have created under the bill that concern the inappropriate sexual behaviours that we seek to address. Therefore, the high-tech crime unit within the Scottish Drug Enforcement Agency, which is a useful start, needs to have more resources and more ability to help the wider police force and the community to detect and respond to sexual offending that involves technology. We have to consider further ways in which we can resource and respond to matters in that regard.
As a child, because I was fortunate to have it brought to my attention by my parents, I was aware of the risks of paedophilia. I suspect, however, that that was extremely unusual. Further, I also had a pretty good idea who the paedophiles who had not gone into the criminal justice system were in the town in which I was brought up. That knowledge and information were protection for me. We must not be afraid to ensure that children are informed about challenging social and sexual matters. We must not shy from that.

I have received a wee note from YouthLink Scotland, which says that it remains a little bit concerned about an issue relating to the risk of sexual harm orders. It points out that, although Disclosure Scotland might be aware of RSHOs, that does not mean that people will be placed on the disqualified list, which means that issues remain regarding whether the person will be adequately known about. It might be possible for the minister to address that matter.

I am happy to support the bill.

17:07

Margaret Mitchell (Central Scotland) (Con): I thank the Justice 1 Committee clerks, the committee’s convener and my fellow committee members for their work in relation to the passage of the bill. I give a special mention to Professor Christopher Gane, who steered the committee through complex legislation.

I welcome the general principles of the bill and take particular pleasure in the provision that is contained in section 1, which I hope will send out a clear message to those who would prey on vulnerable children. In addition to that, section 1 establishes parity with England and ensures that there is no difference between our provision for such offences and that which exists south of the border. It also provides a deterrent, which is important, and highlights the particular danger of grooming via the internet or even at the school gate.

Since entering Parliament almost two years ago, I have campaigned on the issues that we are discussing. What struck me then and still strikes me now is the conclusion of an American survey concerning the victimisation of children via the internet. The study said that, sadly, the internet is not always as safe an educational and recreational environment as we would hope that it would be. I hope that section 1 raises awareness of that fact.

There was a lot of soul searching about the other provisions in the bill. There was concern about balancing the integrity of our justice system with the clear need to protect young and vulnerable people. A breach of the civil orders in the bill constitutes a criminal offence of a sexual nature, which heightens the tensions surrounding the issue and can have far-reaching consequences.

Although we accepted the lower burden of proof—in other words, the balance of probabilities—for issuing RSHOs and interim RSHOs, we attempted to ensure today that the process was robust and that there were no unintended consequences by lodging amendments that contained possible safeguards. For example, we lodged amendments on the teaching of sex education, on time limits on the issuing of an interim RSHO—which by its very nature should be immediate and issued in an emergency situation—and on very specific circumstances in which a previous not guilty verdict could be used.

One of the main difficulties with the European Council framework decision on child prostitution and pornography was the inclusion of 16 and 17-year-olds in the definition of children. I hope that the exemptions that have been agreed to today will satisfy the terms of that decision.

I very much welcome the legislation on the understanding that it will be monitored stringently, especially in relation to RSHOs, and I hope that it will make a real difference to vulnerable children.

17:11

Mike Pringle (Edinburgh South) (LD): I am pleased to speak in the debate. However, as I joined the Justice 1 Committee only in time for stage 3 of the bill, I am afraid that I am not as well informed about its detail as other committee members. As a result, I am grateful to several committee members who gave me good guidance, and to Hugh Henry, who brought me up to date with the issues surrounding the bill.

The Liberal Democrats fully support changes in legislation to prevent sexually predatory behaviours and we support the bill’s expanded scope to protect children and young people from sexual exploitation. Although legislative change must have child protection as its paramount consideration, it must also be compatible with the rights that are enshrined in the European convention on human rights. That fact might have led to the rejection of some amendments this afternoon.

The bill introduces risk of sexual harm orders which, as we all know, are aimed at protecting children who are considered to be at risk of sexual harm from others, and makes breach of such orders a criminal offence. I understand that in the bill as originally drafted by the Executive, only an adult aged 18 or over could commit the offence of meeting a child following certain preliminary contact—in other words, grooming—and could
have an RSHO imposed on them. Those age limits were in keeping with comparable offences in England and Wales that were made under the Sexual Offences Act 2003. The bill has now removed that age limit, which means that an RSHO may be sought by the chief constable in respect of a person of any age who meets the criteria. I must say that I have considerable sympathy with Children 1st, which wanted the age limit to stay at 18.

Mrs Mary Mulligan (Linlithgow) (Lab): I appreciate that Mike Pringle joined the committee after we had had the seminar on those matters. However, does he accept that the committee lodged the amendment on that not simply because we thought that the age limit should be removed, but in response to other children’s charities, which said that they were aware of young people who were exhibiting behaviour that should be dealt with through RSHOs?

Mike Pringle: I am happy to accept that point. Perhaps I was under some misapprehension. However, I should say that the briefing from Children 1st, which I received only last week, was compelling and made a very good point. Clearly, that organisation wanted the age limit to remain. All I am saying is that I am sympathetic to its concerns. I am sure that none of us would want unnecessarily to criminalise people under 18 and I am sure—and I hope—that chief constables, procurators fiscal and the courts will have a sympathetic and understanding attitude to dealing with those individuals.

I now turn to what Marlyn Glen’s amendments showed was a contentious issue: the question of indecent photographs of 16 and 17-year-olds. If someone over 18 has such photographs and they are consensual, there is no problem, but if someone who is 16 or 17 has such photographs there could be a problem. I would have been likely to support Marlyn Glen had she pressed her amendments.

As the bill stands, 16 and 17-year-olds can take explicit sexual photographs of each other if they are married or in an established relationship. I imagine that all of us could probably define what an established relationship is, but what does “established relationship” mean to a 16 or 17-year-old? To some, it could be their first experience of love at the age of 16 or 17. It could last a week and then be over. It has been suggested that, with the wording that is now in the bill, 16 or 17-year-olds are less likely to make rash or impetuous decisions to consent to such pictures, which they might later regret. Does anyone really believe that such people will give any thought to that when they are embarking on brief but passionate affairs? I do not think so. As I said with regard to RSHOs, it is to be hoped that the police, procurators fiscal and courts will be careful and understanding in deciding which 16 and 17-year-olds they take action against. I am delighted that the minister gave a commitment to Marlyn Glen to review that part of the legislation after a suitable time.

I have highlighted the two issues that have caused me some concern. In respect of all other aspects of the bill, I have absolutely no doubt that it is very much to be welcomed and that the further protection that it offers to children is a considerable step forward. I am happy to support the bill.

The Deputy Presiding Officer: I am grateful to the Liberal Democrats and the Conservatives for waiving their closing speeches, which means that I can give three minutes to Patrick Harvie and three minutes to Pauline McNeill.

17:17

Patrick Harvie (Glasgow) (Green): I am, as I said earlier, an outsider to the committee process. As a small group without a member on all committees, it is sometimes difficult for Green members to keep track of legislation. In this case, however, coming late to the bill has been even more challenging than usual, and I express my sympathy for the committee, which has clearly tried hard to make the best of a flawed process.

I have heard serious criticism of the bill from outside Parliament—from non-governmental organisations, from professionals and from individuals. That criticism has not been of the intention to tackle the serious offences that the minister described as despicable, which should be the target of the bill, but of the way in which the bill risks making offences of perfectly normal and innocent sexual activity and sexual exploration by young people, including people who are over the age of consent. If we want young people to learn to exercise that consent responsibly and to respect themselves and one another, we have to make it clear that we respect their ability to do so and their right to do so; 16 and 17-year-olds rarely go behind the bike sheds to discover their sexuality these days. Very often, they go online—to chat, to flirt, to get to know one another and to express their sexuality in a perfectly normal and non-abusive way.

Our duty to extend the protection of the law against abuse into that new domain in society should not result in interference in behaviour that is normal, non-abusive and entirely private. During the stage 1 debate, I expressed my disappointment that the bill had given rise to serious concerns in that regard, when it should have focused on the clearly unacceptable offences that we would all find unforgivable and intolerable.
I am sorry to say that those concerns have not all been satisfactorily addressed, and I reiterate that that is not a criticism of the committee, which was left with insufficient time to deal with some aspects of the bill. The infringement of 16 and 17-year-olds’ right to consent remains an issue. There is also ambiguity around what is appropriate or inappropriate behaviour, and around what is appropriate or inappropriate material and information to give to young people. The idea—that is contained in many parts of the bill—that we should leave that to the discretion of an individual remains a serious problem.

I will vote in favour of the bill, but I will do so with grave concerns and with a desire to see the review that the minister spoke about being conducted. It should be a review not only of specific aspects, but of many aspects of the bill that have been rushed and have been introduced in a form that still gives rise to serious concerns. Those matters should be reviewed soon and should be subject to further scrutiny in Parliament. I regret not being able to support measures in the bill that are greatly needed without also having to support some aspects that give rise to very serious concerns.

17:20

Pauline McNeill (Glasgow Kelvin) (Lab): I thank the Justice 1 Committee, which has done excellent work. I am grateful for the remarks made by both ministers when they signalled their appreciation of what we have gone through.

This has been another small bill that deals with complex issues. When first we looked at it we thought, “Here’s another wee bill; it won’t take much time.” We now know from experience that a bill being small does not mean that it is not complex. I will run through a few issues and address some of the points to which Patrick Harvie referred.

One of the most important points is about proving the offence; I think that we have done the right thing on that. We are reassured by where we have ended up, because proving the offence is the most important issue. However, legislation alone is not the most important tool in fighting sexual crime against children: we know from cases that have been highlighted to us that what can be provided by way of resources along with surveillance and intelligence work by police forces is just as important. There is more work for us to do.

It is important to note that the bill stands alongside much other legislation and the work on dealing with serious violent and sexual offenders that was commissioned by the Executive and carried out by MacLean and Cosgrove. Other important work has been done. I hope that the courts will continue to use the new order for lifelong restriction for very serious offences.

Monitoring of people who are on the sex offenders register is worthy of further attention because the quality of that monitoring is what really matters. We must get to grips with that.

There is a greater incidence of situations in which adults entrap young people simply for sexual gratification than of cases in which they intend to go further. The committee was adamant about that, but we are now satisfied that there will exist the relevant offences to criminalise adults who also engage in that activity.

I will deal with the ages at which a person is defined as being a child. The idea that we can be consistent about that is nonsense—it is necessary to consider each situation on its own merits. In respect of sexual exploitation, we are obliged by Europe to define a child as being someone up to the age of 18. Let us not forget that. That is different from defining the age of a child for another purpose. It is wrong to suggest that there should be a review to come up with an age that applies in all circumstances. It cannot be done, so at stage 2 we removed the age limit for an offender, with the Executive’s support, for that reason.

Although Children 1st made in its submission a very good point about one scenario, the other scenario is that a 15-year-old could be found to be grooming a 12-year-old. Under our current law we will prosecute a 15-year-old who rapes a 12-year-old child and we will send him to the criminal courts. Because we received evidence that predatory behaviour could be shown by a 15-year-old to a younger child, we felt that, on balance, we had to remove the age limit. Let us not forget that the children’s organisations who argued for that change also want us to change the primary legislation on children’s hearings so that all those who are under the age of 18 go to children’s hearings. That completes their argument. Members should understand that that is the context in which we removed the age limit.

I am sure that I am running out of time.

The Deputy Presiding Officer: Yes. I must hurry you.

Pauline McNeill: The bill is good and I hope that members understand why the committee came to its conclusions. I am pleased that the Executive has said specifically that it will review the matter and I am confident that it will do so.

17:24

Mr Bruce McFee (West of Scotland) (SNP): The bill has come a long way since stage 1. Many concerns that the committee expressed at that
stage were addressed at stage 2 and various loopholes have been closed.

For the record, I say that I concur wholeheartedly with comments about the Executive amendments that were made by Pauline McNeill on behalf of the committee, but I also recognise the position of ministers.

The bill will generally improve protection for children. Not only will it make it an offence to contact and travel to meet a person under 16 to engage in sexual activities, it will also introduce risk of sexual harm orders, which can be imposed on individuals who display worrying patterns of behaviour of a sexual nature, or who have engaged in inappropriate sexual conduct towards a child. The bill will also provide adults and children with additional protection from sex offenders by allowing the courts to impose sexual offences prevention orders on people who have been prosecuted for certain offences.

That said, we must be careful and recognise that we need to get the message out to parents and wider society that, of itself, the bill will not adequately protect children. On that, I agree heartily with the sentiments of Children 1st, which has said that legislation alone will not protect children. Emphasis should be placed on education and prevention, with sexual abuse of children being seen as a public health priority. Danger to children comes not only from strangers or paedophiles whom they might meet on the internet, but from people who are closer to home—abuse may be perpetrated by an individual whom the child thought he or she could trust.

We will support the bill because we believe that it will contribute to the safety of children. However, let the message go out loud and clear that child protection is a job that is not just for legislators. In the words of Children 1st:

"Child protection is everyone's business."

17:26

The Deputy Minister for Justice (Hugh Henry): In response to Stewart Stevenson's question about YouthLink Scotland, I assure him that my ministerial colleagues with responsibility for education and young people will pursue the matter with that organisation.

The bill has been a difficult experience for everyone concerned, but I thank the Justice 1 Committee in particular. I appreciate the difficulties that the committee faced, but I believe that we now have a better bill as a result of its endeavours. I also want to put on record my thanks to the Scottish Executive officials who worked hard to get the bill to this stage. Our officials were often up against tight deadlines, but they sought valiantly to support ministers and the committee—as, I think, the committee appreciated—through what was a difficult process.

In the course of deliberations, we all learned as we went along, but one shocking thing that emerged in the evidence that the committee took is—as Stewart Stevenson mentioned—the speed with which technology is changing. The evidence that the committee heard from the police and from academics also revealed the cunning that is demonstrated by some of the people who use technology and other techniques to trap and abuse young children. It is astonishing just how manipulative those people can be. We heard all sorts of distressing examples of the lengths to which such people will go in trying to manipulate young people into positions in which they can be abused. It is right that we have reflected some of those concerns in the bill by seeking to move with the times and by trying to be as flexible as possible while retaining some certainty in law.

Another important outcome of the committee's discussions and deliberations is that we have now extended some of the definitions in the bill. For example, it is right that we have moved beyond simple definitions of abuse in relation to prostitution by ensuring that the offences that are introduced will apply to people who cynically, and purely for profit, try to manipulate and exploit young people not just in prostitution but through telephone sex lines or in some of the sleazy establishments to which people will go for a certain element of gratification. It is proper that those definitions have been widened.

I genuinely believe that Parliament has worked well with Government in trying to introduce legislation that will give added protection. It is encouraging that Parliament is able to send a unified message to people throughout Scotland that we will do everything in our power to protect young children and that we will not accept sexual exploitation and abuse of young children. I hope that the bill will play a significant role in the future in providing the protection that society rightly wants for children.
Protection of Children and Prevention of Sexual Offences (Scotland) Bill

[AS PASSED]

CONTENTS

Section

Meeting a child following certain preliminary contact
1 Meeting a child following certain preliminary contact

Risk of sexual harm orders
2 Risk of sexual harm orders: applications, grounds and effect
3 Interpretation of section 2
4 RSHOs: variations, renewals and discharges
5 Interim RSHOs
6 Appeals
7 Offence: breach of RSHO or interim RSHO
8 Effect of conviction etc. under section 7 above or section 128 of Sexual Offences Act 2003

Sexual services of children and child pornography
8A Paying for sexual services of a child
8B Causing or inciting provision by child of sexual services or child pornography
8C Controlling a child providing sexual services or involved in pornography
8D Arranging or facilitating provision by child of sexual services or child pornography
8E Sections 8B to 8D: supplementary
8F Liability to other criminal proceedings

Unlawful intercourse with girl between 13 and 16
8G Removal of time limit for prosecution of offence

Indecent images of children
8H Indecent photographs of 16 and 17 year olds

Sexual offences prevention orders
9 Prevention of sexual offences: further provision

General
9A Minor and consequential amendments
10 Interpretation
11 Citation and commencement

Schedule 2—Minor and consequential amendments
Protection of Children and Prevention of Sexual Offences (Scotland) Bill

[AS PASSED]

An Act of the Scottish Parliament to make it an offence to meet a child following certain preliminary contact and to make other provision for the purposes of protecting children from harm of a sexual nature, including provision for implementing in part Council Framework Decision 2004/68/JHA; and to make further provision about the prevention of sexual offences.

Meeting a child following certain preliminary contact

1 Meeting a child following certain preliminary contact

(1) A person (“A”) commits an offence if—

(a) having met or communicated with another person (“B”) on at least one earlier occasion, A—

(i) intentionally meets B;

(ii) travels, in any part of the world, with the intention of meeting B in any part of the world; or

(iii) makes arrangements, in any part of the world, with the intention of meeting B in any part of the world, for B to travel in any part of the world;

(b) at the time, A intends to engage in unlawful sexual activity involving B or in the presence of B—

(i) during or after the meeting; and

(ii) in any part of the world;

(ba) B is—

(i) aged under 16; or

(ii) a constable;

(c) A does not reasonably believe that B is 16 or over; and

(d) at least one of the following is the case—

(i) the meeting or communication on an earlier occasion referred to in paragraph (a) (or, if there is more than one, one of them) has a relevant Scottish connection;
Protection of Children and Prevention of Sexual Offences (Scotland) Bill

(ii) the meeting referred to in sub-paragraph (i) of that paragraph or, as the case may be, the travelling referred to in sub-paragraph (ii) of that paragraph or the making of arrangements referred to in sub-paragraph (iii) of that paragraph, has a relevant Scottish connection;

(iii) A is a British citizen or resident in the United Kingdom.

(2) In subsection (1) above—

(a) the reference to A’s having met or communicated with B is a reference to A’s having met B in any part of the world or having communicated with B by any means from or in any part of the world (and irrespective of where B is in the world); and

(c) a meeting or travelling or making of arrangements has a relevant Scottish connection if it, or any part of it, takes place in Scotland; and a communication has such a connection if it is made from or to or takes place in Scotland.

(2A) For the purposes of subsection (1)(b), it is not necessary to allege or prove that A intended to engage in a specific activity.

(3) A person guilty of an offence under this section is liable—

(a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;

(b) on conviction on indictment, to imprisonment for a term not exceeding 10 years or a fine or both.

(4) Subsections (6A) and (6B) of section 16B of the Criminal Law (Consolidation) (Scotland) Act 1995 (c.39) (which determines the sheriff court district in which proceedings against persons committing certain sexual acts outside the United Kingdom are to be taken) apply in relation to proceedings for an offence under this section as they apply to an offence to which that section applies.

Risk of sexual harm orders

2 Risk of sexual harm orders: applications, grounds and effect

(1) The chief constable of a police force may apply for an order under this section (a “risk of sexual harm order”) in respect of a person who resides in the area of the police force or who the chief constable believes is in, or is intending to come to, that area if it appears to the chief constable that—

(a) the person has on at least two occasions, whether before or after the commencement of this section, done an act within subsection (3) below; and

(b) as a result of those acts, there is reasonable cause to believe that it is necessary for such an order to be made.

(2) An application under subsection (1) above may be made to any sheriff—

(a) in whose sheriffdom the person against whom the order is sought resides;

(b) in whose sheriffdom that person is believed by the applicant to be;

(c) to whose sheriffdom that person is believed by the applicant to be intending to come; or

(d) whose sheriffdom includes any place where it is alleged that that person did an act within subsection (3) below.
(2A) An application under subsection (1) above shall be made by summary application.

(2B) Such an application shall be made within—

(a) the period of 3 months beginning with the date on which the matter mentioned in subsection (1)(a) above appears to the applicant to be the case; or

(b) such longer period as the sheriff considers equitable having regard to all the circumstances.

(3) The acts referred to in subsections (1) and (2) above are—

(a) engaging in sexual activity involving a child or in the presence of a child;

(b) causing or inciting a child to watch a person engaging in sexual activity or to look at a moving or still image that is sexual;

(c) giving a child anything that relates to sexual activity or contains a reference to such activity;

(d) communicating with a child, where any part of the communication is sexual.

(4) On the application, the sheriff may make a risk of sexual harm order if satisfied that—

(a) the person against whom the order is sought has on at least two occasions, whether before or after the commencement of this section, done an act within subsection (3) above; and

(b) it is necessary to make such an order for the purpose of protecting children generally or any child from harm from that person.

(5) Such an order—

(a) prohibits the person against whom the order has effect from doing anything described in the order;

(b) subject to subsection (7) below, has effect for a fixed period (not less than 2 years) specified in the order.

(6) The only prohibitions that may be imposed by virtue of subsection (5) above are those necessary for the purpose of protecting children generally or any child from harm from the person against whom the order has effect.

(7) Where a sheriff makes a risk of sexual harm order in relation to a person already subject to such an order (whether made by that sheriff or another), the earlier order ceases to have effect.

3 Interpretation of section 2

For the purposes of section 2 above—

(a) the references in that section to protecting children generally or any child from harm from a person are references to protecting them or it from physical or psychological harm caused by that person doing any of the acts within subsection (3) of that section;

(b) “child” means a person aged under 16;

(c) “image” means an image produced by any means and whether of a real or imaginary subject;

(e) a communication is sexual if—

(i) any part of it relates to sexual activity; or
(ii) a reasonable person would, in all the circumstances, consider any part of the communication to be sexual;

(f) an image is sexual if—

   (i) any part of it relates to sexual activity; or

   (ii) a reasonable person would, in all the circumstances, consider any part of the image to be sexual.

4 RSHOs: variations, renewals and discharges

(1) Any of the persons within subsection (2) below may apply to the appropriate sheriff for an order varying, renewing or discharging a risk of sexual harm order.

(2) Those persons are—

   (a) the person against whom the order has effect;

   (b) the chief constable on whose application the order was made;

   (c) the chief constable of the police force in the area of which the person against whom the order has effect resides;

   (d) a chief constable who believes that that person is in, or is intending to come to, the area of the chief constable’s police force.

(3) Subject to subsection (4) below, the sheriff—

   (a) if satisfied, except where the application is made by the chief constable mentioned in subsection (2)(c) above, that the application has been intimated to that chief constable; and

   (b) after hearing the person making the application and (if wishing to be heard) any of the other persons mentioned in subsection (2) above,

may make any order varying, renewing or discharging the risk of sexual harm order that the sheriff considers appropriate.

(4) A risk of sexual harm order may be renewed or varied so as to impose additional prohibitions only if it is necessary to do so for the purpose of protecting children generally or any child from harm from the person against whom the order has effect (and any renewed or varied order may contain only such prohibitions as are necessary for that purpose).

(6) Section 3 above applies for the purposes of this section.

(7) In this section, “the appropriate sheriff” means a sheriff—

   (a) for the sheriffdom of the sheriff who made the risk of sexual harm order;

   (b) in whose sheriffdom the person against whom the order has effect resides;

   (c) in whose sheriffdom that person is believed by the applicant to be; or

   (d) to whose sheriffdom that person is believed by the applicant to be intending to come.

5 Interim RSHOs

(1) This section applies where an application for a risk of sexual harm order (“the main application”) has been intimated to the person against whom the application is made but has not been determined.
(2) An application for an order under this section (“an interim risk of sexual harm order”)—
   (a) may be made by way of the main application; or
   (b) if the main application has been made, may be made, by application to a sheriff
       for the sheriffdom of the sheriff to whom the main application was made, by the
       person who made that application.

(3) The sheriff may, if subsection (3A) below applies, make an interim risk of sexual harm
    order prohibiting the person against whom the main application was made from doing
    anything described in the order.

(3A) This subsection applies if the sheriff is satisfied—
   (a) except where the application is made by way of the main application, that it has
       been intimated to the person against whom it is made;
   (b) that *prima facie* the person against whom the order is sought has on at least two
       occasions, whether before or after the commencement of section 2 above, done an
       act within subsection (3) of that section; and
   (c) that it is just to make the order.

(4) Such an order—
   (a) has effect only for a fixed period specified in the order;
   (b) ceases to have effect, if it has not already done so, on the determination of the
       main application.

(5) The applicant or the person against whom an interim risk of sexual harm order has effect
    may apply to a sheriff for the sheriffdom of the sheriff who made the interim risk of
    sexual harm order for the order to be varied, renewed or discharged.

6 Appeals

(1) An interlocutor granting, refusing, varying, renewing or discharging a risk of sexual
    harm order or an interim risk of sexual harm order is an appealable interlocutor.

(2) Where an appeal is taken against an interlocutor granting, varying or renewing such an
    order, the court may, in the appeal proceedings, suspend the interlocutor appealed
    against pending the disposal of the appeal.

7 Offence: breach of RSHO or interim RSHO

(1) A person, who without reasonable excuse, does anything which the person is prohibited
    from doing by—
    (a) a risk of sexual harm order; or
    (b) an interim risk of sexual harm order,
    commits an offence.

(2) Where an order made under section 123 or 126 of the 2003 Act (which make provision
    for England and Wales and Northern Ireland corresponding to that made by sections 2
    and 5 above) prohibits a person from doing a thing throughout the relevant place, the
    person commits an offence if the person, without reasonable excuse, does the thing in
    Scotland.

(2A) For the purpose of subsection (2) above, the “relevant place” is—
Protection of Children and Prevention of Sexual Offences (Scotland) Bill

(a) where the order was made in England and Wales, England and Wales;
(b) where the order was made in Northern Ireland, Northern Ireland.

(3) A person guilty of an offence under this section is liable—
   (a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;
   (b) on conviction on indictment, to imprisonment for a term not exceeding 5 years or a fine or both.

8 Effect of conviction etc. under section 7 above or section 128 of Sexual Offences Act 2003

(1) This section applies to a person who—
   (a) is convicted of an offence under section 7 above or section 128 of the 2003 Act (breach of RSHO or interim RSHO in England and Wales or Northern Ireland);
   (b) is, in England and Wales or Northern Ireland, cautioned in respect of an offence under section 128 of that Act;
   (c) is found not guilty of one of those offences on the grounds or by reason of insanity; or
   (d) is found to be under a disability and to have done the act charged against the person in respect of one of those offences.

(2) Where the person—
   (a) was a relevant offender immediately before this section applied to the person; and
   (b) would (apart from this subsection) cease to be subject to the notification requirements of Part 2 of the 2003 Act while the relevant order (as renewed from time to time) has effect,

the person remains subject to those notification requirements.

(3) Where the person was not a relevant offender immediately before this section applied to the person—
   (a) the person, by virtue of this section, becomes subject to the notification requirements of Part 2 of the 2003 Act from the time this section first applies to the person and remains so subject until the relevant order (as renewed from time to time) ceases to have effect; and
   (b) that Part of that Act applies to the person subject to the modification set out in subsection (4) below.

(4) In that application, “relevant date” means the date on which this section first applies to the person referred to in it.

(5) In this section—
   “relevant offender” has the meaning given by section 80(2) of the 2003 Act;
   “relevant order” means—
   (a) where the conviction or finding referred to in subsection (1)(a), (c) or (d) above is in respect of a breach of a risk of sexual harm order under section 2 above or section 123 of the 2003 Act, that order;
Protection of Children and Prevention of Sexual Offences (Scotland) Bill

(b) where the caution referred to in subsection (1)(b) above is in respect of a breach of a risk of sexual harm order under section 123 of the 2003 Act, that order;

c) where the conviction or finding referred to in subsection (1)(a), (c) or (d) above is in respect of a breach of an interim risk of harm order under section 5 above or section 126 of the 2003 Act—

(i) any risk of sexual harm order made upon the application to which the interim risk of sexual harm order relates; or

(ii) if no such risk of sexual harm order has been made, the interim risk of sexual harm order;

d) where the caution referred to in subsection (1)(b) above is in respect of a breach of an interim risk of sexual harm order under section 126 of the 2003 Act—

(i) any risk of sexual harm order under section 123 of that Act made on the hearing of the application to which the interim risk of sexual harm order relates; or

(ii) if no such risk of sexual harm order has been made, the interim risk of sexual harm order.

Sexual services of children and child pornography

8A Paying for sexual services of a child

(1) A person ("A") commits an offence if—

(a) A intentionally obtains for himself or herself the sexual services of another person ("B");

(b) before obtaining those services, A—

(i) makes or promises payment for those services to B or to a third person; or

(ii) knows that another person has made or promised such a payment; and

(c) either—

(i) B is aged under 18, and A does not reasonably believe that B is aged 18 or over; or

(ii) B is aged under 13.

(2) In subsection (1)(b) above, "payment" means any financial advantage, including the discharge of an obligation to pay or the provision of goods or services (including sexual services) gratuitously or at a discount.

(3) For the purposes of subsections (1) and (2) above, "sexual services" are—

(a) the performance of sexual activity; or

(b) the performance of any other activity that a reasonable person would, in all the circumstances, consider to be for the purpose of providing sexual gratification, and a person’s sexual services are obtained where what is obtained is the performance of such an activity by the person.

(4) A person guilty of an offence under this section in respect of a person aged 16 or over is liable—
(a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;
(b) on conviction on indictment, to imprisonment for a term not exceeding 7 years.

(5) A person guilty of an offence under this section in respect of a person aged under 16 is liable—

(a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;
(b) on conviction on indictment, to imprisonment for a term not exceeding 14 years.

8B Causing or inciting provision by child of sexual services or child pornography

(1) A person (“A”) commits an offence if—

(a) A intentionally causes or incites another person (“B”) to become a provider of sexual services, or to be involved in pornography, in any part of the world; and
(b) either—

(i) B is aged under 18, and A does not reasonably believe that B is aged 18 or over; or
(ii) B is aged under 13.

(2) A person guilty of an offence under this section is liable—

(a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;
(b) on conviction on indictment, to imprisonment for a term not exceeding 14 years.

8C Controlling a child providing sexual services or involved in pornography

(1) A person (“A”) commits an offence if—

(a) A intentionally controls any of the activities of another person (“B”) relating to B’s provision of sexual services or involvement in pornography in any part of the world; and
(b) either—

(i) B is aged under 18, and A does not reasonably believe that B is aged 18 or over; or
(ii) B is aged under 13.

(2) A person guilty of an offence under this section is liable—

(a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;
(b) on conviction on indictment, to imprisonment for a term not exceeding 14 years.

8D Arranging or facilitating provision by child of sexual services or child pornography

(1) A person (“A”) commits an offence if—

(a) A intentionally arranges or facilitates the—

(i) provision of sexual services in any part of the world by; or
(ii) involvement in pornography in any part of the world of, another person (“B”); and
(b) either—
   (i) B is aged under 18, and A does not reasonably believe that B is aged 18 or over; or
   (ii) B is aged under 13.

(2) A person guilty of an offence under this section is liable—
   (a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;
   (b) on conviction on indictment, to imprisonment for a term not exceeding 14 years.

8E Sections 8B to 8D: supplementary

(1) For the purpose of sections 8B to 8D above, a person is involved in pornography if an indecent image of that person is recorded; and similar expressions, and “pornography”, are to be construed accordingly.

(1A) In those sections, “provider of sexual services” means a person (“B”) who, on at least one occasion and whether or not compelled to do so, offers or provides B’s sexual services to another person in return for payment or a promise of payment to B or a third party; and “provision of sexual services” is to be construed accordingly.

(1B) In subsection (1A) above, “payment” means any financial advantage, including the discharge of an obligation to pay or the provision of goods or services (including sexual services) gratuitously or at a discount.

(1C) For the purpose of subsections (1A) and (1B) above, “sexual services” are—
   (a) the performance of sexual activity; or
   (b) the performance of any other activity that a reasonable person would, in all the circumstances, consider to be for the purpose of providing sexual gratification,

and a person’s sexual services are offered or provided to another person where such an activity is offered to be performed or performed with or for the other person.

(2) A person does not commit an offence under section 8B, 8C or 8D above by reason only of doing something within section 52(1) or 52A(1) of the Civic Government (Scotland) Act 1982 (c.45).

8F Liability to other criminal proceedings

(1) Sections 8A to 8D above do not exempt any person from any proceedings for an offence which is punishable at common law or under any enactment other than those sections.

(2) But nothing in those sections or this section enables a person to be punished twice for the same offence.

Unlawful intercourse with girl between 13 and 16

8G Removal of time limit for prosecution of offence

Subsections (4) and (7) of section 5 of the Criminal Law (Consolidation) (Scotland) Act 1995 (c.39) (unlawful intercourse with a girl under 16) are repealed.
Indecent images of children

8H Indecent photographs of 16 and 17 year olds

(1) The Civic Government (Scotland) Act 1982 (c.45) is amended as follows.

(2) In section 52 (which makes certain conduct in relation to indecent photographs of persons under 16 an offence), in subsection (2), for “16” in both places where it occurs there is substituted “18”.

(3) After section 52A (which makes possession of indecent photographs of persons under 16 an offence) there is inserted—

“52B Sections 52 and 52A: exceptions for photographs of 16 and 17 year olds

(1) If subsection (2) below applies, the accused is not guilty of an offence under section 52(1)(a) of this Act of taking or making an indecent photograph of a child.

(2) This subsection applies if—

(a) either—

(i) the photograph was of the child aged 16 or over; or

(ii) the accused reasonably believed that to be so;

(b) at the time of the offence charged or at the time when the accused obtained the photograph, the accused and the child were—

(i) married to or civil partners of each other; or

(ii) partners in an established relationship; and

(c) either—

(i) the child consented to the photograph being taken or made; or

(ii) the accused reasonably believed that to be so.

(3) If subsection (4) below applies, the accused is not guilty of an offence under section 52(1)(b) of this Act relating to an indecent photograph of a child.

(4) This subsection applies if—

(a) either—

(i) the photograph was of the child aged 16 or over; or

(ii) the accused reasonably believed that to be so;

(b) at the time of the offence charged or at the time when the accused obtained the photograph, the accused and the child were—

(i) married to or civil partners of each other; or

(ii) partners in an established relationship;

(c) either—

(i) the child consented to the photograph’s being taken or made; or

(ii) the accused reasonably believed that to be so; and

(d) the showing or distributing of the photograph was only to the child.
(5) If subsection (6) below applies, the accused is not guilty of an offence under section 52(1)(c) of this Act relating to an indecent photograph of a child.

(6) This subsection applies if—
   (a) either—
      (i) the photograph was of the child aged 16 or over; or
      (ii) the accused reasonably believed that to be so;
   (b) at the time of the offence charged or at the time when the accused obtained the photograph, the accused and the child were—
      (i) married to or civil partners of each other; or
      (ii) partners in an established relationship;
   (c) either—
      (i) the child consented to the photograph’s being in the accused’s possession; or
      (ii) the accused reasonably believed that to be so; and
   (d) the accused had the photograph in his possession with a view to its being distributed or shown only to the child.

(7) If subsection (8) below applies, the accused is not guilty of an offence under section 52A of this Act relating to an indecent photograph of a child.

(8) This subsection applies if—
   (a) either—
      (i) the photograph was of the child aged 16 or over; or
      (ii) the accused reasonably believed that to be so;
   (b) at the time of the offence charged or at the time when the accused obtained the photograph, the accused and the child were—
      (i) married to or civil partners of each other; or
      (ii) partners in an established relationship; and
   (c) either—
      (i) the child consented to the photograph’s being in the accused’s possession; or
      (ii) the accused reasonably believed that to be so.

(9) Subsections (2), (4), (6) and (8) above apply whether the photograph showed the child alone or with the accused, but not if it showed any other person.

52C Section 52B: proof of exceptions

(1) This section applies for the purpose of determining whether a matter within a paragraph of section 52B(2), (4), (6) or (8) of this Act is the case.

(2) If sufficient evidence is adduced to raise an issue as to whether the matter is the case, it shall be held to be the case, except where subsection (3) below applies.

(3) This subsection applies where the prosecution proves beyond reasonable doubt that the matter is not the case.

(4) Otherwise, the matter shall be held not to be the case.”.
Sexual offences prevention orders

9 Prevention of sexual offences: further provision

(1) In section 105 of the 2003 Act (further provision as to sexual offences prevention orders)—

(a) in subsection (2)—

(i) for the words from “within” to the end of paragraph (a) there is substituted—

“(aa) within whose sheriffdom the person in respect of whom the order is sought resides;

(ab) within whose sheriffdom the person is believed by the applicant to be;

(ac) to whose sheriffdom the person is believed by the applicant to be intending to come;”; and

(ii) at the beginning of paragraph (b) there is inserted “within whose sheriffdom lies”; and

(b) in subsection (4), for “(1)(g)” there is substituted “(1)(e)”.

(2) In section 111 of that Act (appeals in relation to sexual offences prevention orders)—

(a) in paragraph (a)—

(i) the words “refusing, varying, renewing or discharging” are repealed;

(ii) after “order” where first occurring there is inserted “on an application under section 104(5) or 105(1)”;

(iii) after “order” where secondly occurring there is inserted “or refusing, varying, renewing or discharging either such order”; and

(b) the word “and” immediately following that paragraph is repealed; and

(c) there is added at the end—

“(c) a sexual offences prevention order made in any other case and any order granting or refusing a variation, renewal or discharge of such a sexual offences prevention order are, for the purposes of appeal, to be regarded—

(i) in the case of solemn proceedings, as if they were orders of the kind referred to in section 106(1)(d) of the Criminal Procedure (Scotland) Act 1995 (c.46) (appeal against probation and community service orders);

(ii) in the case of summary proceedings, as if they were orders of the kind referred to in section 175(2)(c) of that Act (appeal against probation, community service and other orders); and

(d) where an appeal is taken by virtue of paragraph (c) above, the High Court of Justiciary may, in the appeal proceedings, suspend the order appealed against pending the disposal of the appeal.”.

(3) Section 112 of that Act (which provides for the application, with modifications, to Scotland of certain provisions of the Act relating to sexual offences prevention orders) is amended in accordance with subsections (4) and (5) below.
(4) In subsection (1)—
   (a) paragraph (a) is repealed;
   (b) in its place there is inserted—
   “(aa) the references in subsection (2) and (3)(a) of section 104 to an offence listed in Schedule 3 or 5 shall be read as references to an offence listed at paragraphs 36 to 60 of Schedule 3;”;
   (c) in paragraph (e)—
      (i) the words “or interim sexual offences prevention order” are omitted;
      (ii) for the words from “within” to the end of sub-paragraph (i) there is substituted—
      “(ia) within whose sheriffdom the person in respect of whom the order is sought resides;
      (ib) within whose sheriffdom that person is believed by the applicant to be;
      (ic) to whose sheriffdom that person is believed by the applicant to be intending to come;”;
      (iii) at the beginning of sub-paragraph (ii) there is inserted “within whose sheriffdom lies”;
      (iv) in that sub-paragraph, for “the person in respect of whom the order is sought or has effect” there is substituted “that person”; and
      (v) for “references to “the court” being” there is substituted “and, in relation to such an order, references to a court or the court shall be”;
   (d) after that paragraph there is inserted—
   “(ea) an application for an interim sexual offences prevention order—
      (i) is made by way of the main application; or
      (ii) if the main application has been made, is made, by application to a sheriff for the sheriffdom of the sheriff to whom the main application was made, by the person who made that application, (and, in relation to such an order, references to a court or the court shall be construed accordingly);”;
   (e) in paragraph (f)—
      (i) for “either such order” there is substituted “a sexual offences prevention order which was made on an application under section 104(5) or 105(1) or an interim sexual offences prevention order”;
      (ii) the word “or” immediately following sub-paragraph (i) is repealed;
      (iii) for sub-paragraph (ii) there is substituted—
      “(iia) within whose sheriffdom that person is believed by the applicant to be; or
      (iib) to whose sheriffdom that person is believed by the applicant to be intending to come;”;

Protection of Children and Prevention of Sexual Offences (Scotland) Bill

(iv) for “references to “the court” being” there is substituted “and, in relation to an application made by virtue of this paragraph, references to a court or the court shall be”;

(f) after paragraph (f) there is inserted—

“(g) an application for the variation, renewal or discharge of a sexual offences prevention order which was made where subsection (2) or (3) of section 104 applies may be made only by the person in respect of whom the order has effect or the prosecutor;

(h) such an application is made—

(i) where the sexual offences prevention order sought to be varied, renewed or discharged was made by the High Court of Justiciary, to that court;

(ii) where that order was made by the sheriff, to the appropriate sheriff.”.

(5) After that subsection there is inserted—

“(1A) In subsection (1)(h)(ii), the “appropriate sheriff” is—

(a) in a case where the person in respect of whom the order has effect is, at the time of the application for its variation, renewal or discharge, resident in a sheriffdom other than the sheriffdom of the sheriff who made the order, any sheriff exercising criminal jurisdiction in the sheriffdom in which the person is resident;

(b) in any other case, any sheriff exercising criminal jurisdiction in the sheriff court district of the sheriff who made the order.”.

(6) In section 142(3) of that Act (its Scottish extent) after “93” there is inserted “, 110”.

General

9A Minor and consequential amendments

Schedule 2 to this Act, which contains minor amendments and amendments consequential on this Act, has effect.

10 Interpretation

In this Act—

“The 2003 Act” means the Sexual Offences Act 2003 (c.42);

“sexual activity” means an activity that a reasonable person would, in all the circumstances, consider to be sexual; and a reference to engaging in sexual activity includes (other than in section 2(3)(b) above)—

(a) a reference to an attempt or conspiracy to engage in such activity; and

(b) a reference to aiding, abetting, counselling, procuring or inciting another person to engage in such activity.

11 Citation and commencement

(1) This Act may be cited as the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005.
(2) This Act, except this section, comes into force on such day as the Scottish Ministers may by order made by statutory instrument appoint and different days may be so appointed for different purposes.

(3) An order under subsection (2) above may contain transitional, transitory or saving provision.
SCHEDULE 2
(introduced by section 9A)

MINOR AND CONSEQUENTIAL AMENDMENTS

The Criminal Law (Consolidation) (Scotland) Act 1995 (c.39)

1 In section 16B of the Criminal Law (Consolidation) (Scotland) Act 1995 (commission of certain sexual acts outside the United Kingdom), in subsection (7)—

(a) the word “and” immediately before paragraph (j) is repealed; and

(b) after that paragraph there is added—

“(k) an offence under section 52A of that Act (possession of indecent images of children);

(l) an offence under section 8A of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (asp 00) (paying for sexual services of a child);

(m) an offence under section 8B of that Act (causing or inciting provision by child of sexual services or child pornography);

(n) an offence under section 8C of that Act (controlling a child providing sexual services or involved in pornography); and

(p) an offence under section 8D of that Act (arranging or facilitating provision by child of sexual services or child pornography).”.

The Criminal Procedure (Scotland) Act 1995 (c.46)

2 In Schedule 1 to the Criminal Procedure (Scotland) Act 1995 (offences against children under 17 to which special provisions apply), after paragraph 2A there is inserted—

“2B Any offence under section 52 or 52A of the Civic Government (Scotland) Act 1982 in relation to an indecent photograph of a child under the age of 17 years.

2C Any offence under section 1, 8A, 8B, 8C or 8D of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 in respect of a child under the age of 17 years.”.

The Sexual Offences Act 2003 (c.42)

3 In Schedule 3 to the 2003 Act (offences which make a person subject to the requirements of Part 2 of the Act)—

(a) in paragraph 45, after “children)” there is inserted “if—

(a) the child was under 16 and the offender—

(i) was 18 or over, or

(ii) is or has been sentenced in respect of the offence to imprisonment for a term of at least 12 months, or

(b) in imposing sentence or otherwise disposing of the case, the court determines that it is appropriate that the offender be regarded, for the purposes of Part 2 of this Act, as a person who has committed an offence under this paragraph”;

(b) in paragraph 46, after “children)” there is inserted “if—

(a) the child was under 16 and the offender—
Protection of Children and Prevention of Sexual Offences (Scotland) Bill
Schedule 2—Minor and consequential amendments

(i) was 18 or over, or

(ii) is or has been sentenced in respect of the offence to imprisonment for a term of at least 12 months, or

(b) in imposing sentence or otherwise disposing of the case, the court determines that it is appropriate that the offender be regarded, for the purposes of Part 2 of this Act, as a person who has committed an offence under this paragraph;

(c) after paragraph 59 there is inserted—

“59A An offence under section 1 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (asp 00) (meeting a child following certain preliminary contact) if—

(a) the offender—

(i) was 18 or over, or

(ii) is or has been sentenced in respect of the offence to imprisonment for a term of at least 12 months, or

(b) in imposing sentence or otherwise disposing of the case, the court determines that it is appropriate that the offender be regarded, for the purposes of Part 2 of this Act, as a person who has committed an offence under this paragraph.

59B An offence under section 8A of that Act (paying for sexual services of a child), if—

(a) the victim or (as the case may be) other party was under 16 and the offender—

(i) was 18 or over, or

(ii) is or has been sentenced in respect of the offence to imprisonment for a term of at least 12 months, or

(b) in imposing sentence or otherwise disposing of the case, the court determines that it is appropriate that the offender be regarded, for the purposes of Part 2 of this Act, as a person who has committed an offence under this paragraph.

59C An offence under any of sections 8B to 8D of that Act, if—

(a) the provider of sexual services or (as the case may be) person involved in pornography was under 16 and the offender—

(i) was 18 or over, or

(ii) is or has been sentenced in respect of the offence to imprisonment for a term of at least 12 months, or

(b) in imposing sentence or otherwise disposing of the case, the court determines that it is appropriate that the offender be regarded, for the purposes of Part 2 of this Act, as a person who has committed an offence under this paragraph.”; and

(d) in paragraph 60, for “59” there is inserted “59C”.
Protection of Children and Prevention of Sexual Offences
(Scotland) Bill
[AS PASSED]

An Act of the Scottish Parliament to make it an offence to meet a child following certain
preliminary contact and to make other provision for the purposes of protecting children from
harm of a sexual nature, including provision for implementing in part Council Framework
Decision 2004/68/JHA; and to make further provision about the prevention of sexual
offences.

Introduced by: Cathy Jamieson
On: 29 October 2004
Supported by: Peter Peacock, Hugh Henry
Bill type: Executive Bill