Justice Committee

1st Report, 2009 (Session 3)

Stage 1 Report on the Sexual Offences (Scotland) Bill
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Justice Committee

1st Report, 2009 (Session 3)

Stage 1 Report on the Sexual Offences (Scotland) Bill

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Mhairi Logan, Manager, LGBT Domestic Abuse Project;
Tim Hopkins, Policy and Legislation Officer, Equality Network;
Norman Dunning, Chief Executive, Enable Scotland;
Rev Graham Blount, Scottish Churches Parliamentary Officer;
Alistair Stevenson, Public Policy Officer, Evangelical Alliance;
David Greatorex, Head of Research, The Christian Institute;
Dr Gordon Macdonald, Parliamentary Officer, CARE for Scotland.

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Temporary Deputy Chief Constable Bill Skelly, Family Protection Portfolio, and Detective Chief Inspector Louise Raphael, ACPOS;
Professor Pamela Ferguson, School of Law, University of Dundee;
James Chalmers, School of Law, University of Edinburgh;
Professor Michele Burman, The Scottish Centre for Crime and Justice Research, University of Glasgow;
Professor Gerry Maher QC, Former Commissioner, Scottish Law Commission;
Bill McVicar, Convener of the Criminal Law Committee, and Alan McCreadie, Secretary to the Criminal Law Committee, Law Society of Scotland;
Ian Duguid QC, and Ronnie Renucci, Faculty of Advocates.

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The Rt Hon Elish Angiolini QC, Lord Advocate;
Fiona Holligan, Principal Procurator Fiscal Depute, and Andrew McIntyre, Head of Victim Policy, Crown Office and Procurator Fiscal Service;
Kenny MacAskill MSP, Cabinet Secretary for Justice;
Gery McLaughlin, Sexual Offences Bill Team Leader, Patrick Down, Sexual Offences Bill Team, and Caroline Lyon, Legal Directorate, Scottish Government.

Written evidence is published separately on the Committee’s web-page at:
Justice Committee

Remit and membership

Remit:

To consider and report on (a) the administration of criminal and civil justice, community safety, and other matters falling within the responsibility of the Cabinet Secretary for Justice and (b) the functions of the Lord Advocate, other than as head of the systems of criminal prosecution and investigation of deaths in Scotland.

Membership:

Bill Aitken (Convener)
Robert Brown
Bill Butler (Deputy Convener)
Angela Constance
Cathie Craigie
Nigel Don
Paul Martin
Stuart McMillan

Committee Clerking Team:

Douglas Wands
Anne Peat
Andrew Proudfoot
Christine Lambourne
INTRODUCTION

1. The Sexual Offences (Scotland) Bill was introduced to the Parliament on 17 June 2008 by Kenny MacAskill, Cabinet Secretary for Justice. The Parliament designated the Justice Committee as the lead committee for the Bill. Under Rule 9.6 of the Parliament’s Standing Orders, it is for the lead committee to report to the Parliament on the general principles of the Bill.

2. The Justice Committee received a report from the Subordinate Legislation Committee making recommendations in relation to the Bill’s delegated powers. Those recommendations are considered in this report in the context of the sections to which they relate. The report of the Subordinate Legislation Committee is contained in Annexe A to this report.

3. The Finance Committee agreed to adopt level 1 scrutiny of the Bill’s financial provisions. The main issue drawn to the attention of this Committee is covered at paragraph 397 of this report. In addition, the correspondence from the Finance Committee is contained in Annexe B to this report.

4. Additionally, the Equal Opportunities Committee invited written evidence from various organisations on whether the Bill would provide adequate protection from abuse for prostitutes and trafficked women, an issue not identified separately in the Bill although particular provisions may be relevant. Three responses were received and passed to the Justice Committee to take account of during its Stage 1 consideration. The correspondence from the Equal Opportunities Committee is contained in Annexe C to this report.

BACKGROUND AND CONSULTATION

5. In June 2004, Scottish Ministers asked the Scottish Law Commission (“the SLC”) to “examine the law relating to rape and other sexual offences and the evidential requirements for proving such offences, and to make recommendations for reform.” This request followed several high profile decisions of the High Court
of Justiciary on the law of rape.¹ Thereafter, the SLC undertook a process of discussion with stakeholders and interested bodies, set up an Advisory Group and in June 2006 published a discussion paper.² The responses to the SLC’s discussion paper have not been published.

6. In September 2007, during his speech on the legislative programme, the First Minister announced that the Scottish Government would introduce legislation to reform the law on rape and other sexual offences “in the light of the Scottish Law Commission’s review.”

7. In December of that year, the SLC published its Report on Rape and Other Sexual Offences, containing at Appendix A, a draft Bill.³ At paragraph 6.2 of its report, the SLC said—

“after consultation we have decided not to make any recommendations as to reforming the law of evidence in relation to the offences which are within the scope of this project”

and continued—

“our conclusion is based on two fundamental considerations; first, many of the topics which we considered (such as mutual corroboration and character evidence) are better suited for reform across the whole spectrum of criminal offences and not solely in the context of sexual offences; secondly, for topics which are specific (or mainly so) to sexual offences (such as sexual history evidence), the required detailed and thorough analysis cannot be made within the timescale of this project.”

Scottish Government consultation

8. As the SLC’s final report included specific legislative recommendations in the form of a draft Bill, some of which differed from its initial thinking, the Scottish Government issued a further consultation. This consultation ran until March 2008 and received over 1,200 responses, “the majority of which were from individuals and related specifically to the Scottish Law Commission’s recommendations on underage sexual activity.”⁴

9. The responses to the Government’s consultation on the SLC’s final report and draft Bill, although available in hard copy in the Government library, were not, during the course of the Committee’s Stage 1 evidence taking, publicly available. However in the final stages of preparing this report the responses were made available more widely.

¹ Lord Advocate’s reference (No 1 of 2001) 2002 SLT 466 in which the court held that the crime of rape was defined as a man having sexual intercourse with a woman without her consent but it was not a requirement that the man forcibly overcame the will of the woman.
² McKearney v HM Advocate and Cinci v HM Advocate, decisions interpreted as flagging up problems for the Crown in proving the accused’s lack of belief in the consent of the victim.
⁴ Policy Memorandum, Paragraph 27.
10. The Policy Memorandum accompanying the Scottish Government’s Bill, states that a “full analysis of the responses to the consultation will be published separately and copies placed in SPICe.” No such analysis has been provided or published by the Scottish Government.

11. The Committee was disappointed that the responses to the consultation on the Scottish Law Commission’s draft Bill were not publicly available during the Committee’s evidence taking and that the full analysis has not, to date, been made available or published. Timely publication of the responses and the analysis would have been helpful to both the Committee and witnesses and other interested parties. The Committee requests that in future such information is made available from the beginning of the parliamentary scrutiny process and certainly by the time the Committee comes to take evidence.

12. The Scottish Government’s Bill, introduced in June 2008, is based on the draft Bill published by the SLC and in the main reflects the Scottish Law Commission’s proposed provisions. However, there are important aspects where the Bill under consideration differs from what was proposed by the SLC in its draft Bill and these are discussed in the relevant parts of this report.

EVIDENCE RECEIVED BY THE COMMITTEE

13. The Committee issued a call for evidence in June 2008 and received fifty eight written submissions by the time of completion of the evidence-taking. All written submissions, accepted by the Committee into evidence, are available on the Committee’s web page.6

The Committee took oral evidence as follows—

28 October 2008
Sandy Brindley, Rape Crisis Scotland
Susan Gallagher and Frida Petersson, Victim Support Scotland
Louise Johnston, Scottish Women’s Aid

4 November 2008
Netta McIver and Karen Brady, Scottish Children’s Reporter Administration
Martin Crewe, Barnardo’s Scotland
Jan McClory, Children 1st
Kathleen Marshall, Scotland’s Commissioner for Children and Young People
Dr Jonathan Sher, Children in Scotland

5 Policy Memorandum, Paragraph 28.
6 http://www.scottish.parliament.uk/s3/committees/justice/index.htm
OVERVIEW OF THE BILL

14. The Policy Memorandum states that the Bill provides for a statutory framework for sexual offences in Scots law. The Bill repeals the common law offences of rape, sodomy, clandestine injury to women and a number of other statutory sexual offences and creates new statutory offences relating to sexual conduct, in particular where there is no consent.
15. New statutory offences are created including rape, sexual assault, sexual coercion, coercing a person to be present during sexual activity, communicating indecently and administering a substance for a sexual purpose.

16. The Bill provides a general definition of consent as “free agreement” and provides a non-exhaustive indicative list of factual scenarios in which free agreement or consent, is absent.

17. A category of new offences is created, known as “protective offences” which will criminalise sexual activity with anyone who does not have capacity to consent to sexual activity either because of age or because of mental disorder.

18. Professor Gerry Maher, who was the lead Commissioner for the SLC’s discussion paper and the SLC’s draft Bill, summarised the principles behind the proposals put forward by the SLC—

“first and foremost we are concerned about sexual autonomy as a principle: the Bill should both promote and protect sexual autonomy. Of course, the sexual autonomy principle has important implications for the provisions on consent. Another fundamental principle is protection. There are people out there who are vulnerable to sexual exploitation and there are people for whom sex is not an appropriate activity. The law should be seen to protect such people. We also had other aims. Clarity in law is an important aim for any law reform, and this is an area in which the law must be clear.”

Rape – present conviction rates
19. The provisions in the Bill were broadly welcomed, by those from whom the Committee heard, as part of a wider programme to improve the low conviction rate for rape. However many acknowledged that there were limitations to what the Bill, on its own, could do.

20. The Lord Advocate stated that there is no “magic bullet” for improving conviction rates but that she hoped—

“that a package of changes and reforms and consideration will adjust the situation. It is not about improving the conviction rate; it is about ensuring that sound cases are put before the juries, that juries are placed in a position where they are able to test the evidence that is available and that the process has been expeditious and supportive for the victim as well as fair to the accused.”

21. Professor Michele Burman, University of Glasgow, was supportive of what the Bill was trying to achieve and said—

“I think that the Bill will have a positive impact. In particular, it marks an attempt to place existing common-law and statutory sexual offences in a single act and represents an important attempt to bring clarity into this area of law. The provision of a statutory definition of consent is important, because it brings much needed clarity, and will be a positive impact of the Bill...Having

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a clear understanding of what consent means will be especially helpful to juries, as well as to complainers and, dare I say it, to the accused.”

22. Professor Pamela Ferguson, University of Dundee, also agreed, but in doing so said—

“The Bill is to be welcomed because it provides clarification. However more needs to be done on the law of evidence, such as sexual history evidence. That needs to be looked at next. In addition, there is a greater role for education, particularly in schools, about what we mean by rape and sexual offences.”

23. However, other witnesses were more circumspect. For example, James Chalmers, University of Edinburgh, said—

“It is reasonable to say that simply clarifying the definitions of the relevant offence should ensure that there is less possibility of a jury being misdirected, for example, which might be helpful. I do not envisage any detrimental effects coming out of the Bill. All told, I simply do not envisage there being much effect one way of the other.”

24. The Law Society of Scotland said—

“The Society is concerned, however, that there is room for public misconception as to the purpose of this legislation. It is the Society’s understanding from discussion between the Society’s Criminal Law Committee and the Scottish Government’s Bill Team and perusal of the Bill itself that the proposed legislation is intended to be a consolidating and not a particularly innovative measure.”

25. One written submission, from the UK Men’s Movement, expressed fundamental opposition to the Bill—

“the draft Bill is an ill-advised and malevolent attempt by an over-weaning State to use the blunt instrument of the law to over-regulate complex and private human behaviour.”

Statistical data
26. The Committee is aware that recorded crime figures do not generally provide a full picture of all crime committed because many criminal incidents are never reported. The SPICe briefing on rape indicates that many instances of rape or attempted rape are never reported to the police (some studies looking at Scotland and other countries suggest that 80% or more may not be reported). Such cases never therefore appear in the statistics produced by the Police and COPFS.

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12 Law Society of Scotland. Written submission to the Justice Committee.
13 UKMM. Written submission to the Justice Committee.
14 Scottish Parliament Information Centre (SPICe) briefing on rape published June 2008.
27. The Scottish Crime and Victimisation Survey\(^{15}\) seeks to provide information which complements recorded crime data. During the last survey, researchers found that only 38% of crimes highlighted by victims responding to the survey had been reported to the police. The methods used during that survey did not produce sufficient data to allow analysis of the level of rape (and other sexual offences) in Scotland. Changes have been made to the 2008 survey, now referred to as the Scottish Crime and Justice Survey, which should increase its potential to provide meaningful statistics on sexual offending in Scotland.

28. The statistical bulletin *Recorded Crime in Scotland, 2007/08*\(^{16}\) provides information on crimes recorded by the police. The following table reproduces some of its figures for the numbers of rapes and attempted rapes recorded by the police. The Committee is aware that these figures only provide a partial picture of the actual level of offending in this area.

*Recorded Crime – rape and attempted rape*

<table>
<thead>
<tr>
<th>Year</th>
<th>2000/01</th>
<th>2001/02</th>
<th>2002/03</th>
<th>2003/04</th>
<th>2004/05</th>
<th>2005/06</th>
<th>2006/07</th>
<th>2007/08</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rape</td>
<td>549</td>
<td>631</td>
<td>743</td>
<td>845</td>
<td>900</td>
<td>975</td>
<td>922</td>
<td>908</td>
</tr>
<tr>
<td>Attempted rape</td>
<td>141</td>
<td>157</td>
<td>181</td>
<td>192</td>
<td>209</td>
<td>186</td>
<td>201</td>
<td>145</td>
</tr>
<tr>
<td>Total</td>
<td>690</td>
<td>788</td>
<td>924</td>
<td>1,037</td>
<td>1,109</td>
<td>1,161</td>
<td>1,123</td>
<td>1,053</td>
</tr>
</tbody>
</table>

Source: Recorded Crime in Scotland 2007/08, tables 1 and A2

29. The bulletin *Criminal Proceedings in Scottish Courts, 2006/07*\(^{17}\) provides information on the outcome of criminal court proceedings. The table below reproduces figures for the number of persons against whom a charge of rape or attempted rape was proven.

*Persons with a Charge Proved – rape and attempted rape*\(^{18}\)

<table>
<thead>
<tr>
<th>Year</th>
<th>1999/00</th>
<th>2000/01</th>
<th>2001/02</th>
<th>2002/03</th>
<th>2003/04</th>
<th>2004/05</th>
<th>2005/06</th>
<th>2006/07</th>
</tr>
</thead>
<tbody>
<tr>
<td>Persons</td>
<td>48</td>
<td>52</td>
<td>67</td>
<td>55</td>
<td>58</td>
<td>69</td>
<td>61</td>
<td>45</td>
</tr>
</tbody>
</table>

Source: Recorded Crime in Scotland 2007/08, table 4(a)

30. The Committee noted that the figures for persons with a charge proved of rape or attempted rape are significantly lower than the recorded crime figures for the same offences. An allegation of rape may fail to produce a conviction for various reasons (e.g. due to a lack of evidence). Some such allegations will not reach court because of decisions of the police or prosecution. In relation to those cases which do reach court, Scottish Government statistics for 2006/07 indicate that a charge was proved in 49% of rape and attempted rape cases.\(^{19}\)

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\(^{15}\) A large-scale household survey of people’s experiences and perceptions of crime. The latest published results are from a survey carried out in 2006 which sought information on incidents taking place between April 2005 and March 2006.


\(^{18}\) The bulletin states that the 2006/07 figure may be underestimated slightly due to late recording of disposals.

\(^{19}\) See *Criminal Proceedings in Scottish Courts, 2006/07*, Table 2.
31. If allegations which never reach court are included, and indeed allegations which are never reported to the police, estimates of conviction rates for rape or attempted rape fall dramatically from the figure of 49%.

Call for research
32. It was put to the Committee by the Lord Advocate that the conviction rate for sexual offences in Scotland is no worse than in other jurisdictions, rather it is the restrictive definition of rape that causes the difficulty in Scotland, a matter considered later in this report.

33. Despite this, the Law Society of Scotland and the Faculty of Advocates both suggested that further research is required into what the problems are and why juries do not convict in rape cases. The Committee recognises that there would be difficulties in trying to do this, not least of which is the Contempt of Court Act 1981 which makes it a contempt of court to “obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceedings.”

34. Rape Crisis Scotland suggested that a full attrition study was needed for Scotland as presently it is not known how many cases fall because of the complainer withdrawing the allegation as opposed to prosecution decisions.

35. The term “attrition” is used to describe the process whereby criminal cases “fail” at some point between the commission of the crime and the securing of a conviction. This can occur because the victim is, or becomes, reluctant to support a prosecution or, alternatively, because a decision is taken by one of the constituent parts of the criminal justice process that the allegation should be pursued no further.

36. The Committee asks the Scottish Government to advise what consideration, if any, it is giving to a full attrition study of cases of sexual assault and rape.

Law of evidence
37. Concerns were also expressed by some witnesses about the law of evidence, and in particular, issues around sexual history and character evidence. The Lord Advocate spoke in support of further work in this area saying—

“The law of evidence in particular is crucial in relation to the conviction rate in Scotland. That law must be examined and a decision must be made as to whether it remains as it is or whether consideration should be given to variation – for example, in relation to the Moorov doctrine and its operation.”

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21 Contempt of Court Act 1981, Section 8.
38. The Moorov doctrine is not confined to sexual offences. It is the general rule of the law of evidence that, in certain circumstances, where a person is charged with a series of offences, evidence from a single source in respect of any one of the offences can corroborate the evidence in relation to another of them, provided that there is an underlying unity which makes each offence part of a single course of conduct.

39. In November 2007, the Scottish Ministers invited the SLC to consider the law relating to judicial rulings that can bring a solemn case to an end without the verdict of a jury, and rights of appeal against such; the principle of double jeopardy, and whether there should be exceptions to it; admissibility of evidence of bad character of previous convictions, and of similar fact evidence; and the Moorov doctrine. Following from this reference, the work was split into separate projects. A discussion paper on Crown Appeals was published in March 2008, followed in July 2008 by a report. The SLC aims to report on double jeopardy in early 2009 and on the other matters in 2010 or 2011.

40. It may be that the issues raised by witnesses in relation to sexual history and character evidence can be considered in the round by the SLC under the referral made in November 2007 by the Scottish Ministers, however it is not clear that this is the intention.

41. Despite the origins of the SLC’s remit, the issue of increasing the conviction rate for rape did not appear to be significant when considering the implications of the Bill.

42. The Committee therefore seeks clarification from the Scottish Government on what is being done at present on the issues of sexual history and character evidence.

PART 1 – RAPE ETC.

Rape

43. Section 1 of the Bill creates a statutory offence of “rape” involving penile penetration of the vagina, anus or mouth of another person without consent and without any reasonable belief that there was consent. The Bill’s Explanatory Notes explain that—

“a person will commit the offence of rape by intentionally or recklessly penetrating, with their penis, the victim’s vagina, anus or mouth, in circumstances where the victim does not consent, and the accused has no reasonable belief that the victim is consenting to the penetration.”

Existing common law definition of rape

44. At present in Scotland, rape is governed by the common law. The common law offence involves penile penetration of a woman’s vagina without her consent. The common law definition does not include any other form of penile penetration. For example, under current provisions, penile penetration of a man’s anus, without

his consent, although criminal (chargeable as either as sodomy or indecent assault) is not rape. Thus, by including penile penetration of the anus or mouth within the definition of rape, the Bill will widen the scope of the offence.

**Definitions of rape – other jurisdictions**

45. In comparative terms, the Scots law definition of rape is quite narrow and is seen by some as being too restrictive.\(^\text{26}\) Many other legal systems now have a much wider definition of rape.

46. For example, since 2003, rape in England and Wales can be penile penetration of the victim’s vagina, anus or mouth. In France, rape involves any act of sexual penetration. In Sweden, rape involves sexual intercourse or another sexual act that, having regard to the nature of the violation and the circumstances in general, is comparable to sexual intercourse. In Victoria, Australia, rape involves penile penetration of the victim’s vagina, anus or mouth or penetration of the victim’s vagina or anus by any object or body part other than the penis. In Western Australia and New South Wales there is no offence called “rape” but the offence of sexual assault covers those acts described elsewhere as rape.

**Problems with existing common law definition of rape**

47. The Lord Advocate told the Committee that there are many common obstacles throughout the world to securing convictions in cases of rape and sexual assault and, as highlighted earlier in this report, that—

> “the conviction rate for sexual offences in general is as good here as it is in any other jurisdiction; it is the restrictive aspect of our definition of rape that causes the difficulty. So far as that is concerned, the problems arise from a number of complex variables. First, we operate with a very narrow definition of rape...Secondly corroboration is required. That is another feature that is unique to this jurisdiction.”\(^\text{27}\)

48. When considering the existing law in this area, the SLC said—

> “There are limits on how far (common) law can be altered by means of judicial decision, even if it is clear that the law no longer reflects contemporary social values. For example, there was, from at least the late 18th Century, a rule that a husband could not be convicted of raping his wife. That rule was abolished by judicial decision but only in 1989. A more far-reaching change to the law of rape, as for example extending the types of prohibited conduct to include anal or oral penetration of the victim, would be unlikely to result from judicial development of the common law.”\(^\text{28}\)

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\(^{26}\) For example, see Scottish Law Commission, *Discussion paper on Rape and other Sexual Offences* (Discussion Paper No 131) paragraphs 4.18 – 4.20; Clive, Ferguson and Gane, Draft Criminal Code for Scotland, ss. 60 and 61 with related commentary.


49. Another concern with the common law as it stands is that a man cannot be guilty of rape if he has sexual intercourse with a woman in the belief that she consents, even if he has no reasonable grounds for that belief.\textsuperscript{29}

**New statutory definition of rape**

50. The creation of a new statutory offence of rape with a wider definition, recognising that men can be the victims of rape, was generally welcomed by all from whom the Committee took evidence. Also welcomed was the clear statement in the Bill that where a victim does not consent, any unreasonable belief on the part of the perpetrator that there was consent would not prevent a conviction.

51. Professor Gerry Maher explained how the SLC reached its decision on how to define rape—

   "We took the view that, in trying to separate out the different types of sexual assault offences, of which rape is one, it is important to make it clear that the law should reflect the specific type of wrong that has been done to the victim. It seemed to us that penetration with someone else’s sexual organ is a distinct type of wrong that should have its own offence, which should be a separate offence from other types of sexual assault including other types of penetration."\textsuperscript{30}

52. Many witnesses were supportive of the Bill’s definition of rape and noted that it reflects the fact that the crime of rape is mainly committed by men. For example Professor Michele Burman, said—

   "I support the view that penile penetration is a crucial element of rape. I think that I said in my written submission that rape is a powerful and weighty word that taps into complex symbolic meanings. It conveys in specific terms the nature of the offence and denotes a specific type of wrong, with characteristics that are quite distinct."\textsuperscript{31}

53. James Chalmers, said—

   "It is fair to say that penile penetration is a different form of wrong. Technically, the Bill is gender neutral, because any person can commit the offences, so the Bill therefore avoids the questions that might arise due to gender reassignment. However, once the wrong of penile penetration is identified as being separate and distinct, it flows from that that essentially only men can commit the crime of rape – at least, as the principal actor."\textsuperscript{32}

54. However in both written and oral evidence, the Faculty of Advocates expressed concern about the proposed statutory definition of rape—

   "Judging from our experience, we think that juries will be reluctant to consider oral penetration as a form of rape, which is why we are against it…Our experience so far has been that there have been perfectly proper

\textsuperscript{29} Jamieson v HM Advocate 1994 Scots Law Times 537.
prosecutions and convictions for indecent assault, which deals with the libel of oral penetration and is dealt with appropriately by the courts. Therefore, we see no need to change the law in the way that is suggested.”

55. The Faculty also said that, in its view, there was a difficulty with the concept of recklessness being introduced into the actus reus (the actions required to constitute the crime). The Faculty commented—

“It is not easy to envisage a situation in which the actus reus of the offence could be committed “recklessly”...the extension of an offence that is substantially an offence of assault to include recklessness is a fundamental change in the law.”

56. In the view of the Faculty, there will be recklessness in the physical act not in the intention, as is the case presently. However this view was not shared by the Law Society of Scotland who said—

“Our view was that the recklessness that is specified related to mens rea, and we did not have a difficulty with it being placed in the section. I hear what the Faculty of Advocates has said, and understand its concerns, but if one considers the idea of recklessness as part of mens rea, there is no particular difficulty.”

57. The Bill provides that the act of penetration may be intentional or reckless. The Committee understands that this would, for example, allow the successful prosecution of a man for rape where there is proof that there was penile penetration of the victim’s vagina, even if the man claims that he only intended to have external sexual contact and the prosecution is only able to prove that he was reckless in relation to penetration.

58. Notwithstanding the Committee's understanding in this regard, the Committee considers that it would be helpful if the Scottish Government would confirm that this is the case.

59. Other witnesses felt that the definition of rape was not wide enough. In its written and oral evidence Victim Support Scotland said it believed that—

“the term “rape” should include any (intentional or reckless) sexual penetration of the vagina, anus or mouth without that person’s consent, regardless if this penetration is made by penis, other parts of the body or an object.”

60. Victim Support Scotland said that this definition would make the offence completely gender neutral (the crime of rape could then be committed by both men and women), and would recognise that penetration with an object has the potential to cause a higher level of physical, internal damage and that victims experience

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34 Faculty of Advocates. Written submission to the Justice Committee, Official Report, 18 November 2008, Col 1376.
36 Victim Support Scotland. Written submission to the Justice Committee.
the same distress and psychological impact regardless of what is used to penetrate.

61. In Victim Support Scotland’s view, changing the definition of rape in this way would remove the need for an overlap and confusion between rape (section 1) and sexual assault (section 2) and create a distinction in law between penetrative and non-penetrative acts.

62. The Cabinet Secretary for Justice said that although Scottish Ministers took the definition of rape from the SLC’s proposals and that in Scottish Minister’s views, the inclusion of oral penetration was felt to be satisfactory, he was happy to take account of views and to re-consider whether the definition should include penetration by an object.

63. **Having considered the evidence received, the Committee is content with the definition of rape as proposed in the Bill.**

**Transgender issues**

64. The Equality Network said that it is unclear whether the definition of rape would cover the rape of a transsexual woman who has a surgically constructed vagina, either because of the surgical construction or because the victim might still legally be a man if she had not received gender recognition under the Gender Recognition Act 2004.

65. In its written submission, the Lesbian, Gay, Bisexual and Transgender Abuse Project stated that the language used in section 1 of the Bill to describe genitalia that have been created in the course of surgery, such as gender reassignment surgery is inappropriate. It advised that the term “artificial” is not generally used to refer to surgically reconstructed parts of the body but to prosthetic parts. The Committee notes that the terms “artificial penis” and “artificial vagina” are not used in the Sexual Offences Act 2003, the corresponding legislation for England and Wales.

66. **As the Cabinet Secretary undertook to consider this issue, the Committee requests confirmation of the Scottish Government’s intention in this regard and that the appropriate changes will be brought forward by way of amendments at Stage 2.**

**Sexual assault**

67. Section 2 of the Bill creates a statutory offence of sexual assault which will, in the main, involve physical contact without consent or without any reasonable belief that consent exists.

68. Subsection (2) provides the four specific sexual acts which will each constitute a sexual assault: (a) penetrating the victim’s vagina, anus or mouth by any means in a sexual way; (b) touching the victim in a sexual way; (c) having any other sexual contact with the victim, whether directly or through clothing and whether with a body part or implement; and (d) ejaculating semen onto the victim.
69. These acts are generally covered by existing offences, in particular the common law offence of indecent assault. It should be noted that the Bill does not abolish the existing offence of indecent assault, but it does provide that any conduct that could be charged under section 2 could not be charged under a pre-existing offence.

70. An example of where a person might still be prosecuted for indecent assault, rather than charged under the new statutory offence created by section 2 of this Bill, is given at paragraph 3.46 of the SLC’s report – where someone urinates on another (without that person’s consent). Such an act is not covered by the new offence in section 2, as in terms of the Bill, there is a general requirement for physical contact between the perpetrator and the victim.

71. In its report, the SLC explained—

“We do not recommend that the common law on indecent assault should be abolished in its entirety. Instead we favour retaining the common law except in relation to those activities which constitute the proposed statutory offence of sexual assault (or indeed any other offence in the draft Bill)...We wish to retain the possibility that someone who engages in an attack, but not of a type within the definition of sexual assault, should still be liable to be convicted of assault, and where the circumstances merit it, of indecent assault.”

72. The Committee sees the merit in this approach.

Counselling and advice

73. Sense Scotland, an organisation which provides services for people who are deafblind, have sensory impairment or other physical, learning or communication difficulties, said that under current legislation, it is almost impossible to provide sexual health information to some of the people it supports. Primarily this is because of the tactile nature of communication, a general lack of formal language; the impossibility of fully understanding new information or concepts without experiencing them and therefore difficulties with consent or free agreement.

74. Sense Scotland said that it had concerns about section 2(2)(b)—

“From this is it is quite clear that any hands-on teaching is likely to be impossible, unless there is free agreement from the person involved.”

75. Other organisations such as the Scottish Child Law Centre raised similar concerns with regard to the offences against children and suggested that there should be clear exemptions for legitimate counselling and advice work.

76. The Committee draws these concerns to the attention of the Scottish Government and asks for its response.

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38 Sense Scotland. Written submission to the Justice Committee.
Overlap with section 1
77. The new statutory offence proposed in the SLC’s draft Bill and adopted by the Government in its Bill provides, in section 2, for sexual assault by penetration and indeed creates a deliberate overlap with section 1 by virtue of the definition of penetration “by any means”. The maximum penalty on conviction on indictment for an offence under either section 1 or 2 is life imprisonment.

78. The Faculty of Advocates questioned why the legislation seemed to make the same situation eligible for prosecution in two different ways, seeing no obvious reason for choosing to prosecute a case under section 1 rather than section 2.  

79. The Law Society of Scotland suggested that section 2(6) could cover the situation where a victim did not know what penetration was with. If the accused was tried under section 2, instead of section 1, and gave evidence that penetration was with his penis, it would then be open to the Crown to seek a conviction under section 2(6) even if something else was labelled at the outset.  

80. The Lord Advocate confirmed that if there was a crime that supported the offence of rape, then it would be prosecuted as rape, but that the overlap was deliberate—

“The difficulty would be in cases where it might not be possible to corroborate the fact that it was a penis that made the penetration. Victims might be blindfolded in some cases, and they might have no idea with what they have been penetrated”

81. The Committee understands the rationale for the approach taken with regard to the offences covered by sections 1 and 2 and for the element of overlap. The Committee is content with this approach.

Sexual assault by penetration

82. In its original discussion paper, the SLC proposed that in addition to rape, there should be a further separate offence of sexual assault by penetration. This proposal received support from consultees.

83. However the SLC’s thinking shifted and its draft Bill did not recommend that sexual assault by penetration should be a separate offence. In its final report accompanying the draft Bill, the SLC said that it was still of the view that the law should recognise non-penile penetration as a specific sexual wrong but not as a separate offence, rather it should be “one of several forms of conduct which constitute sexual assault.”

84. The SLC gave a number of reasons for this change of approach. One reason was that the scope of the proposed offence would be limited to non-penile penetration of the vagina or mouth. Extension of the offence to cover penetration of the mouth, although in some instances as serious as other forms of sexual...
penetration, could catch activities such as a “stolen” kiss. Another reason was that the SLC wanted to avoid creating a hierarchy of offences.

85. In explaining the approach adopted in its draft Bill, the SLC said that including non-penile penetrative activity under the heading of sexual assault avoided a distinction being drawn between penetrative attacks which constitute the offence of sexual penetration and penetrative attacks which are to be regarded as sexual assaults.  

86. Despite the explanation given by the SLC for its approach to defining rape and sexual assault in sections 1 and 2, much of the evidence taken by the Committee was in favour of the SLC’s initial proposal to create a further offence of sexual assault by penetration.

87. For example, in its written submission, Rape Crisis Scotland said—

“there should be a separate offence of sexual assault by penetration which is equivalent in seriousness and maximum sentence to rape, rather than this being subsumed within the new offence category of sexual assault.”

88. This was supported by Scottish Women’s Aid, who explained in oral evidence—

“the violation of someone’s person by an object should be acknowledged as being equal in severity to rape. If that offence were enshrined as a separate offence, it would give some weight to that view of the severity of the offence. Women have commented that violation of their person by an object is as distressing as penile penetration. Although we clearly wish to differentiate between penile penetration and penetration by an object, they are equal in severity.”

89. The Equality Network said—

“There should be a separate offence. The English offence is called “sexual assault by penetration”, but the term “rape with an object” would be better because it captures the victim’s rape-like experience while distinguishing the crime from the central rape offence of penile penetration. The offence should cover vaginal and anal penetration, but not oral penetration; that is what the English law does.”

90. A number of witnesses raised the issue of rape by a woman and to research by Stonewall Scotland which found that one in fifteen lesbian or bisexual women said that they had been raped by a partner. For that reason, the LGBT Domestic Abuse Project, supported by the Equality Network, spoke in favour of creating a new offence—

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44 Rape Crisis Scotland and Scottish Women’s Aid. Written submissions to the Justice Committee.
47 Equality and Human Rights Commission, the Equality Network and the LGBT Domestic Abuse Project.
“It is important that the rape with an object offence is included to cover lesbian and bisexual women’s experience in the context of domestic abuse. Without that we cannot say that the legislation is sexual-orientation neutral because it will not cover the experience of a sizeable proportion of women. I support what Scottish Women’s Aid and Rape Crisis Scotland said on the issues. It is important that “rape with an object” is used.”

91. Professor Pamela Ferguson agreed that there could be merit in this suggestion—

“There might be merit in having a separate offence of penetration with an object. Currently, that offence is included in section 2 as part of sexual assault. However, it is a serious form of sexual assault and, for the point of fair labelling and having previous convictions reflect the gravity of the offence, having a separate offence has merit.”

92. Professor Michele Burman also gave support—

“I support the proposal to have a separate offence that is distinct from sexual assault and equivalent in seriousness and maximum sentence to rape.”

93. Professor Gerry Maher, in oral evidence, explained further why the SLC had adopted the approach taken in the Bill—

“There is no suggestion that in confining rape to penile penetration we are saying that all instances of penile penetration are worse than other forms of penetration, or that there is some form of hierarchy in that respect...One of our pragmatic reasons for including sexual assault of penetration within the broader category of sexual assault was to do with the point about maximum penalties. It seemed to us that it would be better to keep sentences for all types of sexual assault within the range of the possible maximum of life imprisonment. Technically it might be more difficult to attach a maximum of life imprisonment to what might be termed bare sexual assault – in other words, non-penetrative assault – but locating sexual assault by penetration within the broader category of sexual assault might have advantages.”

94. Professor Maher also drew attention to the fact that there are existing conventions about maximum penalties for statutory offences and stated that although it would not be impossible to argue for life imprisonment as a maximum penalty for a residual category of sexual assault, in the view of the SLC, it was easier to create a general type of sexual assault, under section 2, which avoided any perception of hierarchy.

95. This approach was supported by the Faculty of Advocates and the Law Society of Scotland. Bill McVicar of the Law Society said—

“In my view it would be redundant under the Bill to create an offence of rape with an object. We should get away from the notion that the Bill creates a hierarchical structure of offences – offences should be considered in the round, rather on the basis that one offence is more serious than another. There is no need for a separate offence relating specifically to penetration with an object.”\textsuperscript{52}

96. Victim Support Scotland did not support the creation of a further offence separate from rape and non-penetrative sexual assault.\textsuperscript{53}

97. After careful consideration of the evidence received and in recognition of the comparable distress such an act is likely to cause the victim, the Committee has reached the view that there should be a separate offence of rape with an object or with another part of the body, limited to vaginal or anal penetration, and with the same penalties as rape. Such an offence already exists for England and Wales and the Committee recommends that the same offence should be created for Scotland.

Sexual coercion

98. Section 3 creates the offence of “sexual coercion” intended to cover circumstances in which sections 1 and 2 will not apply, for example where someone forces another to have sex or to engage in sex that does not involve the accused. Professor Maher explained—

“It seemed to us that there is an important gap in the law in that regard, which the Bill’s sexual coercion provisions are meant to cover. An accused can get sexual pleasure, for a variety of reasons, from forcing someone else to engage in a sexual act. We thought that the law should make it absolutely clear that that is a crime.”\textsuperscript{54}

99. The Faculty of Advocates felt that further clarity was required and suggested that it would be useful if the Bill made it explicit that the provisions in this section are directed at coercion by someone of someone else into sexual activity with a third person.\textsuperscript{55}

Coercing a person into being present during a sexual activity

100. Section 4(2) provides that in relation to coercing a person into being present during a sexual activity, one of two purposes must be proved. The purposes are obtaining sexual gratification or humiliating, distressing or alarming the victim. The Lord Advocate said that this could present a problem for prosecutors as—

“The actual motivation, or the reason why something has been done, is not something that we ordinarily have to prove.”\textsuperscript{56}

\textsuperscript{55} Faculty of Advocates. Written submission to the Justice Committee.
101. The Committee sought clarification of whether there was a possibility of parents who have sexual intercourse in the presence of their infant child being caught by this provision in the Bill. The Lord Advocate said that this would not happen because the prosecutor’s common sense would be used. However, the Committee considers that there is still the potential, albeit on a strict reading of this provision, that this could be an unintended consequence.

102. The Bill includes three similar offences (although consent is only relevant to the first of these): section 4 coercing a person into being present during a sexual activity; section 17 causing a young person to be present during a sexual activity and section 24, causing an older child to be present during a sexual activity.

103. The Committee seeks clarity on whether in relation to any prosecution under section 4, on the basis that the accused acted for the purposes of obtaining sexual gratification, the prosecution would have to prove that the accused sought sexual gratification from the fact that the victim was present and not just from the sexual activity itself.

104. The Committee also recommends that the Scottish Government consider the wording of sections 4, section 17 and section 24 in order to avoid any ambiguity, or the creation of any unintended consequences, for example criminalising parents for having sexual intercourse in the presence of their infant child.

105. In correspondence received after the conclusion of evidence taking, the Cabinet Secretary for Justice advised that the Government recognises the difficulties that could be created for the Crown to prove beyond reasonable doubt the purpose for which the accused acted, as a matter of subjective fact.

106. The Government proposes to amend the Bill to provide that the accused may be convicted where it can be reasonably inferred from all the facts and circumstances that he or she acted either for the purpose of obtaining sexual gratification or causing humiliation, alarm or distress. The Committee welcomes this undertaking.

PART 2 – CONSENT AND REASONABLE BELIEF

107. Section 9 of the Bill sets out a statutory definition of “consent” as free agreement. The concept of consent was central to the SLC’s considerations of rape and sexual offences and was discussed in great detail in Part 2 of the SLC’s report. Section 9 of the Bill adopts the conclusions and recommendations made by the SLC as set out in its report and draft Bill.

108. Section 12 provides that for the purposes of Part 1 of the Bill, when considering whether a person’s belief as to consent was reasonable, regard is to be had to whether the person took any steps to establish whether there was consent and what those steps were.

Definition of consent

109. In its report, the SLC discussed the difficulties of determining the presence of consent where the words “I consent” (or their equivalent) were not actually said;
that the idea of consent is inherently ambiguous; and that, at present, the focus of
attention is not on what the accused did to the victim but on what the victim did
with the accused.57

110. In light of its deliberations, the SLC recommended that for sexual offences
there should be a statutory definition of consent, that consent should be defined
first by means of a general description of what consent means and that the
statutory definition should provide a non-exhaustive list of situations where
consent does not exist.58

111. There is no specific definition in Scots law of “consent”. As stated earlier in
this report, rape is currently defined as sexual intercourse with a woman without
her consent. The Crown has to prove that the accused knew, or was reckless as
to the possibility, that the woman was not consenting. This requirement for the
Crown to prove mens rea (the state of mind of the accused), in addition to proving
the fact of lack of consent, has been problematic.

112. The move to set out, for the first time, a statutory definition of consent in
terms of free agreement, to include on the face of the Bill a number of
circumstances in which free agreement will not be present and to exclude from the
defences available any unreasonable belief of consent, was generally welcomed
by most respondents.

113. For example, the Law Society of Scotland said—

“It is an improvement on the current law. It is difficult to express or draft in an
elegant way the concepts that are involved in consent. When taken together,
sections 9 and 12 set out clearly what a jury must consider in dealing with the
question of consent.”59

114. The Lord Advocate said that the definition will be a useful tool for helping
juries to understand what consent means—

“The term “free agreement” is readily understood in that context because of
its breathtaking simplicity and beauty. The term “consent” is in use, but we
know from the authorities and case law that, in developing jurisprudence,
people have struggled with the extent to which consent can be inferred.”60

115. James Chalmers said—

“The words “free agreement” are preferable to the convoluted definition that
has been used in recent English legislation. The correct approach to the
definition of consent has been reviewed in a number of countries in recent
years and the words “free agreement” are the best that anyone has come up
with. Recent evidence suggests that if we continue to use “consent” juries

might enter the jury room with preconceptions of what that means and apply their own understanding.”  

116. However, in relation to the definition of “consent”, Professor Pamela Ferguson said that whilst the Bill was a step forward—

“I would prefer it if we simply used “free agreement” and left “consent” out of the picture all together. Rape would then be defined as penile penetration without the free consent of the other party. Using “consent” in the Bill can only lead to confusion. If, for example, a woman ultimately submitted to intercourse on the basis that she feared that she would be killed or seriously injured if she did not, that would be consent but not free agreement. It would be simpler to leave out “consent” and use “free agreement.”  

117. Professor Burman saw merit in both views—

“The term has lots of advantages, especially when compared with the situation in England and Wales...I had not thought about the issues that Professor Ferguson raised, but, having listened to her, I feel that there is something to be said for her view.”  

118. Andrew McIntyre for the Crown Office said—

“I agree that there is something attractive about replacing “consent” with the term “free agreement” throughout the Bill. I have said in the past that that would be better as it would remove one of the layers of definition. The only thing that makes me pause is the extent to which the common law will continue to apply, which we discussed earlier. There is a great deal of common-law interpretation of consent. I do not know authoritatively, but I wonder whether retaining the term “consent” in the Bill will allow us to introduce more easily its interpretation in the circumstances of a case which has assisted us the past.”  

119. In its written evidence, ACPOS said—

“the definition of consent as “free agreement”, as outlined in Part 2, section 9 of the Bill, may be too simplistic and prove to be insufficient in providing juries with guidance and direction. Expanding the expression “free agreement” to include terms “voluntarily” and “with knowledge of the nature of the act” would provide further clarity.”  

120. Although there has been no detailed discussion of the meaning of consent at common law, the Committee is of the view that the term is established as part of the definition of the crime of rape, and its retention therefore seems appropriate. The Committee is accordingly content with the
continued use of the term “consent” and with it now being defined as “free agreement”.

121. Section 1 makes it clear that a belief in consent does not exclude the responsibility for rape (or any other offence set out in Part 1) unless that belief is reasonable.

122. The Committee asked the Cabinet Secretary for Justice whether this meant that rape could now be committed negligently, for example if A intentionally commits a sexual act against B in the belief that B was consenting, but where that belief has been carelessly formed.

123. The Cabinet Secretary for Justice responded—

“No…for an act to be a crime, it must be committed with the intention to do wrong. I find it hard to think of circumstances in which someone could negligently commit the crime of rape.”

124. In subsequent correspondence, the Cabinet Secretary for Justice explained his position further—

“The wording of the offences at section 1-6 is such that the required mens rea has to be intention or recklessness. The offences cannot therefore be committed “negligently” in the sense of negligence being part of the actus reus for the offence. The accused could be negligent in the sense of being careless as to whether there was consent. The Bill provides that where the accused claims that he or she believed that the other party consented, that belief in consent must be reasonable. Thus, while the physical acts constituting an offence cannot be committed negligently, consideration of whether the accused’s belief that the other party consented was reasonable, when looked at objectively, may include the extent to which the accused acted negligently.”

125. The Bill is clear that an act of penetration cannot be committed negligently, but the Committee is still unclear whether a negligently formed belief in consent would of itself be sufficient to establish criminal responsibility in terms of the Bill. The Scottish Government is asked to confirm its intention.

Circumstances in which conduct takes place without free agreement

126. Despite the wording of subsection 10(1), “for the purposes of section 9, but without prejudice to the generality of the section, free agreement to conduct is absent in the circumstances set out in subsection (2)”, many witnesses felt that it was not clear that the list of circumstances was non-exhaustive and that it should be clearly stated on the face of the Bill that if a situation arises that is not on the list, it could still be the case that consent was not present.

67 Scottish Government. Letter from the Cabinet Secretary for Justice to the Convener of the Justice Committee dated 22 December 2008.
Justice Committee, 1st Report, 2009 (Session 3)

127. ACPOS said that all the examples in section 10 relate to where consent does not exist and that examples of where consent does exist, with further guidance, would be of benefit to the public, in particular juries and the police, when interpreting the word “consent”.

128. Although supportive of the list of non-exhaustive circumstances, Rape Crisis Scotland was concerned about the operation of section 10—

“For example, we are unclear whether the accused will still able to use the defence of consent if the Crown has proved the existence of any of the circumstances in section 10(2). We – and, indeed, a number of other people – had assumed that that would not be the case but, having looked at the detail of the Bill, we are not so sure.”

129. A number of witnesses suggested that further scenarios should be added to the non-exhaustive list in section 10. For example, Victim Support Scotland considered that consent should be seen as lacking for anyone who has been trafficked to the UK for the purposes of prostitution and any sexual penetration in such circumstances should therefore constitute rape.

130. The issue of people trafficking is not one for this Bill; however, the Committee suggests that the Scottish Government considers Victim Support Scotland’s evidence in this regard in the wider context of ongoing work.

131. Clearly, it was the intention of both the Scottish Law Commission and the Government that this list be non-exhaustive. The Committee believes that this is clear from the current wording of the Bill and is not of the view that there is any need to state this more clearly on the face of the Bill, nor that additional examples, showing where consent does exist, should be included in Section 10. Section 10 is intended to provide some clarification of situations where consent does not exist.

132. The Committee does, however, request that the Scottish Government confirms whether the accused will still be able to claim consent existed if any of the circumstances in section 10 are present.

Prior consent

133. More specifically, many witnesses expressed serious concerns about the introduction of the concept of prior consent into statute; specifically the circumstances set out in section 10(2)(b) providing that free agreement does not exist “where at the time of the conduct, B is asleep or unconscious, in circumstances where B has not, prior to becoming asleep or unconscious, consented to the conduct taking place while B is in that condition”.

134. Victim Support Scotland said—

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70 Victim Support Scotland. Written submission to the Justice Committee.
71 Zero Tolerance; Rape Crisis Scotland; Scottish Women’s Aid; Victim Support Scotland; the Equality and Human Rights Commission.
“we have a problem with the idea of someone giving prior consent. It is extremely important that consent is given at the time that sexual activity takes place...If one accepts the interpretation that consent is valid until withdrawn, the victim must surely have an opportunity to withdraw it, which he or she would not have if they were asleep, or, indeed, unconscious.”72

135. Rape Crisis Scotland said—

“If the notion of prior consent is introduced, it will make rape even harder to prove – and it is already extremely hard to prove. The crown would need to disprove the existence of prior consent in a rape trial. That goes against the philosophical underpinnings of the Bill which are based on sexual autonomy – that is, a person can withdraw consent at any time.”73

136. In her oral evidence, Professor Michele Burman echoed the view of Rape Crisis Scotland.

137. The Equality and Human Rights Commission argued—

“We must ensure that we do not sweep up in the law people who behave inappropriately but not in a way that should leave them open to a serious criminal charge...The dangers in going down that route are manifold. By its nature, consent, or free agreement, as it is defined in the Bill, implies the ability freely to withhold consent at any time, but that ability is removed if one of the sexual partners is unconscious.”74

138. It is recognised, that difficulties can arise when trying to ascertain whether consent exists, for example, when judging whether someone is too drunk to consent to sexual activity. The Law Society asked whether removing prior consent, could result in criminalising something that could be regarded as a common activity between adults who have had too much to drink but one that would not normally be regarded as criminal activity. 75

139. James Chalmers said—

“I suspect that we can only reinforce the general test - that for sexual activity to be lawful there must be free agreement in all cases. That requirement is in no way diminished by the fact that someone has taken a drink – drink is not a licence to exploit someone.”76

140. The Lord Advocate said –

“an issue is the right of individuals under article 8 of the European convention on Human Rights to enjoy a private, sexual and family life as they wish to without undue interference from the state. A danger lies in criminalising conduct that is currently lawful – if people who are in a long-term or even a

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short-term relationship agree explicitly or impliedly to such activity, it is not
criminal.”

141. The Lord Advocate went on to question whether it was absolutely necessary
to have prior consent if a reasonable belief existed. She suggested that the
concept of prior consent might need further definition or refinement—

“to ensure that it does not cover a situation in which, for example, someone
who makes a casual suggestion in a state of sobriety wishes, five hour later,
to exercise some autonomy or even, in sobering up, takes a very different
view of what happened when they were sleeping. A person should not be
tied to a decision that they might have made earlier.”

142. Professor Maher gave the SLC’s view when it approached this issue—

“My worry is that the notion may get out that the law does not allow prior
consent. I take the opposite view: there must always be prior consent. The
focus of the Commission’s message is that if no consent is given prior to a
sexual act, the sexual act is a criminal act. I am worried about the language
of not allowing prior consent. The absence of consent prior to an act is what
makes the activity criminal. Unless prior consent is included in the Bill, there
is no point in talking about withdrawal of consent, because withdrawal of
consent presupposes that consent has been given.”

143. The Law Society of Scotland suggested that a clearer way of expressing the
issue of prior consent had been set out at paragraph 2.59 of the SLC’s Report –

“where a person was unconscious or asleep and had not earlier given
consent to sexual activity in these circumstances”

144. Professor Maher said that he would be concerned about the removal of
section 10(2)(b)—

“Removal of section 10(2)(b) would not solve the problem, but would simply
move the focus to section 9. If the Bill were to be passed with section
10(2)(b) absent, this question would arise: is it an offence of rape in Scots
law for a man to have intercourse with a woman while she is asleep? The
answer should depend on whether she has consented to having sex in that
state. In my view, the problem will not go away if we remove the provision in
section 10(2)(b).”

145. Given the concerns raised about this particular provision, some witnesses
suggested that either 10(2)(b), or the second part of it, be removed from the non-
exhaustive list or that it should at least be looked at again to ensure that it does
not have some unintended consequences.
146. In light of the concerns expressed by witnesses, particularly the lapse of time, or the possibility of a change of circumstances between the giving of consent to sexual contact in such circumstances and the act itself, the Committee has some reservations about section 10(2)(b). The Committee recommends that the Scottish Government give further consideration to these particular examples.

Historic abuse and threats of violence

147. Another concern raised regarding section 10 was that subsection 10(2)(c) might not clearly cover a situation where someone agrees to conduct because of a history of violence or abuse between the accused and the victim. In its written evidence, Zero Tolerance said—

“In reality, most women who are raped know their attacker and “violence” as juries might understand it is not always present – someone does not have to be wielding a weapon or using physical force to be using violence. Often in domestic abuse cases the violence is more insidious and some rapes in the domestic sphere or in existing relationships can use similar kinds of threat and fear without necessarily using force.”

148. Scottish Women’s Aid suggested—

“(the) presumption of “no consent” should apply in circumstances in which the complainer had been the victim of sexual or physical abuse at the hand of the accused on previous occasions.”

149. The Committee noted from the SLC’s report (paragraph 2.68) and the accompanying draft Bill that—

"An important feature of the definition is that it does not require that the violence occurred or the threat was made at time of the sexual act. In other words the definition covers what is known as historic abuse. However, in cases of historical abuse it may be more difficult for the Crown to establish the causal link between the violence or threat and the agreement or submission to the sexual activity."

150. In oral evidence, Professor Maher confirmed that it was not the intention of the SLC when bringing forward this proposal, nor the Scottish Government in adopting it, that this section was to be interpreted as requiring that the violence or threat of violence had to take place at the same time as the rape or sexual assault. Professor Maher explained—

“The key point about section 10(2)(c) is that it relates to situations in which there is a causal link between violence and consenting or submitting to sexual activity. If the violence took place far back in time, it may be more

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81 Raised by Victim Support Scotland; the Equality and Human Rights Commission; Scottish Women’s Aid.
82 Zero Tolerance. Written submission to the Justice Committee.
83 Scottish Women’s Aid. Written submission to the Justice Committee.
difficult for the Crown to show that there is such a causal link, but our intention was that the definition would apply to historic violence or abuse.”

151. The Committee recommends that the Scottish Government gives further consideration to the wording of this provision in order to ensure that the stated policy intent is clearly given effect to and that the issues of reasonable or legitimate fear of violence are properly taken account of.

152. More generally, in its written evidence, Zero Tolerance expressed concern about the use of the term “violence” saying—

“We feel that the provision at clause 10(2)(c) is insufficient and would welcome a more broad clarification and understanding of the term “violence” to encompass but not be limited to coercion, force and threat of violence / coercion and force.”

153. Along a similar line, Enable Scotland suggested that—

“what one person sees as a credible threat might not seem so to another. In that respect, people with learning difficulties might be much more suggestible to threats than others…we suggest that if section 10 is to be amended, it should cover not only threats of violence but credible coercion or something like that.”

154. The suggestion to include a specific reference to threats was also supported by the Law Society of Scotland.

155. In light of the evidence received, the Committee recommends that the Scottish Government considers the need to amend the Bill to include a definition of threats in paragraph 10(2)(c) of the Bill and reflect the issue of coercion raised by Enable Scotland.

Deception

156. Section 10(2)(e) provides that where a person agrees or submits to the conduct because he or she is mistaken, as a result of deception by another person, as to the nature or purpose of the conduct, free agreement does not exist. In the view of the Faculty of Advocates this could mean that where a man meets a woman and says that he is 25 when in fact he is 35, and the two engage in sexual intercourse, this could leave the man liable to prosecution for rape, by virtue of his deception.

157. The Law Society of Scotland said that it had discussed that point with the Bill team and that it understood that this provision related to the nature or the purpose of the conduct and that—

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“what the Bill team had in mind was the carrying out of a spurious medical examination or something of that sort.” 87

158. It is not immediately clear to the Committee what, in the wording of section 10(2)(e), would support the interpretation placed on it by the Faculty of Advocates; however in light of its comments, the Committee recommends that the Scottish Government look at this wording again in order to avoid the potential of a wider interpretation than what was intended.

Reasonable belief
159. As noted already, section 12 of the Bill makes further provision about “reasonable belief”. It will be for a court or a jury to determine in each particular case what amounts to reasonable belief. In deciding whether a belief was reasonable, regard must be had as to whether the accused took any steps to ascertain whether there was consent and what those steps were.

160. Other witnesses questioned how this would work in practice and what would happen if the accused refused to give evidence. The Equality and Human Rights Commission asked—

“How, without prejudicing a defendant’s right to silence, will section 12 achieve its aim? Will it be made explicit that an inference may be drawn from the defendant’s refusal to outline the steps taken to determine consent? The Commission considers that without such a provision section 12 runs the risk of being meaningless.” 88

161. Professor Michele Burman said—

“I support the move away from the subjective approach that is currently taken to establish mens rea. The introduction of a reasonable belief provision, whereby the accused must have reasonable belief that the victim consented to the act, is welcome. In a sense, the Bill provides for a greater focus on the responsibility of the accused to demonstrate the steps that they took, but for me it is difficult to conceive how the accused could demonstrate that without taking the witness stand to describe those steps.” 89

162. Consequently, Professor Burman said that she supported making it more explicit that some inference could be drawn from an accused’s refusal to outline the steps he or she took to ascertain consent.

163. However the Law Society of Scotland pointed out—

“It seems to me that if an accused person were unwise enough not to give evidence in those circumstances, a jury might very well just bring in a verdict of guilty anyway because there would be no basis for holding that there was a reasonable belief in consent.” 90

88 Equality and Human Rights Commission. Written submission to the Justice Committee.
164. James Chalmers explained what happens at present when an accused refuses to give evidence—

“At present, where the circumstances are crying out for an explanation, the jury can be directed to take into account the accused’s failure to give evidence. However it would be inappropriate simply to direct a jury that it could draw an inference from the fact that the accused had not given evidence, when the accused is entitled to do so. As far as I can tell, the current law on the inferences that may be drawn from silence is not often invoked by judges in charges to the jury. If there were a desire to use it more often, in such cases, it would be helpful to include something specific in the statute.”


165. It was suggested to the Cabinet Secretary that one option might be to consider imposing an onus on the accused to show that he or she had taken steps to ascertain whether there was consent. In response, the Cabinet Secretary said that he would be willing to consider this—

“But it would be contrary to the idea that, in Scotland, people are not required to state their defence and are entitled to hide behind a denial.”


166. This Bill does not change the current position that an accused is entitled to refuse to give evidence at trial. The only change made by the Bill is that there is a move away from an entirely subjective test in relation to belief in consent to a more objective test based on reasonable belief. Therefore, although it is a breach of the European Convention on Human Rights to force an accused to give evidence, the current law leaves open the possibility for a judge to draw the attention of the jury to an accused’s failure to give evidence. The Committee is conscious that some people may be inarticulate when presenting evidence.

167. The Committee notes that the current law leaves open the possibility that a judge may draw the attention of a jury to an accused’s refusal to give evidence. It therefore appears to the Committee that powers do exist to allow inference to be drawn from silence.

Definition of “reasonableness”

168. Another issue raised by James Chalmers about section 12 related to reasonableness—

“It is necessary to give some guidance on how “reasonableness” is to be assessed... The Bill provides no answer. In due course, the High Court may have to decide the position. I am confident that the court would approach the question with great care, but this means that the eventual rule will not have been democratically scrutinised, and it may result in convictions being quashed on the basis that trial judges did not direct juries in accordance with the view eventually reached by the appeal court.”
169. Although the Committee notes this observation, it finds it difficult to see what further guidance the court could give a jury on the issue of “reasonableness” as the question of “reasonableness” will always be one of fact or circumstance. The Committee notes however that the equivalent legislative provision for England and Wales sets out that whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.

170. **The Committee recommends that the Scottish Government gives consideration to whether similar wording, setting out clearly that regard is to be had to all the circumstances, including steps taken to establish whether consent existed, should be included on the face of this Bill.**

**Attempts to commit offences**

171. Before moving on from the issues of consent and reasonable belief, the Committee notes that in response to whether the Bill’s provisions are intended to apply to attempts to commit rapes or sexual assaults, Professor Maher responded—

“There is a view that there is a problem with how the English legislation was drafted, in that the consent provisions do not apply to attempts. We had that specifically in mind in instructing our draftsmen about the draft that the committee has. In the light of the provisions of the Criminal Procedure (Scotland) Act 1995, we are quite satisfied that, with respect to talks about attempting to commit crimes, for our purposes we need only define consent in relation to committing the crime, and the provisions on attempts will kick in. In trying to get the drafting right, we had it in mind that those provisions would apply to attempted rape and attempted assault.”

172. In her evidence, the Lord Advocate stated that she did not see a distinction between the complete offence and an attempt to commit that offence—

“If the offence is available for the completed crime, it has to be available for an attempt.”

173. The Committee notes that it is intended that the Bill’s provisions will apply to attempts to commit an offence, however the Bill does not make this explicit or that the provisions will apply to incitement to commit an offence.

174. Section 9 (which provides the definition of consent) refers specifically to Parts 1 and 3 of the Bill, and section 10 (which amplifies the definition of consent) is limited to the interpretation of section 9. Section 11 (which deals with the scope of consent and its withdrawal) refers to sections 1 to 6 of the Bill and section 12 (which deals with reasonable belief) is confined to Part 1 of the Bill.

175. The Committee accepts that in terms of the Criminal Procedure (Scotland) Act 1995 (and at common law) an attempt to commit an offence is itself an offence. However the Criminal Procedure (Scotland) Act does not include any...
provision setting out that application of any rule of the common law or any statutory rule applicable to a full offence is available to an attempt. Even if there were such a rule, it would only apply to an attempt to commit the offence, and would not apply to other forms of inchoate offending, such as conspiracy or incitement.

176. **In these circumstances, the Committee suggests that the Scottish Government considers this matter and whether it would be prudent for the Bill to include a “for the avoidance of doubt” provision which would make it clear that these provisions will apply to incitement, conspiracy and attempt to commit the full offence.**

### PART 4 – CHILDREN

177. Part 4 of the Bill contains offences relating to sexual activity involving children.

178. As previously outlined in this report, most of the provisions contained in the Bill are the same or very similar to proposals put forward by the SLC in its 2007 report. However, one significant difference between the SLC proposals and the Bill as introduced, concerns how the law should deal with ‘older children’ aged 13, 14 or 15 who engage in consensual sexual activities with other older children. This change is examined later in this section of the Committee’s report.

### Consultation

179. As noted earlier in this report, the Scottish Government undertook a public consultation exercise between December 2007 and March 2008, seeking views on the recommendations contained in the SLC’s final report. The Committee has already expressed its concern at the absence of a published analysis of the responses which the Government received.

180. The Committee received submissions from several organisations which were critical of the lack of any specific consultation with children and young people by the Scottish Government.

181. In her written evidence, Professor Kathleen Marshall, Scotland’s Commissioner for Children and Young People, encouraged the Committee to seek a commitment from the Scottish Government “to engage with children and young people in order to formulate law, policy and practice on underage sexual activity in way that effectively achieves our common aim and avoids unintended consequences.” Professor Marshall also noted that in her response to the Government’s consultation she had called for “sensitive consultation with children

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95 Scottish Law Commission. (2007) *Report on Rape and Other Sexual Offences* (Scot Law Com No 209)

96 Scotland’s Commissioner for Children and Young People. Written submission to the Justice Committee.
and young people and, indeed, that this was required by article 12 of the United Nations Convention on the Rights of the Child.”

182. When she appeared before the Committee, Professor Marshall confirmed that in relation to the Bill’s provisions on sexual activity between older children, she favoured decriminalisation. And she expressed concern that the Bill was “proceeding on the basis of insufficient information” about the views of young people.

183. Children in Scotland supported Professor Marshall’s position and called for “in-depth research and a meaningful consultation process ... from a national cross-section of children and young people about what messages and measures would really discourage early sexual intercourse, as well as what information and assistance would really encourage behaviours having the fewest and least serious negative consequences.”

184. In its written submission, Children 1st set out the views of some young people it had consulted about the terms of the Bill—

“...some young people spoke about their right to make decisions about their own sexual health and about when they were ready to have sex, whilst others felt that any actual or perceived change in 16 as the age of consent might lead to more early sexual activity and more unwanted pregnancies. Significantly, some young people spoke about using 16 years old as a form of ‘buffer’ or excuse to withstand peer pressure to have sex earlier than this age boundary.”

185. In oral evidence, Children 1st explained that its consultation had been carried out with a group of 12 users of its service in West Lothian.

186. Children in Scotland commended Children 1st for its initiative but reiterated its call for further consultation—

“... we should now do what should have been done by the Government earlier. As commendable as the efforts of Children 1st are, they cannot replace a meaningful full-scale Government-led national consultation of a wide cross-section of children and young people.”

187. Although supportive of the position of other organisations, Barnardo’s Scotland sought to place a caveat on research of this nature—

“It would be good to undertake that research, but you would be asking young people to talk about a situation that they would not be in at that moment in time. Two 15-year-olds, in a moment of passion, might not behave as rationally as they might do when surveyed. I support going ahead with wider

97 Scotland’s Commissioner for Children and Young People. Written submission to the Justice Committee.
99 Children in Scotland. Written submission to the Justice Committee.
consultation, but we also need to have a reality check and ensure that we understand what is happening on the ground.”

188. The Committee explored these issues with the Scottish Government. The Cabinet Secretary for Justice was asked for his perspective on the need for consultation with young people. He responded—

“We have spoken to various organisations and people, including Scotland's Commissioner for Children and Young People, Barnardo's and Children 1st. We went out of our way to ensure that we consulted 13 and 14-year-olds, if not specifically and directly. We consulted organisations that articulate and advocate for them and represent them.”

189. The Cabinet Secretary stated that he considered that the Government had “acted appropriately and obtained the appropriate information” but that it was happy to listen and make changes if required.

190. When asked whether the Government would consider extending the period between Stage 1 and Stage 3 of the Bill's passage to allow for further consultation with young people, the Cabinet Secretary indicated that this would cause difficulty but that he would be happy to facilitate further evidence gathering by the Committee. However, he ruled out further consultation by the Government.

191. The Committee was surprised by the lack of willingness on the part of the Scottish Government to carry out direct, meaningful and appropriate consultation with young people who have a direct interest in the proposals contained in Part 4 of the Bill.

192. Notwithstanding this, the Committee reluctantly accepts that the legislative process has now reached a point at which a Government consultation with young people in relation to what provisions should be contained in the Bill would no longer be meaningful. The Committee considers this to be a missed opportunity.

193. In order to fully inform young people about the changes to the law which directly affect them, the Committee recommends that following enactment of the Bill the Government should implement an age-appropriate information and publicity campaign after having consulted appropriately with this age group.

Young children

194. Sections 14 to 20 of the Bill contain a set of statutory offences which criminalise sexual activity with a young child.

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The SLC proposals
195. The SLC Report sought to draw a distinction between ‘young children’ aged less than 13 and ‘older children’ aged 13, 14 or 15. Various existing sexual offences already recognise such a distinction.\textsuperscript{105}

196. In relation to sexual activities involving young children, the SLC Report noted that the majority of consultees who responded to its Discussion Paper expressed a preference for the view that offences involving sexual activity with children under the age of 13 should be based on a principle that such children do not have the capacity to consent to sexual activity. The SLC concluded, therefore, that engaging in sexual activity with a young child is always wrong and should be prohibited by the criminal law.\textsuperscript{106}

Scottish Government approach
197. The Scottish Government made no changes to the SLC’s proposed approach to these offences. Sections 14 to 20 of the Bill are therefore the same as those contained in the SLC’s final report and draft Bill.

198. Part 4 of the Bill contains a range of offences which mirror those provided for in Part 1. Section 14 of the Bill (rape of a young child) provides that it shall be an offence to penetrate with a penis the mouth, vagina or anus of a child under the age of 13. A separate provision (section 15) provides that other forms of sexual assault on a young child constitute an offence. Sections 16 to 19 (“causing a young child to participate in a sexual activity”; “causing a young child to be present during sexual activity”; “causing a young child to view an image of a sexual activity” and “communicating indecently with a young child”) also mirror offences contained in Part 1 of the Bill. The latter three offences only apply where they are done for the purpose of obtaining sexual gratification or alarming, humiliating or distressing the child. The Policy Memorandum states that the offences would not be committed where, for instance, someone engaged in sexual activity in private without being aware of the presence of a young child.\textsuperscript{107}

Distinction between young and older children
199. The distinction which the Bill draws between offences committed against young and older children was subjected to criticism by Professor Jennifer Temkin, on the following grounds—

“A child is a child. By describing some children as “older”, this undermines the general message that sex with all children under 16 is against the law. We tend to equate older with wiser so that an “older” child invites the perception of a knowing child in less need of protection.”\textsuperscript{108}

200. The Committee notes, however, that this observation appears to ignore the fact that the Bill does not propose to de-criminalise sexual relations between


\textsuperscript{107} Policy Memorandum, paragraph 104.

\textsuperscript{108} Professor Jennifer Temkin. Written submission to the Justice Committee.
children and adults, and only in limited circumstances does it propose de-
criminalisation of sexual conduct between older children.

201. The National Development Group: Working with Children and Young People
with Sexually Harmful Behaviour considered that the distinction between young
and older children was an arbitrary one as children develop both physically and
mentally at very different rates. In relation to the Section 14 offence “Rape of a
young child”, the Group quoted from the Explanatory Memorandum to the Bill—

“An offence will be committed irrespective of whether a young child
apparently “consented” to the penetration.”

202. The Group questioned whether, in circumstances where two 12 year-olds
engaged in a consensual penetrative act, the penetrator could be charged with the
rape of a young child while, if the two children were aged 13 years, the
consequence would be different. The Group sought clarification of this point.

203. In oral evidence, both Barnardo’s Scotland and Children in Scotland agreed
that, although not perfect, drawing a distinction between children under the age of
13 and older children was reasonable and necessary.

Potential criminalisation of young children
204. The Scottish Child Law Centre supported the proposed protective offences
against young children contained in sections 14 to 19. However, the Centre
suggested that it should be a defence for a child who has committed such an
offence, and who is within two years of the age of the victim, that he or she
believed that the victim had attained the age of 13 years.

205. Barnardo’s Scotland expressed support for the introduction of protective
offences for children under the age of 13 years on the basis that they are deemed
never to have the capacity to consent by reason of their age. However, Barnardo’s was concerned that the Bill, as framed, could lead to criminalisation of
young children. It expressed concern that admission of sexual activity between
two children aged under 13 years old could, even where there was no evidence of
coercion, lead to a young child being prosecuted for rape or some other serious
sexual offence. Barnardo’s suggested—

“... in this instance there would be merit in jointly remitting the case to both
Procurator Fiscal and the Reporter to ascertain where the case should best
be heard.”

206. In its written evidence, Children 1st expressed similar concerns to those
raised by Barnardo’s. However, unlike Barnardo’s, Children 1st recommended

109 Explanatory Notes, paragraph 53.
110 National Development Group: Working with Children and Young People with Sexually Harmful
Behaviour. Written submission to the Justice Committee.
112 Scottish Child Law Centre. Written submission to the Justice Committee.
113 Barnardo’s Scotland. Written submission to the Justice Committee.
114 Barnardo’s Scotland. Written submission to the Justice Committee.
that the Bill be changed so that a child under 13 years old could not be charged
with a sexual offence.\textsuperscript{115} In oral evidence, Children 1st submitted that—

“… if young people under the age of 13 are incapable of giving informed
consent to sexual activity, a contradiction exists in the Bill, in that they could
be charged with a criminal offence. We would argue that young people
under 13 are not capable of sexual offences of such a nature.”\textsuperscript{116}

207. Children in Scotland expressed concern that the definitions of what
constitutes sexual activity for children under 13 years old were imprecise and that
there were “various sexual explorations that fall well short of the definition of
penetrative sexual intercourse used in other parts of the Bill that would subject
younger children to a criminal charge and a criminal record.”\textsuperscript{117}

208. Children in Scotland argued that this was “not in children's best interests”,
and that—

“The Bill should be clearer that there is no intent to criminalise young children
when they engage in sexual explorations that are neither coercive nor
exploitative.”\textsuperscript{118}

209. Professor Kathleen Marshall expressed concern about the potential for
criminalisation of children under 13 for what might be defined as “sexual activity”
with each other—

“The definition of “sexual activity” is very broad and could include normal,
childish exploration and activities such as kissing. Given the very low age of
criminal responsibility in Scotland, this allows for the possibility of children
aged 8 to 12 being prosecuted for sexual offences or referred to the
children’s hearing on the grounds that they have committed such an offence.
It seems strange that children might be charged with offences relating to
activities that they are otherwise presumed to be incapable of consenting to.
At the very least, this should be mitigated by a provision analogous to that in
section 27(7) of the Bill concerning instructions from the Lord Advocate.”\textsuperscript{119}

210. The Committee was concerned to avoid a situation where normal tactile
actions such as kissing or cuddling were criminalised. However, it noted evidence
from the Scottish Children's Reporter Administration that when a young person
under 16 is reported on criminal grounds, only when there was a need for
compulsion would a Reporter refer that young person to a Children's Hearing.
More commonly, measures of care are put in place to engage the young person
and their family voluntarily.\textsuperscript{120} The Committee was satisfied that this would, in
practice, avoid the potential for inappropriate state intervention in normal teenage
activities.

\textsuperscript{115} Children 1st. Written submission to the Justice Committee.
\textsuperscript{119} Scotland's Commissioner for Children and Young People. Written submission to the Justice
Committee.
211. The Lord Advocate was asked by the Committee whether it was correct, as a matter of principle, that offences that are designed to protect young children could also be committed by members of that protected group. The Lord Advocate replied—

“The current position is that I do prosecute children for non-consensual offences against other children when my doing so is in the public interest. However, that is extremely rare because we have a strong system in which most cases of offences by children are reported to the children’s panel.”

212. When asked to consider a hypothetical case in which both the alleged perpetrator and the victim were under 13 and whether both would be guilty of an offence, the Lord Advocate responded—

“A case involving the scenario of a 12-year-old touching another 12-year-old would never see the light of day in the criminal courts. It would possibly not even be reported to the children's panel, because such a scenario probably takes place in numerous neighbourhoods during the summer holidays. There may be some form of exploratory touching by children within a normal childhood.

It would be very different if a 12-year-old was bullying another 12-year-old, aggressively coercing them, and showing conduct that might illustrate a propensity on the part of the aggressive 12-year-old—female or male—to commit sexually aggressive behaviour for the course of their life. In those circumstances, the reporter to the children's panel would consider whether care and protection were necessary under the Children (Scotland) Act 1995 or whether the conduct was so serious that prosecution was merited.”

213. When asked whether the Bill contained a potential anomaly which would allow the prosecution of young children for offences designed to protect them, the Cabinet Secretary for Justice pointed to the prosecutorial discretion of the Crown—

“We must allow the Crown to act on the basis of whether a crime has been committed, whether it can be proved and whether prosecuting it is in the public interest. The Crown has always had to and will always have to answer those three questions. We always fall to the third question: is prosecution in the public interest? That judgment is exercised with great discretion and judiciousness by the Lord Advocate and the Crown. I have great faith in them.”

214. When asked whether the issue could be addressed by an understanding that perpetrators who were under 13 would not be prosecuted but would routinely be referred to a children’s panel, the Cabinet Secretary responded positively—

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“The intention is that such matters will routinely go to a panel. We must consider the facts and circumstances and trust the Lord Advocate and her successors to act in the public interest.”

215. In a supplementary submission, the Cabinet Secretary for Justice provided further justification for the Government’s position—

“We think it would be inconsistent to provide, on the one hand, that a child under the age of 13 is incapable of consenting to sexual activity and that sexual activity without consent is criminal, but on the other, that certain sexual activity between young children is not a criminal offence.

For young children under the age of 12, the Lord Advocate decides whether prosecution is appropriate and has prepared guidelines to the police on the crimes and offences committed by all children over the age of criminal responsibility up to and including 15 year olds that should be considered for prosecution. In all circumstances the Children's Reporter will be involved in discussions with prosecutors about the most appropriate course of action and whether concerns regarding public safety outweigh the best interests of the child. As a result the wider circumstances affecting the child's life will always be taken into consideration.”

216. The Committee strongly supports the provisions of the Bill which seek to protect young children from sexual abuse and exploitation.

217. The Committee considers that offences committed by children under the age of 13 are best dealt with via the Children’s Hearings System rather than the criminal courts. However, the Committee notes that under the terms of the Bill, the Lord Advocate will retain the option of criminal prosecution.

Older children

Scottish Law Commission proposals – child protection

218. In its report, the SLC gave detailed consideration to offences involving sexual activity with children aged 13, 14 or 15. The SLC referred to these young people as older children.

219. In relation to offences committed against an older child by an adult, the SLC considered that there was “a clear social need for the protection of children from sexual abuse and exploitation, especially by adults.”

220. The SLC noted that offences based on the lack of a victim's consent to sexual activity (i.e. those offences such as rape and sexual assault which are now

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125 Scottish Government. Letter from the Cabinet Secretary for Justice to the Convener of the Justice Committee dated 22 December 2008.
set out in Part 1 of the Bill) would apply to older child victims in the same way that they would apply to adult victims.¹²⁷

221. In addition, the SLC recommended that there should be special protective offences applying to older child victims, in relation to which a conviction would not require evidence of a lack of consent.¹²⁸ These offences are now set out in sections 21 to 26 of the Bill.

Scottish Law Commission proposals - criminal liability of older children

222. In its Discussion Paper, the SLC considered whether children under 16 should be exempted from potential criminal liability under the special offences designed to protect older children. The SLC noted that the vast majority (over 99 per cent) of cases involving children under 16 who commit an offence are dealt with through the Children’s Hearings system and not in the criminal justice system.¹²⁹

223. In its Discussion Paper, the SLC proposed that older children should not be exempt from criminal liability under those protective offences aimed at protecting older children. At that stage, the SLC had argued that such cases should be integrated into the general system on the prosecution of children under 16.¹³⁰ In its final report, the SLC explained the rationale for this initial proposal—

“The advantage of proceeding in this way was that the practical effect would be that criminality would not in the vast majority of cases be attached to consenting sexual activity between under 16 year-olds. Yet at the same time criminal prosecution could be brought against a child under 16 where there were compelling public interest reasons for doing so (for example, in cases involving exploitation); and, further, children under 16 who engaged in sexual activity could, where appropriate, be referred to a children’s hearing.”¹³¹

224. The SLC also noted that the proposal in the Discussion Paper that the protective offences for older children should apply to children under 16 who commit them was, “in broad terms supported by consultees”, but that there were noticeable dissents from this position, “especially from bodies which are concerned with the issue of children’s welfare.”¹³²

225. However, by the time of its final report, the SLC had changed its position—

“We have reconsidered our position in the light of the points raised during consultation, and we now recommend that the provisions should not apply

where the parties are under 16. We wish to emphasise that these provisions deal only with conduct involving consent. There is no question of removing criminal liability for people under 16 who participate in sexual conduct with someone who does not consent to it. Where there is exploitation by one child of another who is aged 13 to 16, then that conduct should be criminal where there is no consent to it.”

226. The SLC set out the rationale for this approach—

“In making this recommendation we are particularly struck by anomalies which would follow in criminalising consenting sexual activity between teenagers, which would extend to activities such as kissing each other. We are not impressed by the argument that such criminal liability would be theoretical only and in the vast majority of cases there would be no criminal prosecutions. Such an approach fails to take account of the possibility that older children might still be subject to investigation by the police, even if prosecution in the criminal courts is unlikely. More fundamentally, there is an important point of principle involved. If consenting sexual activity between young people is not to attract criminal liability, then the activity should not be criminal.”

227. In reaching its conclusion, the SLC acknowledged that there would be cases where there are issues about the welfare of children who are sexually active and who should be referred to a Children’s Hearing. The SLC noted that under current provisions “there is no ground of referral to a hearing of such a child other than that the child has committed an offence.”

228. The SLC, therefore, recommended that the proposed protective offences involving older children “cannot be committed by a person who has not reached the age of 16.”

229. The SLC also recommended that there should be a new ground of referral of a child to a Children’s Hearing “that the child has engaged in sexual activity with another person or has been subjected to sexual activity with another person.”

Scottish Government approach

230. In relation to offences against older children, the Scottish Government retained the basic structure of the SLC’s approach to offences concerning sexual activity with older children; sections 21 to 26 of the Bill are the same as those contained in the SLC’s draft Bill. However, the Government has brought forward changes to the SLC’s proposed approach in respect of consensual sexual activity

between older children. The Government’s proposals are contained in sections 27 and 28 of the Bill.

231. Sections 21 to 26 of the Bill provide for a range of protective offences in respect of adults (aged 16 or over) who engage in sexual activity with older children (“intercourse with an older child”; “engaging in sexual activity with or towards an older child”; “causing an older child to participate in a sexual activity”; “causing an older child to be present during a sexual activity”; “causing an older child to look at an image of a sexual activity”; and “communicating indecently with an older child”). Like the young children protective offences, the types of activity covered by these older children offences mirror similar offences in Part 1 of the Bill. However, a prosecution does not require proof that the child victim did not consent.

Older children engaging in penetrative sexual conduct with each other

232. As noted above, the offences in sections 21 to 26 of the Bill can only be committed by someone aged 16 or over. However, section 27 makes it a criminal offence for an older child to engage in penetrative sexual conduct with another older child even though both children consent. In such a situation both children commit an offence.

233. Subsections (1) to (3) of section 27 provide that an older child who intentionally or recklessly penetrates sexually another older child’s vagina or anus commits the offence of “engaging while an older child in certain types of penetrative sexual conduct with or towards another older child”. Subsection (4) provides that an older child who consents to such penetrative sexual conduct will also be guilty of an offence; that offence being “engaging while an older child in consensual penetrative sexual conduct with another older child”. 138

234. Subsection 27(7) states that the Lord Advocate has discretion to issue instructions to chief constables of police forces in Scotland about reporting offences under this section. This is a restatement of the current statutory position, as the Lord Advocate already has this power by virtue of section 12 of the Criminal Procedure (Scotland) Act 1995 and section 17 of the Police (Scotland) Act 1967.

235. Section 28 makes further provision as to the meaning of penetration and consent for the purposes of section 27, while section 29 provides for a range of defences which can be invoked by a person who is charged with an offence against an older child. 139

236. In the Policy Memorandum, the Government set out its reasons for departing from the SLC’s recommended approach—

“Touching, kissing and sexual conversations are considered by most people to be a normal part of growing up for a teenager. The Scottish Government does not propose that the law should interfere with this kind of activity between two young people aged 13 to 15 so long as both parties consent to the activity. We take a different view in relation to sexual intercourse since

138 Explanatory Notes, paragraphs 95 and 96.
139 Explanatory Notes, paragraphs 99 and 104.
this poses much greater risks to a young person’s welfare and health and the law is an important aspect in guiding young people’s behaviour in approaching sexual intercourse.”

“Having a definitive age in law at which young people are deemed to have the capacity to consent to sexual intercourse is important. That age is currently 16 in Scotland and throughout the rest of the UK. We are concerned that the SLC’s proposals could be perceived as reducing this to 13 in Scotland and are therefore concerned about the potential for damaging consequences for young people. Retaining 16 as the age at which the law recognises that young people have sexual autonomy is consistent with existing legal provision. Decriminalising sexual intercourse between teenagers under the age of 16 may make it more difficult for young people to resist peer pressure to engage in sexual intercourse and therefore risks more and earlier sexual activity amongst young people in Scotland.”

237. The Policy Memorandum also explained that the Government decided that the offence of engaging in penetrative sexual conduct will apply both to the person who penetrates and the person who consents to being penetrated because it believes “that the way in which the law currently acts to criminalise only boys (where the activity is consensual and both are of similar age) is discriminatory.”

238. A further consequence of the approach adopted by the Government is that the new ground of referral to the Children’s Reporter proposed by the SLC does not appear in the Bill as the Government considered that it was no longer necessary.

Criminalisation of older children for consensual sexual conduct

Evidence from stakeholders

239. A number of respondents to the Committee’s call for evidence commented extensively on the provisions in the Bill relating to older children and section 27 in particular.

Churches and Christian organisations

240. The Church of Scotland stated that it was “not persuaded” by sections 27 to 29 of the Bill and argued in favour of “reversion to the original proposal from the Scottish Law Commission that evidence of sexual activity be grounds for referral to the Children’s Reporter.”

241. The Catholic Parliamentary Office supported the provisions in the Bill, and argued that—

140 Policy Memorandum, paragraph 113.
141 Policy Memorandum, paragraph 119.
142 Policy Memorandum, paragraph 120.
143 Policy Memorandum, paragraph 122.
144 Church of Scotland. Written submission to the Justice Committee.
“Sex between consenting children under the age of consent cannot be seen as being condoned and a legal prohibition must remain.”

242. CARE expressed support for the Scottish Government’s proposals and noted that, in most cases, children and young people found engaging in sexual activity will be referred to a Children’s Panel on welfare grounds. CARE considered that “this strikes the right balance between upholding the law, acting with compassion and seeking to address potentially harmful behaviour patterns.”

243. The Christian Institute considered that the proposals in the Bill unduly limited the scope of the criminal law in this area (e.g. oral sex would not be covered by the offences in section 27) and would lead to “a severe weakening of the law”. It called for Part 4 of the Bill to be revisited in order to properly protect children.

Providers of sexual health services

244. The Family Planning Association was concerned that the Bill, as drafted, would criminalise young people and potentially deter them from accessing sexual health services.

245. The British Medical Association (BMA) also expressed concern at the proposals in the Bill to criminalise some consensual sexual activities between older children—

“Whilst the threat of criminal prosecution may send out a clear message that underage sex is wrong and that society does not condone the idea of children consenting to have underage sex with one another, it is also highly likely to deter young people from seeking the advice of health professionals on sexual health matters.”

246. Brook, a leading sexual health organisation for young people, was opposed to the potential criminalisation of children and young people of a similar age engaged in genuinely consensual and non-exploitative activity, even under the age of 13. Its written submission explained that—

“Brook believes that it is inappropriate and unnecessary to criminalise young people who are genuinely capable of giving consent to sexual activity including sexual intercourse. We would advocate that all genuinely consensual sexual activity, between young people of a similar age and similar physical and emotional maturity should be decriminalised. This approach has been taken in other European countries such as Finland where young people who have sexual contact with others of a similar age and stage of development are exempted from sexual offences by the Finnish penal code.”

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145 Catholic Parliamentary Office. Written submission to the Justice Committee.
146 CARE for Scotland. Written submission to the Justice Committee.
147 The Christian Institute. Written submission to the Justice Committee.
148 Family Planning Association. Written submission to the Justice Committee.
149 British Medical Association. Written submission to the Justice Committee.
150 Brook. Written submission to the Justice Committee.
247. Sandyford, the sexual and reproductive health services provided by NHS Greater Glasgow and Clyde, considered that where a consensual relationship is demonstrated, there should be “no prosecution for young people engaging in sexual activity with each other.”

Other stakeholders
248. The Commission for Equality and Human Rights recognised the need to take a different approach to consensual activity between older children aged 13 to 15. The Commission considered that there was a “need to retain a criminal justice response to sexual offences committed by older children on other older children”, but that “care must be taken to determine where a criminal justice response should take precedence over other interventions better able to reflect the needs and circumstances of individual children.”

249. The submission from Community Planning Partners in Highland urged the removal of section 27 from the Bill in favour of the Scottish Law Commission’s proposal that the Children’s Hearing system could be utilised as an alternative to criminalising young people.

Issues with criminal procedure
250. The Sheriffs’ Association confirmed that it “remains unusual for children to be the subject of prosecution in the sheriff court.” It did, however, raise significant practical issues about the potential prosecution of older children in the sheriff court for consensual sexual penetrative conduct with each other. The Sheriffs’ Association pointed out that section 27 will, potentially, make both children guilty of an offence in respect of their consensual behaviour for the first time and highlighted some associated issues—

“Evidential difficulties are likely to result where both children are prosecuted for a consensual act. If both children face charges, warnings against self-incrimination will require to be given to them both. If one is prosecuted and the other gives evidence for the Crown, the child giving evidence for the prosecution will have immunity from prosecution.”

251. The Committee recognised the evidential difficulties highlighted by the Sheriffs’ Association but noted that the Crown already deals with circumstances where the successful prosecution of one person involved in a crime can only be achieved by using someone else involved in that crime as a prosecution witness rather than seeking to prosecute both. However, the Committee would welcome assurances that, in the particular situation raised in the Bill, the Crown will be able to demonstrate cogent and fair reasons for prosecuting one child but not the other.

252. The Sheriffs’ Association also pointed out a potential issue with the notification requirements of the Sexual Offences Act 2003 (“the 2003 Act”)—

151 Sandyford, NHS GGC. Written submission to the Justice Committee.
152 Equality and Human Rights Commission. Written submission to the Justice Committee.
153 Community Planning Partners in Highland. Written submission to the Justice Committee.
154 The Sheriffs’ Association. Written submission to the Justice Committee.
“Once convicted, sentencing options may be limited and in any event the sheriff may require advice from the Children’s Hearing prior to sentence. It should be noted that such children on conviction will be subject to notification requirements in respect of the so-called Sex Offenders’ Register ... At present the sheriff would have no discretion as to whether or not to make the child subject to notification requirements.”

253. Children 1st argued that the need for registration of a child on the Sex Offenders’ Register should be reviewed by an expert panel.

254. The Committee noted that schedule 3 of the 2003 Act contains a substantial list of sexual offences. In relation to Scotland, common law offences currently listed in Schedule 3 include: (a) rape; (b) indecent assault; and (c) lewd, indecent or libidinous behaviour or practices. Statutory offences currently listed in Schedule 3 include various offences relating to children, for example: (a) indecent images of children (e.g sections 52 and 52A of the Civic Government (Scotland) Act 1982); (b) sexual activities with children (e.g. section 5 of the Criminal Law (Consolidation) (Scotland) Act 1995); and (c) abuse of trust (e.g. section 3 of the Sexual Offences (Amendment) Act 2000).

255. In addition to setting out a long list of specific offences, schedule 3 of the 2003 Act also provides in relation to Scotland that a conviction for any other offence will lead to the offender being subject to the notification requirements of the 2003 Act if the court determines that “there was a significant sexual aspect to the offender’s behaviour in committing the offence” (paragraph 60).

256. The Committee is aware that a number of the offences in Schedule 3 of the 2003 Act are subject to age and/or sentence thresholds beneath which the offence will not trigger the notification requirements. Some also provide the court with a degree of discretion. For example, a conviction under section 9 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 (paying for sexual services of a child under 18) will trigger the notification requirements if either of the following apply:

- the victim was under 16 and the offender was: (a) 18 or over; or (b) is sentenced to imprisonment of at least 12 months
- in disposing of the case the court determines that it is appropriate for the notification requirements to apply

257. However, the Committee noted that some of those offences in schedule 3 of the 2003 Act which always trigger the notification requirements could, in terms of seriousness, cover a broad range of offending behaviour (e.g. the common law offence of indecent assault). In such cases, the fact that a particular conviction involves a less serious example of an offence does not mean that notification requirements do not apply.

258. In relation to the issues surrounding the operation and application of the Sex Offenders’ Register, the Committee noted that, currently, sheriffs

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155 The Sheriffs’ Association. Written submission to the Justice Committee.
156 Children 1st. Written submission to the Justice Committee.
and judges have only limited discretion as to whether or not to make a child convicted of a sexual offence subject to notification requirements.

259. The Committee, therefore, invites the Scottish Government to commission an expert review of the notification requirements of the Sexual Offences Act 2003 as it applies to offenders under the age of 16. Following the outcome of that review, the Committee considers that the Scottish Government should act swiftly to implement all appropriate recommendations.

Lord Advocate’s power to issue instructions to chief constables

260. Children 1st welcomed the inclusion in section 27 of the statement of the Lord Advocate’s discretion to give guidance to the police about reporting offences. Children 1st suggested that “this guidance is intended to avoid unnecessary investigations of consensual sexual activity between 13-15 year olds.”

261. When asked about the need for this subsection, the Lord Advocate conceded that it was not necessary—

“It states what my powers are already. I think that it is in the Bill to acknowledge explicitly the Lord Advocate’s powers when Parliament passes provisions that create a new offence for girls between the ages of 13 and 16.

… I do not think that section 27(7) in any way compromises the Lord Advocate’s independence; it simply restates what is in section 12 of the Criminal Procedure (Scotland) Act 1995 and section 17 of the Police (Scotland) Act 1967. The provision is harmless; it is simply a signpost to what the Parliament intends, but it is not necessary.”

262. The Cabinet Secretary for Justice defended the inclusion of the subsection in the Bill—

“It seems to me appropriate to include the subsection, and I do not see why it should set a precedent. There is no clear evidence that it will undermine previous legislation in any way. If it is appropriate for the bill, we should do what is right.”

263. The Committee notes that the inclusion of reference to the Lord Advocate’s power to issue instructions to chief constables in section 27(7) simply restates existing statutory provisions. The Committee invites the Scottish Government to provide a more comprehensive justification for the inclusion of this provision.

Underage sexual activity – multi-agency guidance

264. Responding to concerns expressed by a number of witnesses as to how the provisions concerning sexual activity between children under the age of consent will operate in practice, in a supplementary written submission, the Cabinet Secretary for Justice provided the Committee with information about the work of

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157 Children 1st. Written submission to the Justice Committee.
the Short Life Working Group on Reporting and Handling Disclosures of Underage Sexual Activity.

265. The Cabinet Secretary explained that the Group had developed multi-agency guidance for professionals working with children to assist decision making—

“The guidance is drafted to allow professionals to make confident, careful and robust assessments in individual cases. The principal point is that the guidance calls for a proportionate response from professionals, in keeping with meeting the needs of the young person in question. The guidance is in draft at the moment, and will be subject to further revision and consultation.”

266. The Committee welcomes the work of the Short Life Working Group and notes the explicit linkages in the guidance to the Scottish Government’s strategies *Getting it right for every child* and *Respect and Responsibility: Strategy and Action Plan for Improving Sexual Health.* The Committee acknowledges the importance of agencies such as health, education, police and social work responding appropriately and in a co-ordinated manner when they become aware that a child is engaging in sexual activity.

267. In addition to the guidance, the Committee considers that there is a pressing need for the Scottish Government to bring forward, as expeditiously as possible, a comprehensive framework for multi-agency co-operation to provide effective support to a child or children involved in underage sexual activity.

*Symbolic use of the criminal law*

268. The Committee explored with witnesses whether it was appropriate to create in statute, offences which would be rarely prosecuted in practice.

269. In his written submission, James Chalmers commented on the Government’s decision to depart from the Scottish Law Commission’s proposals on sexual activity between older children. He pointed out that when the Scottish Law Commission reviewed the law on the age of criminal responsibility at an earlier stage it found that, from 1994-1999, only 31 children were prosecuted for sexual offences (a figure which would encompass consensual and non-consensual activity, and activities involving both older and younger children). Mr Chalmers submitted that this low figure suggested that prosecutions are not brought for consensual sexual activity between older children, and that the Policy Memorandum to the Bill “does not indicate any desire that this position should change”. He concluded—

160 Scottish Government. Letter from the Cabinet Secretary for Justice to the Convener of the Justice Committee dated 22 December 2008.


“... it is inappropriate to pass criminal laws unless we are prepared to enforce them. The criminal law is too serious a tool to be used simply to “send a message”... It seems to me strange that any Parliament would pass criminal laws which it wished prosecutors to refrain from enforcing.”

270. In his oral evidence, James Chalmers discussed the difficulties which could arise from using the criminal law in this way—

“Criminal law is perhaps viewed as an easy educational tool, but we must be wary of patronising young children and assuming that they are not well aware that particular offences are not prosecuted. If children see that people regularly engage in certain activities and are not regularly prosecuted, they are not likely to take the legal message seriously. The danger is that they then might start to take other legal messages less seriously than they ought to.”

271. In its oral evidence, the Equality and Human Rights Commission provided a helpful summary of the issue—

“It is a case of weighing up the pros and cons of changing the law and decriminalising such offences, or proceeding on the basis that has been advocated by several witnesses, who believe that, on balance, it is better to ensure that we continue to have a criminal law response in our armoury while recognising that that response is unlikely to be used frequently. I realise that such an approach is unsatisfactory to some members, who will think that laws that will not be enforced should not be passed. However, organisations in the children's sector have stated that we must be mindful of the complexities of the law in this area and of the unintended consequences of sending out messages that the law has been relaxed or the penalties lowered.

The issue is not clear cut or easy, but a number of witnesses have advocated the best balance, which involves moving forward on the basis that the law exists with the understanding that when and how to proceed will be up to the wisdom and judgment of the Lord Advocate.”

272. The Committee strongly supports the retention of 16 as the age of consent in Scotland. The Committee acknowledges the evidence it has received which confirms the potentially serious consequences for the health and welfare of young people who engage in sexual activity below this age. The Committee considers that safeguarding the welfare of these young people is of paramount importance.

273. The Committee supports the continued use of the Children’s Hearings System to address offending behaviour by children in the overwhelming majority of cases. However, the Committee is satisfied that the decision by the Scottish Government to retain in the Bill the option of criminal

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163 James Chalmers. Written submission to the Justice Committee.
prosecution for consensual penetrative sexual conduct between older children, at the discretion of the Lord Advocate, is appropriate.

**Gender neutrality**

274. The Policy Memorandum to the Bill states that the Bill’s provisions provide “greater gender neutrality than the current common law and statutory sexual offences, many of which can only be committed against girls or boys.”

275. A large number of written responses to the Committee’s call for evidence expressed support for the gender neutral drafting of the Bill.

276. Children in Scotland supported this general intent with the exception of the provisions of section 27 which, in its view, would—

“expose … young women to a new set of potential criminal charges for consensual sexual intercourse with other older children. While this would make their legal status/vulnerability equal to that of young men of their age, we do not share the view that either males or females of this age should be treated as criminals for engaging in consensual sexual intercourse with each other.”

277. The Committee explored with the Lord Advocate whether there was a justification for treating girls aged under 16 differently from boys. The Lord Advocate replied—

“The provisions in the Bill suggest that there should be equality in relation to gender. In contrast with the law that we had in the past, when we consider how to legislate, we now have to ensure that the law complies with article 14 of the European Convention on Human Rights and is non-discriminatory. We can justify a departure from that only where there are good reasons to discriminate between the genders.”

278. The Cabinet Secretary for Justice confirmed that the Scottish Government considered that there was a “requirement for gender neutrality” under the terms of the ECHR. He noted, however, that—

“… it could be argued that perhaps many of those girls should be referred to the children’s panel so that we can look after their care and welfare, because teenage pregnancy is a considerable problem for our society and it causes great difficulty and distress for the girls and their families.”

279. The Committee is supportive of the gender neutral approach taken in the drafting of the Bill and understands the need to ensure compliance with the terms of the ECHR in this respect. However, the Committee notes the evidence from the Lord Advocate that a departure from this approach can be justified if there are good reasons to do so.

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166 Policy Memorandum, paragraph 173.
167 Children in Scotland. Written submission to the Justice Committee.
280. The Committee considers that in relation to the provisions of section 27 there is an objective justification to treat the genders differently. For example, in circumstances where two older children engage in consensual penetrative sex and the girl becomes pregnant, the Committee believes that it would be highly undesirable and potentially damaging to subject that girl to a criminal prosecution. The Committee agrees with the Cabinet Secretary that referral to the children’s panel would be a more appropriate response.

281. The Committee, therefore, recommends that the Scottish Government gives further consideration to the provisions of section 27 of the Bill in order to address this issue.

Older children engaging in consensual oral sex with each other

282. Several respondents to the call for evidence pointed out that consensual oral sex between older children is specifically excluded from the provisions of section 27. The concerns raised were that there was insufficient justification offered for drawing the distinction between oral sex and other forms of penetrative sex.  

283. Although clear that it did not believe that criminalising consenting sexual activity between young people was appropriate, the Family Planning Association was concerned about the possible messages which the exclusion of oral sex from section 27 could send to young people—

“the exclusion of oral sex from this clause could serve to send a message to young people that as consensual oral sex is not illegal, it is risk-free, which is not necessarily the case. Although the risk of contracting an STI from unprotected oral sex is much lower than through unprotected vaginal or anal sex, there is still a small risk … We are also concerned that young people could feel under some pressure to have oral sex, even if they do not want to, because it is seen as being ‘okay’ or ‘allowed’ because it has been treated differently in the legislation.”

284. The Christian Institute pointed out that sexual activities other than full sexual intercourse carried a number of risks for the participants, including the risk of sexually transmitted infection. The Christian Institute considered that “the failure to prohibit any under-age sexual activity except penetration of the vagina or anus otherwise than by the mouth, and the inclusion of the proximity of age defence, will dismantle key aspects of the age of consent law.”

285. The Lesbian and Gay Christian Movement (LGCM) and the Reformed Churches Caucus of LGCM also raised concerns about the exclusion of oral sex from the offences set out in section 27 due to the associated health risks—

“Preserving the personal sexual health of children seems to us an adequate justification for seeking to discourage risky behaviour through the law.”

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169 Children 1st and Sandyford NHS GGC. Written submissions to the Justice Committee.
170 Family Planning Association. Written submission to the Justice Committee.
171 The Christian Institute. Written submission to the Justice Committee.
172 Lesbian and Gay Christian Movement and the Reformed Churches Caucus of LGCM. Written submission to the Justice Committee.
286. ACPOS also raised concerns about the drafting of section 27—

“The inclusion of activity using the mouth would require careful drafting because we would not want to criminalise kissing between older children, but by explicitly excluding it from the section we are allowing some types of sexual behaviour, such as oral sex, that we feel should be included.”

287. The Cabinet Secretary for Justice was asked to explain the Government’s reasons for treating oral sex differently from other penetrative sexual activity between older children. He replied that the Government was willing to reflect on the matter, but—

“It seems to us that many such matters are best dealt with through education and health counselling. We must take into account the difficulties in locating such activity, proving it in court and progressing such cases. It is about striking the right balance.”

288. The Committee shares the concerns expressed by many stakeholders at the exclusion of oral sex from the provisions of section 27. The Committee is concerned that this could send an inappropriate message to young people that society considers such activities to be acceptable and risk free.

289. The Committee does not believe that the Scottish Government has provided sufficient justification for treating oral sex differently from other penetrative sexual conduct and recommends that the section should be amended to include oral sex within the scope of the offence provisions. In so doing, however, the Government must ensure that normal teenage consensual activities such as kissing are not made criminal.

Privacy and sexual acts between older children

290. Article 8(1) of the European Convention on Human Rights guarantees the right to respect for private life. The European Court of Human Rights has held that this protects the establishment of relationships with others, including sexual relationships. The Convention does not, in this regard, draw a distinction between adults and younger people.

291. However, the right to privacy is not absolute. Article 8(2) of the Convention provides that the State may interfere with the right to privacy provided that such interference is “necessary” in order to achieve or protect certain important social interests. These include the prevention of crime, the protection of health or morals and the protection of the rights and freedoms of others.

292. The Committee explored with the Lord Advocate and the Cabinet Secretary for Justice whether the provisions of section 27 of the Bill which would criminalise consensual penetrative sexual conduct between older children would infringe the right of these young people to a private life.

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293. The Lord Advocate acknowledged that Article 8 protects privacy and the rights of the family, but pointed out that the European Court of Human Rights “gives a margin of appreciation to states” to “consider protection of their most vulnerable citizens”. The Lord Advocate explained that “the Court had not put in place a high threshold for interference; there is a low common denominator on the extent to which the state can interfere with private lives, family choices or individuals’ sexual lives.” The Lord Advocate concluded, therefore, that it was “perfectly legitimate to take a welfare approach” in this instance.  

294. The Cabinet Secretary for Justice set out the Government’s position on the matter—

“Our must protect the rights of children between 13 and 16, who we believe are not in a position properly to consider their own interests on such matters. It is a question of balance. Of course children have rights under the ECHR, but, as the Lord Advocate said, there is a margin of appreciation. Society has a choice about where to set the parameters and we have decided to make provision for 13 to 16-year-olds. Other jurisdictions take a different approach, but I do not think that anyone is suggesting that we change our approach.”  

295. The Cabinet Secretary stated that the Government’s position relied upon the advice of its legal team and consultation with the Lord Advocate. He concluded—

“It would be incompetent of the Government to ask the Parliament to pass a bill that was not ECHR compliant. The best advice that we have is that it is ECHR compliant.”  

296. The Committee is satisfied that the Scottish Government has given consideration to the potential conflict between the provisions of section 27 of the Bill and Article 8 of the European Convention on Human Rights and notes its conclusion that the provisions are compliant in this respect.  

Section 29 – Defences in relation to offences against older children  

297. The Committee examined the defences set out in section 29 relating to sexual activities with older children.  

298. The first of these defences covers all of the older child offences (i.e. those set out in sections 21 to 28). It provides that it is a defence if the accused reasonably believed that the complainer had attained the age of 16 years. A similar defence exists under the current law in relation to the offence of having sexual intercourse with a girl who has reached the age of 13 but who has not attained the age of 16.  

299. Although this defence did not raise significant objections in principle from the majority of respondents to the Committee’s call for evidence, the Sheriffs’ Association pointed out a potential unintended consequence arising from the drafting of this defence—

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“The only defence available to a child under 16 (“child A”) who sexually penetrates another child (“child B”), is that child A thought that child B was over 16. The only defence available to child B who is penetrated in a consensual act is that child B thought that he or she was being penetrated by a person over 16. It will therefore be a defence to a charge under clause [sic] 27(1) and (4) that rather than having consensual penetrative sex with another child, the child thought that he or she was having consensual sex with an adult.”

300. The Committee invites the Scottish Government to respond to the issue raised by the Sheriffs’ Association.

301. A number of respondents to the call for evidence noted that the defence was not available if the accused had “previously been charged by the police with a relevant offence”. This raised two issues. Firstly, the absence of a definition of “relevant offence” on the face of the Bill and, secondly, whether it was appropriate for the defence not to be available if an accused person had “previously been charged by the police” as opposed to prosecuted or convicted.

302. The Committee noted that in relation to the existing offence of sexual intercourse with a girl aged under 16, as set out in section 5 of the Criminal Law (Consolidation) Scotland) Act 1995, where the girl is aged over 13 it shall be a defence, subject to certain conditions, that the accused believed on reasonable grounds that the girl was 16 years old or over. One of those conditions is that the accused had not previously been charged with “a like offence”. The definition of “a like offence” is provided at subsection (6) rather than being left to subordinate legislation.

Definition of “a relevant offence”
303. Section 29(5) provides that the definition of “a relevant offence” will be specified in subordinate legislation which would be subject to the negative procedure.

304. The Sheriffs’ Association pointed out the absence of guidance in the Bill as to what constitutes “a relevant offence” and invited the Parliament to consider whether the use of the negative procedure was appropriate.

305. The Subordinate Legislation Committee considered this delegated power as part of its scrutiny of the Bill. It concluded that the use of subordinate legislation to specify “relevant offences” for the purpose of Section 29(2) is appropriate “in order to provide flexibility to address future changes in the law.”

306. However, the Subordinate Legislation Committee recommended that the Government “consider further whether the Bill can be amended to restrict the
scope of the power to a power to specify offences or circumstances involving conduct of a sexual nature involving children as “relevant offences”.181

307. The Committee is not content to endorse the recommendation of the Subordinate Legislation Committee in relation to this matter. The Committee considers that, in keeping with the example of the Criminal Law (Consolidation) Scotland) Act 1995, “relevant offences” should be defined in the Bill.

**Availability of defence if “previously charged by police”**

308. As previously stated, the defence is not available to someone previously charged by the police with a relevant offence.

309. ACPOS noted that in accordance with its recommendation, the Government had restricted the application of this defence to those not previously charged with a like offence.182

310. The Scottish Child Law Centre expressed concern about this provision, pointing out that it was uncommon for charges to lead to no action due to lack of evidence. It submitted that “being charged with an offence is not equivalent to being found guilty of an offence.”183

311. The Lesbian and Gay Christian Movement was also unhappy that the defence was ruled out on the basis that the accused had previously been charged by the police with a similar offence as it believed that this did not protect the basic freedoms of the citizen.184

312. On balance, the Committee supports the restricted application of this defence in keeping with the example of the Criminal Law (Consolidation) Scotland) Act 1995.

**Proximity of age defence**

313. Significant concerns were raised in some written submissions about the defence set out in section 29(3). This defence applies to—

- the offence under section 21, to the extent that it takes the form of a male offender penetrating the mouth of the other party with his penis (section 29(4)(a));

- the offence under section 22, to the extent that the charge is founded on A penetrating B’s mouth with his penis, or where other forms of penetration were achieved by A’s mouth, tongue or teeth (section 29(4)(b)(i));

- any of the other offences created by section 22(2)(b), (c) or (d) (sexual touching, sexual activity causing physical contact with the complainer and ejaculating semen onto the complainer) (section 29(4)(b)(ii));

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182 ACPOS. Written submission to the Justice Committee.
183 Scottish Child Law Centre. Written submission to the Justice Committee.
184 Lesbian and Gay Christian Movement. Written submission to the Justice Committee.
any of the offences created by sections 23 to 26.

314. The Committee understands that the defence created by section 29(3) introduces a new concept into Scots criminal law - that of a defence based on the age difference between the offender and the other party. Under section 29(3), for the offences to which it applies (as set out above), it will be a defence that at the time when the conduct to which the charge relates took place, the difference between the accused’s age and that of the other party did not exceed two years.

315. The Committee noted that the offences to which section 29(3) applies all involve a situation in which the alleged offender has reached the age of 16 while the other party is an older child. The effect of section 29(3) would then be that, for example, if a seventeen year old boy were to sexually touch his fifteen year old girlfriend, with her consent, there would be no offence. If however, an eighteen year old youth were to engage in the same kind of conduct with his fifteen year old girlfriend there would be an offence.

316. Importantly, the Committee also noted evidence from the Cabinet Secretary for Justice that the defence set out in section 29(3) does not apply in any case to an offence which consists of vaginal or anal penetration.  

317. In a supplementary submission, the Cabinet Secretary for Justice also informed the Committee that the Government intended to amend the Bill so as to provide that the defence of ‘age proximity’ does not apply in respect of sexual intercourse with a child under the age of consent under any circumstances. He explained that his would ensure that “the Bill does not discriminate according to gender or sexuality.”

318. Concerns about this defence essentially replicated the more general concerns about de-criminalisation of some forms of consensual sexual conduct between older children.

319. The Christian Institute was strongly opposed to the inclusion of this defence in the Bill—

“Allowing 15 or 16-year-olds to engage in a range of sexual activities short of full intercourse with 13 or 14-year-olds respectively could be highly exploitative and abusive. The younger party is unlikely to fully comprehend the physical, emotional or moral implications of the activities, or the health risks, and is therefore in no position to be able to give genuine consent. Consequently, the criminal law has a clear duty to intervene by prohibiting this conduct.”

320. Another more specific concern was raised that this defence was novel and unfamiliar, and would thus lead to confusion. It was argued that a formerly clear rule about age – namely that sexual activity was prohibited with girls who had not

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186 Scottish Government. Letter from the Cabinet Secretary for Justice to the Convener of the Justice Committee dated 22 December 2008.
187 The Christian Institute. Written submission to the Justice Committee.
reached the age of 16 – was to be replaced by a more complex set of rules which depended on age difference.

321. In its written submission, Children 1st stated that it understood the rationale behind the defence in section 29(3) and agreed that it made “no sense to criminalise normal and non-exploitative relationships between a 16 -17 year old and for example a 14 -15 year old.” However, Children 1st argued that the creation of this defence was “confusing, unworkable and difficult to communicate clearly to the young people who may be in these circumstances.” It suggested, therefore, that this aspect of the Bill be withdrawn and replaced by guidance, including guidance from the Lord Advocate to the police about the situations where prosecution of sexual activity between a 16-17 year old and a 14-15 year old would or would not take place.\(^{188}\)

322. There were, however, other witnesses who welcomed the introduction of this defence, largely for the same reasons as were put forward in support of a broader policy of decriminalisation in this area.

323. ACPOS supported the proposed defence and commented that it contained “straightforward, unambiguous parameters that are easily understood, not least of which by older children themselves.”\(^{189}\)

324. The Committee is concerned that the proximity of age defence would effectively decriminalise a wide range of sexual activity between young adults and older children as young as 14 years old. The Committee invites the Scottish Government to consider the scope of this defence in light of the recommendation which the Committee has made in this report regarding oral sex between older children.

Older children - Conclusion

325. The Committee noted the differing views about the legislative approach chosen by the Government to address consensual penetrative sexual conduct between older children.

326. The Committee acknowledges the detailed work of the Scottish Law Commission (SLC) in this area and notes that, in the course of its deliberations, the SLC changed its position from favouring integration of these offences with the general system on the prosecution of children under 16 to a final recommendation that consenting sexual activity between older children should not be criminal.

327. The Committee also noted the SLC’s recommendation that there should be a new ground of referral of a child to a children’s hearing, “that the child has engaged in sexual activity with another person or has been subjected to sexual activity with another person.”

328. As previously stated, the Committee strongly supports the retention of 16 as the age of consent in Scotland. In relation to consensual sexual conduct between older children, the Committee believes that the Scottish

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\(^{188}\) Children 1st. Written submission to the Justice Committee.

\(^{189}\) ACPOS. Written submission to the Justice Committee.
Government’s general approach is appropriate and makes clear that society does not condone underage sexual intercourse. The Committee has made several recommendations designed to strengthen the Bill in this regard.

329. The Committee strongly favours a welfare based approach to address underage sexual activity between older children in order to safeguard their health and wellbeing. The Committee considers that Scotland’s Children’s Hearings System provides a strong and effective mechanism to deal with the vast majority of such cases. However, the Committee supports the retention of the option of criminal prosecution in the Bill for consensual penetrative sexual conduct subject to the discretion of the Lord Advocate.

PART 5 – ABUSE OF POSITION OF TRUST

330. Section 31 creates an offence of “sexual abuse of trust” in relation to child victims under the age of 18. A person commits sexual abuse of trust if they are aged 18 years or older and intentionally engage in sexual activity with a person who is under 18 and in respect of whom the older person is in a position of trust. It is not necessary, for conviction, to prove that the victim did not consent to the activity.

331. This offence replaces a number of existing offences contained in the Criminal Law (Consolidation) (Scotland) Act 1995 and the Sexual Offences (Amendment) Act 2000. It covers circumstances where a sexual breach of trust occurs in a family setting and where it occurs in respect of someone who has a position of trust over a child in their care, for example in a school or hospital.

332. Section 32 contains detailed provisions on when a position of trust can be said to exist. In addition to setting out five sets of circumstances in which there is a position of trust, it gives Scottish Ministers the power to specify (by way of subordinate legislation) additional circumstances in which there is a position of trust.

333. Four specific defences to the offence of sexual abuse of trust are set out in section 34. Firstly, that the accused reasonably believed that the person in relation to whom they were in a position of trust was 18 or older. Secondly, that the accused reasonably believed that they were not in a position of trust in relation to the person they were engaging in the sexual conduct with. Thirdly, that the accused and the other person were married or in a civil partnership. Fourthly, that immediately before the position of trust was created, a sexual relationship already existed between the two people. The first two defences are available in relation to all the positions of trust set out in section 32 of the Bill. The other defences are not available in relation to the family type situations set out in section 32(6).

334. In written evidence, ACPOS said—

“ACPOS welcomes the provision in the Bill to extend the offences relating to abuse of trust from under 16 year olds to those under 18 years olds. However, persons who have attained the age of 18 but who are nevertheless
extremely vulnerable within society will not benefit from the overarching protective principle the Bill endeavours to achieve.”\textsuperscript{190}

335. In its supplementary written evidence, ACPOS drew attention to section 25(3) of the Children (Scotland) Act 1995. This states that a local authority may provide accommodation for any person within their area who is at least eighteen years of age but not yet twenty one, if they consider that to do so would safeguard or promote that person’s welfare. ACPOS advised that those in local authority provided accommodation in these circumstances would not be protected by the provisions in this Bill, despite the fact that placement in local authority accommodation is intended to safeguard the person’s welfare.

336. ACPOS also drew attention to the fact that—

“the structures of many contemporary family units do not necessarily represent the stereotype of a “traditional household” and are often fragmented and complex. Parental functions are now commonly discharged by persons such as those referred to in section 32(6) of the Bill. Abuse often begins when the victim is under the age of 16 and continues into adulthood. The lack of control and inability to escape the influence of the abuser, as experienced by victims of extensive abuse, can be exacerbated by issues such as financial dependency or emotional loyalty to the natural parent, thereby making the individual extremely vulnerable.”\textsuperscript{191}

337. ACPOS proposed that the Bill should be amended to provide that an offence would be committed where there was a position of trust between the parties and the sexual activity took place as a result of a position of trust.

338. \textbf{The Committee recommends that the Scottish Government considers this issue and advises the Committee of its view prior to the Stage 1 debate.}

\textbf{Delegated powers}

339. As commented on above, section 32(1) confers a power on Scottish Ministers to make an order, subject to negative procedure, specifying what other conditions, in addition to those already set out in section 32, will constitute a “position of trust”.

340. In its report, the Subordinate Legislation Committee noted that Ministers can specify any condition by which a position of trust would be established for the purposes of creating an offence, that there are no apparent restrictions on this and that there is no provision for any qualitative test to be applied by the Ministers in exercising this power so as to narrow its scope. As the power is one which will have the effect of amending primary legislation, this has the potential to widen the scope of the offence.

341. After taking evidence, the Subordinate Legislation Committee accepted the use of delegated powers in principle but asked the Scottish Government to

\textsuperscript{190} ACPOS. Written submission to the Justice Committee.
\textsuperscript{191} ACPOS. Written submission to the Justice Committee dated 6 January 2009.
consider further whether the power could be framed more narrowly. The Subordinate Legislation Committee concluded—

“Given the potential impact of the exercise of this power to widen the scope of the offence of the sexual abuse of trust the Committee recommends that affirmative procedure is the appropriate level of parliamentary scrutiny.”

342. The Committee endorses the recommendation of the Subordinate Legislation Committee and draws it to the attention of the Scottish Government.

Sexual abuse of trust of a mentally disordered person

343. Section 35 of the Bill creates an offence of “sexual abuse of position of trust of a mentally disordered person”. It is not necessary, for conviction, to prove that the victim did not consent to the activity. Section 36 sets out a number of defences which are specific to the offence.

344. It will be an offence for a person to intentionally engage in any sexual activity with a mentally disordered person, where the perpetrator of the offence is in a position of trust in relation to the victim. The offence is aimed broadly at anyone whose work involves providing care services to a mentally disordered person or anyone who is employed by (or contracted to provide services in, or who manages) a hospital in which a mentally disordered person is receiving treatment.

345. Sense Scotland said that although rape, sexual assault and sexual coercion are all clearly defined, it was not clear in the Bill how “sexual activity” is to be defined.

346. In its written submission, the Law Society of Scotland raised more general concerns about this section—

“The Society would envisage difficulties with regard to the definition of when individuals are in a position of trust such as health professionals and would suggest that the definition be widened to include those in a voluntary role. The Society would also question whether individuals can, or should be defined mainly in relation to the service they are receiving rather than on the capacity to consent and would welcome suitable clarification. As well as widening the definition to include those in a voluntary role as referred to above, the Society would respectfully suggest that there are other categories of individuals which may well be in a position of trust such as advocates, employers and employment support workers.”

347. The Law Society drew particular attention to individuals being defined in the Bill in relation to the service they receive. In its view, any move towards self-directed support would result in the person who receives the service being the employer. This would make it difficult to regulate any relationship formed between carer and the person receiving the care. The Law Society also said that it would welcome information with regard to prosecutions and convictions under the current

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192 Subordinate Legislation Committee. Report on Sexual Offences (Scotland) Bill, Paragraph 31
193 Sense Scotland. Written submission to the Justice Committee.
194 Law Society of Scotland. Written submission to the Justice Committee.
legislation in order to establish whether the law with regard to sexual abuse of trust of mentally disordered persons is effective. 195

348. In the view of the Committee, the issue raised by the Law Society about a person receiving care becoming an employer is one that requires further consideration. The Committee draws this matter to the Scottish Government and requests a response prior to the Stage 1 debate.

349. The Bill’s Policy Memorandum states that section 35—

“replaces the existing provisions at section 313 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (the 2003 Act) which, though not referring to the term “breach of trust” clearly have this concept at their core. The provisions are wider in their application than those at Part One of the Bill, in that they apply in respect of a person with a mental disorder, regardless of whether that person’s mental disorder is such as to negate their ability to consent to sexual conduct. However, in another sense, the provisions are narrower, insofar as they apply only to those in providing care services to the mentally disordered person.” 196

350. In its written and oral evidence, Enable said that the Bill did not represent an improvement on the 2003 Act—

“Enable Scotland has changed its view...We in no way wish to give the impression that we condone any breach of trust by people who are there to care for and support people with learning difficulties, but the criminal law is not helpful in trying to resolve that situation. We note in our submission that there have only been four referrals under the 2003 Act, none of which has resulted in prosecution. There were only a handful of referrals under the previous provisions in the 1983 Act. Criminalising such a breach of trust does not seem to work, which is why we have revisited the issue.” 197

351. Enable also stated that such breaches of trust usually take place in private and that people are not coming forward with such information because of the implications of it being a criminal offence. 198

352. Enable made it clear that in formulating its view, it was referring to people with learning disabilities who have the capacity to consent, and not people who are judged incapable and who are covered by legislation elsewhere. Enable suggested—

“If a support worker finds themselves getting into an improper relationship, we want them to come forward, but they are less likely to do so if they think that it is a criminal offence...There are, of course, other sanctions that can be applied. If the support worker was employed, their behaviour would be inappropriate in their employment situation, and if they were a registered

195 Law Society of Scotland. Written submission to the Justice Committee.
196 Policy Memorandum, Paragraph 151
worker, their registration might need to be terminated. However, we do not think that the criminal law is the best way to deal with the situation.”

353. In support of Enable’s view, the Equality and Human Rights Commission said—

“Enable raises a very important point about how we can address the difficult area of ensuring that we extend all the protection that we should to people with learning disabilities while not using the criminal law as a means of regulating how consenting adults have sexual relationships.”

354. The Scottish Commission for the Regulation of Care (SCRC) said that it broadly supported Enable’s comments with regard to section 35 of the Bill, particularly the need for differentiation between people with a learning difficulty who have capacity to make decisions and people who do not have capacity to make decisions. In its view, some issues that arise should not be treated as criminal matters but would be more a matter of misconduct which could be acted upon through employers etc. The SCRC gave the example of a teacher having a relationship with a 17 year old pupil which presently would not necessarily be treated as a criminal matter but would be viewed as misconduct.

355. The Committee notes however that under section 31(1) of the Bill, it will become an offence for a teacher to engage in sexual activity with a pupil aged 17 because sections 32(5) and 32(7) provide that the teacher will be in a position of trust with regard to the pupil.

356. Norman Dunning, for Enable, summarising its position, said—

“it is a question of how best to help people with learning disabilities. Rather than “protecting” them – as I said, there is no evidence that the current law does that, and the new measures are very similar – we need to educate them and give them the confidence to be ordinary citizens. A lot of the information that we receive from people with learning difficulties with capacity is that they want to be treated like other citizens – like everybody else…Giving those people the right support to deal with complex matters in their lives is much more important than having a criminal sanction. Criminal sanctions tend to work the other way round – they mark them out as being different and encourage overprotective attitudes.”

357. Initially in its evidence, the Law Society said that having considered the submission from Enable, it agreed that the matters raised should be given further consideration. However, in a supplementary written submission, the Law Society advised that its Mental Health and Disability Sub-Committee had reconsidered its position. It confirmed that it agreed with the Bill’s intention that it should be an offence for a person to engage in sexual activity with a mentally disordered person where that person is providing a care service to the mentally

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201 Scottish Commission for the Regulation of Care. Written submission to the Justice Committee.
disordered person or works in, or is the manager of, a hospital where the mentally
disordered person is being given treatment. 204

358. Dr Donald Lyons, The Mental Welfare Commission for Scotland, said—

“While understanding the position of Enable, there is an inherent danger in
persons with learning disability engaging in sexual relationships with people
in a professional caring role. The risk of this being an exploitative
relationship is greater than if an “ordinary” relationship develops. I therefore
think the wording of the Bill (being very similar to the 2003 Act) is
appropriate.” 205

359. The Lord Advocate said that she had been successful in prosecuting a
number of such cases and that she did not see a distinction between those without
and those with capacity—

“In those circumstances, one person would be in a position of care, and
exploiting that position in a sexual way or allowing a romance to develop
would be a failure of duty. If the person in the position of care sees that a
relationship may be about to occur, they must desist. There are means by
which they can get themselves out of the situation, so that they are no longer
in a position of care or trust, and so that they are able to pursue a lawful
relationship.” 206

360. The Cabinet Secretary for Justice, said that he was not persuaded that this
provision required to be looked at again—

“We feel that some protection is necessary. These issues are a matter of
balance. We have to ensure that we do not cast the net too widely and
interfere with organisations and individuals who are acting legitimately and
thereby jeopardise a variety of aspects of the care and wellbeing of
individuals but we have to protect those who have mental disabilities. We
believe that we have struck the right balance.” 207

361. The Committee understands that the position adopted by Enable
Scotland may not be consistent with article 8 of the European Convention on
Human Rights. That aside, the Committee agrees that protection of people
with learning difficulties should be paramount and is content that the option
of using the criminal law is available.

Defences
362. Section 36 sets out circumstances which give rise to a defence to a charge of
sexual abuse of trust of a mentally disordered person. Subsection 36(2) provides
that it shall be a defence if the parties are married, civil partners or involved in a
sexual relationship. Scottish Women’s Aid expressed concern—

204 The Law Society of Scotland. Written submission to the Justice Committee dated 15 December
2008.
205 Mental Welfare Commission for Scotland. Email communication from Dr Donald Lyons, Director.
“it is perfectly possible for the spouse, civil partner or sexual partner to exploit and abuse the other person, which can happen in relationships where the person does not have a mental disorder, as highlighted in Recommendation 6 of the 2007 consultation which states, “The giving of consent to one sexual act does not by itself constitute consent to a different sexual act.”

363. Scottish Women’s Aid said that it would like to see something on the face of the Bill to reflect this particular recommendation and that it would welcome further discussions with the Government and the Crown.

364. The Committee recommends that the Scottish Government considers this concern and advises the Committee of its view prior to the Stage 1 debate.

PART 6 - PENALTIES

365. Part 6 and schedule 1 of the Bill set out the relevant penalties. A number of witnesses noted that schedule 1 stated that the penalty for “rape” and “rape of a young child” could be a fine – the maximum penalty is stated as being life imprisonment or a fine (or both). The Committee was concerned that a person could potentially receive only a fine for this type of crime.

366. The Lord Advocate stated that the Bill replicates the current law which provides that a fine is available on conviction for rape but the reality is that no fine has been imposed for rape in the last decade. The Lord Advocate said that she found the prospect of only a fine being imposed as extraordinary and that her understanding was that any fine would be cumulative and not an alternative penalty. She suggested that in the context of cumulative penalties, consideration should also be given to compensation orders.

367. Professor Maher advised that the SLC’s drafting instructions were to ensure that the courts had the power to fine in addition to the power to imprison, in order to clarify an anomaly whereby there are certain offences for which there is no option of a fine. The SLC did not envisage that a fine would be a sole penalty, rather that it would be an additional penalty, where for example, a rapist was very wealthy.

368. The Cabinet Secretary confirmed—

“It is our understanding that the fine was to be cumulative; it was not meant to be an alternative. There was a great deal of merit in what the Lord Advocate had to say about that, particularly in relation to compensation orders. We will ensure that there is no ambiguity about these matters.”

369. The Committee looks forward to this provision being clarified by the Government in order to ensure that there is no possibility of a fine being imposed as a sole penalty for the offence of serious sexual assault or rape.

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208 Scottish Women’s Aid. Written submission to the Justice Committee.
370. Victim Support Scotland questioned the disparity between the penalties for penile penetration, depending on the age of the victim – and the creation of a grade of severity of the attack based on the age of the victim.

371. The Bill provides that the offences of “rape” and “rape of a young child” can only be tried under solemn procedure in the High Court and can attract a maximum custodial sentence of life imprisonment or a fine (or both).

372. In contrast, a charge of “having intercourse with an older child” can be heard in both summary and solemn courts, and the maximum custodial sentence under solemn procedure is imprisonment for a term not exceeding 10 years. The Committee noted that where it is possible to prove that an older child did not consent, the accused could be charged with rape. In Victim Support Scotland’s view, the offence of “having intercourse with an older child” should be heard in the High Court and attract the same penalties as “rape” and “rape of a young child.”

373. Victim Support Scotland also raised the issue of equal opportunities. It pointed out that as rape, rape of a young child and having intercourse with an older child can only be by penile penetration, only men can commit these offences. Females can be charged with the offence of sexual assault, sexual assault of a young child and engaging in sexual activity with an older child. As cases of sexual assault can be raised in the lower courts with lesser maximum summary conviction penalties, it may be that penetration by an object (by either male or female offenders) could be given a lower penalties than an offence committed by penile penetration (in which the offender can only be male).

374. In its written evidence, Victim Support said —

“Victims of female offenders are hence given a different legal setting within which to gain recognition and restoration compared to victims of male offenders, regardless of the circumstances in the case or the damages caused by the penetration. The same is applicable for victims who have turned 13 but not yet 16, since the offences “intercourse with an older child” and “engaging in sexual activity with or towards an older child” can be raised in a lower court with a significantly lower range of penalties.”

375. The Committee is concerned that there may be an inconsistency in this provision and asks that the Scottish Government considers the position and reports its views to the Committee prior to the Stage 1 debate.

PART 7 – MISCELLANEOUS AND GENERAL

Continuity of law on sexual offences

376. Section 41 “for all purposes not relating to offences committed before the coming into force of this section” abolishes the common law offences of rape, clandestine injury to women, lewd, indecent or libidinous practice or behaviour and sodomy.

Victim Support Scotland. Written submission to the Justice Committee.
Victim Support Scotland. Written submission to the Justice Committee.
Victim Support Scotland. Written submission to the Justice Committee.
377. The Faculty of Advocates, when discussing the issue of withdrawal of consent, suggested that—

“if the common law is abolished, there will be no precedent to follow and the appeal court will be inundated with challenges to the interpretation of a statute. Therefore, the whole area of law will have to be revisited and matters will have to be discussed and argued at length.” 215

378. The Faculty of Advocates suggested that a provision should be included to the effect that the common law precedent would remain insofar as it was compatible with the Bill. This would allow the courts to continue to have regard to decisions made on particular matters.

379. However the Law Society of Scotland did not share the Faculty’s view on the continued availability of precedent, saying—

“I do not think it necessarily follows that we need a provision in the Bill stating that the pre-existing law still applies where appropriate…I rather assumed that the existing law would still apply if the circumstances, offences and themes of the Bill were the same as the common law.” 216

380. The Lord Advocate advised—

“I appreciate that section 41 suggests that the common law will be abolished at the time of commencement, in so far as the provisions relate to offences that take place post-commencement. I am not convinced that that is absolutely necessary. It is for the Committee to decide whether to remove law, or simply to allow it to fall into desuetude as we begin to use the new statutory offences.” 217

381. The Lord Advocate went on to say that the jurisprudence on the common law would still require to be used for some time as many cases would still fall to be prosecuted under the “old law” and that in her view there would be no bar to the courts applying the old jurisprudence to the new law in so far as it was relevant and coincided with that jurisprudence.”

382. However the Lord Advocate concluded—

“The beauty of the common law is its flexibility. There may be wisdom in retaining some of that, at least in the initial stages after the commencement of the new legislation.” 218

383. In light of comments made by witnesses, the Committee recommends that the Scottish Government considers the continuity of the law on sexual offences and the consequences of section 41.

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Ancillary provisions
384. Section 45 of the Bill enables Scottish Ministers to make ancillary provision by statutory instrument where it is necessary or expedient, or in consequence of giving full effect to the Bill.

385. In its report, the Subordinate Legislation Committee noted that this is a wide power which could be used to amend or repeal primary legislation (including the Bill once enacted). In the view of the Subordinate Legislation Committee, justification is required for any power to amend or modify the effect of primary legislation, when the power is not subject to affirmative procedure.

386. In response, the Scottish Government said that it would bring forward amendments to ensure that any direct modification of primary legislation, whether textual or otherwise, would be subject to affirmative procedure.

387. The Committee notes this undertaking and the Subordinate Legislation Committee’s intention to consider the relevant amendment(s) at Stage 2.

SCHEDULE 5

388. The Equality Network raised a number of issues in relation to the repeal of section 13 of the Criminal Law (Consolidation) (Scotland) Act 1995 which is intended to reflect the replacement of offences in that section with gender neutral offences. In the view of the Equality Network, the repeal will leave some definitions remaining which will either require consequential updates or are deemed offensive to gay men.\textsuperscript{219}

389. The Committee notes that the Cabinet Secretary for Justice has agreed to consider the points raised in this regard and looks forward to his response prior to the Stage 1 debate.

EQUALITY IMPACT ASSESSMENT

390. The Scottish Government prepared an Equality Impact Assessment for this Bill which was clear and helpful.

391. The Committee welcomes the adoption by the Scottish Government of this approach for assessing the potential equality impact of legislation. The Committee would therefore encourage the Scottish Government to produce Equality Impact Assessments (EIAs) for all future Bills.

392. Notwithstanding the Committee’s view on the clarity of the Equality Impact Assessment, some equalities issues did arise during the Committee’s evidence taking and have been highlighted previously in this report.

FINANCE COMMITTEE CONSIDERATION OF THE FINANCIAL MEMORANDUM

393. The Finance Committee examined the financial implications of the Bill through scrutiny of the Financial Memorandum. It adopted level one scrutiny and received four written submissions. It is noted that the Scottish Children’s Reporter

Administration questioned the figures in the Financial Memorandum and stated that it was not possible for the SCRA, on the basis of the provisions now in the Bill, to predict the financial costs, as the proposals differ from those originally proposed by the SLC. In this regard, it should be noted that this Committee has highlighted the need for welfare interventions and that there may well be financial implications as a result of this.

CONCLUSION

394. The Committee has made several recommendations including that a further category of offence be created - rape with an object or with another part of the body, limited to vaginal or anal penetration, and with the same penalties as rape. The Committee is also concerned about the details of several proposals in the Bill. Nonetheless, subject to the response of the Scottish Government to the recommendations and concerns, the Committee is content to recommend that the Parliament agrees to the general principles of the Bill.
ANNEXE A: REPORTS FROM OTHER COMMITTEES

Subordinate Legislation Committee

Sexual Offences (Scotland) Bill

The Committee reports to the Parliament as follows—

Introduction

At its meetings on 9 September\(^{220}\), 7 October\(^{221}\), 28 October\(^{222}\) and 4 November\(^{223}\) 2008 the Subordinate Legislation Committee considered the delegated powers provisions in the Sexual Offences (Scotland) Bill at Stage 1. The Committee submits this report to the Justice Committee as the lead committee for the Bill under Rule 9.6.2 of Standing Orders.

The Scottish Government provided the Parliament with a memorandum on the delegated powers provisions in the Bill.

The Committee’s correspondence with the Scottish Government is reproduced in the Annexe.

Delegated Powers Provisions

This Bill provides a statutory framework for sexual offences in Scots law. The Bill contains 9 delegated powers to make subordinate legislation, the majority of which are subject to negative resolution procedure.

The Committee considered each of the delegated powers provisions in the Bill.

The Committee determined that it did not need to draw the attention of the Parliament to the delegated powers in the following sections: 30, 38, 42, 43, 46 and 49.

Section 29: Power to specify “relevant offences” for the purpose of Section 29(2)

Background

Section 29(1) provides that it shall be a defence for an accused person who is charged with an offence under sections 21 to 27 (sexual activity involving or directed towards a child aged 13-15) that he or she reasonably believed that the child, with whom he or she engaged in sexual activity, had attained the age of 16 years at the time the conduct took place. Section 29(2) provides that such a defence is not available to an accused if that accused has previously been charged by the police with a “relevant offence”.

\(^{220}\) Official Report 9 September
\(^{221}\) Official Report 7 October
\(^{222}\) Official Report 28 October
\(^{223}\) Official Report 4 November
Subsection (5) of section 29 confers a power on the Scottish Ministers to specify by order, subject to negative procedure, which offences will constitute a “relevant offence” for the purpose of section 29(2). (Those offences can be specified individually or can be identified by describing the type of offences which are “relevant offences”.)

The Committee wrote to the Scottish Government raising concerns about the scope of this power as well as the parliamentary procedure attached to it. The Committee also subsequently took oral evidence from officials on this issue.

In particular, the Committee wished to examine whether “relevant offences” for this purpose should be specified “on the face” of the Bill. The Committee believed that the scope of the power merited careful consideration given that the exercise of the power determines whether a defence of mistaken belief as to age is available. The Committee notes that there is no limitation on Ministers in specifying offences for this purpose – Ministers are not restricted to specifying offences in relation to sexual behaviour for example. The Committee also wished to explore whether the exercise of such a power should be subject to affirmative rather than negative procedure.

Evidence
In evidence to the Committee Gery McLaughlin of the Scottish Government Criminal Justice Directorate stated that it was felt to be more appropriate for the list of “relevant offences” to be provided in a single order rather than in a mix of primary and secondary legislation. In addition, while the absence of such a power had caused no difficulties in the past, listing the “relevant offences” in an order gave Ministers flexibility to respond quickly to any changes in the law both in Scotland and in other parts of the UK. (Col 393)

The Committee also asked for further explanation as to why negative procedure was considered to be an appropriate level of scrutiny. The Government explained that the use of negative procedure reflects the approach taken by the Scottish Law Commission in relation to order making powers in general its Report on Rape and Other Sexual Offences. Mr McLaughlin stated that, in his interpretation, the Scottish Law Commission had adopted an approach which favoured the use of affirmative procedure only where there is to be a substantial change in the law. (Col 397)

Conclusions and Recommendations
The Committee acknowledges that the argument that a complete list of “relevant offences” should be kept in one place is valid in that it is important that the criminal law should be clear and easily accessible. The Committee notes that it would be possible to achieve this objective through a list of “relevant offences” in the Bill itself. The Committee also recognises that the requirement to ensure flexibility to respond to new and changing legislation north and south of the Border is a legitimate aim and that there is a strong public interest in keeping the law up to date.

The Committee considers therefore that, on balance, there are arguments which support the use of subordinate legislation in these circumstances.
However concerns remain about the breadth of this power. The Committee must have regard to the fact that without any limitation on what may be specified, Ministers under this, or any future administration, could greatly expand the number or types of offences specified and therefore the availability of the defence.

The Committee did not consider that it had received a full explanation as to why the power to specify “relevant offences” cannot be framed more narrowly, to reflect the stated policy intention that “relevant offences” would be offences committed against children which had a sexual element.

The Committee therefore considers that the use of subordinate legislation to specify “relevant offences” for the purpose of Section 29(2) is appropriate in order to provide flexibility to address future changes in the law.

However, the Committee recommends that the Government consider further whether the Bill can be amended to restrict the scope of the power to a power to specify offences or circumstances involving conduct of a sexual nature involving children as “relevant offences”.

The Committee also continues to have concerns about the use of negative procedure for this power. While there is a need for flexibility to respond to changes in the law, it was not suggested by officials that there was a need to respond so quickly to developments that the use of affirmative procedure would be ruled out. The need to exercise this power will be preceded by legislative change and this can be anticipated in sufficient time to timetable an affirmative order. As this power was not contained in the draft bill annexed to the Scottish Law Commission’s report, the Committee considers that it does not have the benefit of the Commission’s view on which procedure it would have proposed to attach to such a power. As Ministerial involvement in specifying when the defence is available would be a change to the current law, the Committee is not persuaded that it can be assumed the Commission would have proposed negative procedure.

Given the significance of the effect of the exercise of the proposed power in determining when a defence of mistaken belief as to age is available to an accused, the Committee considers that specification of “relevant offences” should be subject to Parliament’s approval through affirmative procedure.

The Committee therefore recommends that the specification of “relevant offences” should be subject to affirmative procedure. The Committee draws the attention of the lead committee to these concerns.

Section 32: Power to amend the definition of what constitutes a “position of trust” in respect of the offence of sexual abuse of trust at section 31

Background
Section 31 creates an offence of sexual abuse of trust. It provides that a person commits an offence of sexual abuse of trust if they are aged 18 years or older and intentionally engage in a sexual activity with, or directed at, a person who is under 18 and in respect of whom the perpetrator is in a position of trust. Section 32 defines “position of trust” for the purpose of the offence in section 31 by setting out conditions which, if fulfilled, denote a person being in a “position of trust”.
Five situations which are “positions of trust” are set out in the Bill. In addition section 32(1) confers a power on Ministers to make an order, subject to negative procedure, specifying what other conditions, in addition to those already set out in section 32, will constitute a “position of trust”.

Members noted that Ministers can specify any condition by which a position of trust would be established for the purpose of the offence. There are no apparent restrictions on this and the section does not provide for any qualitative test to be applied by the Scottish Ministers in exercising this power so as to narrow its scope. The power is also one which will have the effect of amending primary legislation, albeit not by textual amendment - this has the potential to broaden the scope of the offence.

_Evidence_

The Committee wished to explore whether Ministers’ unlimited discretion to define new situations of trust to which the criminal offence would apply could be restricted in some way. The Committee also wished to probe further the Scottish Government’s reasons for proposing negative procedure.

Therefore, following its meeting on 9 September the Committee wrote to the Scottish Government with a number of questions about the scope of this power and the fact that the Bill proposes that it be subject to negative procedure and the Committee also considered oral evidence on this issue at its meeting on 28 October.

The response received by the Committee stated that framing the power at section 32 more narrowly would risk losing the flexibility to respond quickly to changes in the arrangements for the care and education of young people in Scotland, without the need for primary legislation. In oral evidence Mr McLaughlin stated that it was difficult to speculate at this stage what future changes may involve. (Col 398)

_Conclusions and Recommendations_

The Committee agrees that it is appropriate to have the flexibility to amend the law to reflect change in care arrangements and that these are likely to alter over time. However, the power available to Ministers is much broader than one which permits them to update references to reflect changes in care arrangements. It permits them to specify any conditions which are new positions of trust and which concern a relationship between persons one of which is over 18 and the other is under 18. The Committee notes that the law does not interfere with sexual relationships between consenting persons over the age of 16 without good cause. In its view the exercise of this power is therefore of significance.

Accordingly, the Committee finds the use of a delegated power acceptable in principle. However, members wish to ask the Scottish Government to consider further whether the power could be framed more narrowly in such a way that would allow for flexibility in responding quickly to any changes in the arrangements for the care and education of young people in Scotland.

In evidence to the Committee Mr McLaughlin stated that the choice of negative procedure was consistent with the Scottish Law Commissions’ approach. (Col 398) However, the Committee disagrees with this view. In the Scottish Law
Commission’s report and draft Bill this power is subject to affirmative procedure (see s 31(7) of the draft Bill annexed to the Scottish Law Commission Report)—this is consistent with the existing law as set out in section 4(1) of the Sexual Offences (Amendment) Act 2000.

Given the potential impact of the exercise of this power to widen the scope of the offence of the sexual abuse of trust the Committee recommends that affirmative procedure is the appropriate level of parliamentary scrutiny.

Section 35: Power to specify circumstances which are to be regarded as constituting the provision of care services for the purpose of the offence of sexual abuse of trust of a mentally disordered person

Background
Section 35 creates the offence of sexual abuse of trust of a mentally disordered person. Subsection (1) provides that a person commits an offence under this section if they fall within the class of persons specified in subsection (2) and intentionally engage in sexual activity with, or directed at, a mentally disordered person. Subsection (2) sets out the classes of person who are subject to the offence provisions in subsection (1). It provides that they are those who provide a care service to a mentally disordered person and those who are employed in, or contracted to provide services in, or who manage, a hospital in which a mentally disordered person is receiving treatment.

Subsection (4) lists what constitutes the “provision of care services”. In addition it confers a power on the Scottish Ministers to make an order, subject to negative procedure, specifying other circumstances which constitute the provision of care services.

Evidence
At its meeting on 9 September the Committee agreed to write to the Scottish Government to seek an assurance that this power is framed more narrowly than that in section 32(1).

The Scottish Government’s response confirmed that the power at Section 35 of the Bill is framed in such a way that it is only the manner of provision of care services as defined that can be amended and that this can be done only by addition rather than deletion of any part of Section 35(4).

In light of the assurance provided the Committee considers that this power is acceptable.

Section 45: Ancillary provision

Background
Section 45 of the Bill confers on the Scottish Ministers a power to make by order such incidental, supplemental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes of, or in connection with, or in order to give full effect to, the Bill. Subsection (2) provides that the power extends to the modification of any enactment, instrument or document.
Section 46(3) provides that any order under this section which contains provisions that add to, replace or omit any part of the text of an Act will be subject to affirmative procedure. Otherwise, it will be subject to negative procedure.

The Committee noted that this is a wide power which could be used to amend or repeal primary legislation, (including the Bill once enacted). Such powers are commonly sought as the full range of amendments to the statute book necessary to give effect to a Bill cannot always be identified, or may change, in the course of the passage of the Bill. However, the Committee considers that justification is required for any power to amend or modify the effect of primary legislation which is not subject to affirmative procedure.

The Committee therefore agreed to ask the Scottish Government—

- whether it would be prepared to agree that any modification of primary legislation however effected should be subject to affirmative procedure; and

- if not, whether it would give an undertaking that any significant or permanent modifications made to enactments using this power would be effected through textual amendment and so subject to affirmative procedure.

In its response, the Government stated that it did not consider that it would be appropriate to give an undertaking, in abstract, as to the way in which any modifications using this power will be effected, however, it stated that in the particular circumstances of this Bill, it would be willing to bring forward amendments to ensure that any direct modification of primary legislation, whether textual or otherwise, will attract affirmative procedure.

The Committee welcomes this response and will consider the proposed amendments at Stage 2.
ANNEXE

Response from Scottish Government

Sexual Offences (Scotland) Bill at stage 1

At its meeting on 9 September 2008 the Committee asked for explanation of the Scottish Government’s thinking on a number of matters relating to the powers to make subordinate legislation contained in the Bill.

Section 29: Power to specify “relevant offences” for the purpose of Section 29(2)

The Committee asks the Scottish Government—

- what type of offences it intends to specify as “relevant offences”;
- to explain why it is considered appropriate that the availability of the defence under section 29(1) should be dependent on whether or not a person has previously been charged with a relevant offence rather than convicted of such an offence, given that a person charged may subsequently not be convicted;
- why relevant offences could be not be listed in the Bill at this stage in combination with a restricted power to amend that list to reflect changes in the law on sexual offences within the UK;
- alternatively whether the Bill could be amended to clarify the nature of offences that could be specified using this power; and
- given the significance of the effect of the exercise of the proposed power, in that it determines the availability of a statutory defence to a serious criminal offence, why specification of relevant offences should not be subject to Parliament’s approval through affirmative procedure.

Section 32: Power to amend the definition of what constitutes a “position of trust” in respect of the offence of sexual abuse of trust at section 31

The Committee asks the Scottish Government—

- whether the open discretion to Ministers to provide for additional conditions constituting positions of trust could be framed more narrowly; and
- if not, whether it would agree that given the potential impact of the exercise of this power to widen the scope of the offence of sexual abuse of trust affirmative procedure would be the appropriate level of parliamentary scrutiny.
Section 35: Power to specify circumstances which are to be regarded as constituting the provision of care services for the purpose of the offence of sexual abuse of trust of a mentally disordered person

The Committee asks for an assurance from the Government that the power in section 35 is framed more narrowly than section 32(1), in that it is only the manner of provision of care services as defined that can be amended and that only by addition rather than deletion of any part of section 35(4).

Section 45: Ancillary provision

The Committee asks the Scottish Government—

- whether it would be prepared to agree that any modification of primary legislation however effected should be subject to affirmative procedure; and
- if not, whether it would give an undertaking that any significant or permanent modifications made to enactments using this power would be effected through textual amendment and so subject to affirmative procedure.

The Scottish Government responds as follows—

Section 29: Power to specify “relevant offences” for the purpose of Section 29(2)

Section 29(1) provides that it is a defence to an offence concerning sexual activity with an ‘older child’, that is a child aged between 13-15, that the accused reasonably believed that the child had attained the age of 16 years. Section 29(2) places a restriction on the availability of this defence by providing that the accused may not use the defence if he or she had previously been charged with a ‘relevant offence’. Section 29(5) gives Scottish Ministers power to prescribe by order the definition of a ‘relevant offence’.

The policy intention is that ‘relevant offences’ would be offences committed against children which had a sexual element. These will be likely to include the offences contained at sections 14 to 26 of the Bill, in addition to a number of existing provisions, such as those contained at sections 6 and 7 of the Criminal Law (Consolidation) (Scotland) Act 1995. The Government did not include these on the face of the Bill as it considered that it would be more appropriate that these be listed in a single Order, rather than being contained only on the face of the Bill or in a mix of primary and secondary legislation. It did not consider it either necessary or desirable to specify on the face of the Bill the nature of the offences that might constitute a “relevant offence”.

Committee members have asked why this defence should be restricted to those not previously charged with a relevant offence, as opposed to being restricted only to those not previously convicted of a relevant offence. If the test was that the accused had previously been convicted of a relevant offence it would not be possible to convict, as the accused would be able to rely, on each occasion, on the fact that he or she had not previously been convicted. The fact that an accused
person has been previously charged means that he, or she, is on notice that in the future more caution has to be exercised. Furthermore, it should be noted that section 5(5) of the Criminal Law (Consolidation) (Scotland) Act 1995, which criminalises intercourse with a girl aged 12-15 and is replaced by the provisions of this Bill also restricts the use of the defence of mistaken belief as to the girl’s age to those not previously charged with a like offence. This is not therefore a new approach.

It is the Government’s view that the negative resolution procedure will provide the appropriate level of scrutiny for an order specifying the offences to be included in the definition of ‘relevant offences’ for the purpose of the offences in Part 4 of the Bill. In the event that any Member had significant concerns about the terms of any such Order, or the offences included within the definition of ‘relevant offence’, it would be open to that Member to pray against the Order in Committee.

Section 32: Power to amend the definition of what constitutes a “position of trust” in respect of the offence of sexual abuse of trust at section 31

The Committee asks whether the power to amend the definition of what constitutes a “position of trust” in respect of the offence at section 31 of the Bill could be framed more narrowly. As outlined in the Delegated Powers Memorandum, the power is intended to allow sufficient flexibility to respond to changes in the arrangements for the care and education of young people in Scotland without the need for primary legislation. In the Government’s view, framing the power at section 32 more narrowly would risk losing the flexibility to respond quickly to such changes. As with the power at section 29, the Government’s view is that the negative resolution procedure provides the appropriate level of scrutiny for such an Order.

Section 35: Power to specify circumstances which are to be regarded as constituting the provision of care services for the purpose of the offence of sexual abuse of trust of a mentally disordered person.

The Committee asks for an assurance that the power at section 35 is framed in such a way that it is only the manner of provision of care services as defined that can be amended, and that this can be done only by addition rather than deletion of any part of section 35(4). The Government confirms that this is the case.

Section 45: Ancillary provision

The Committee asks whether the Scottish Government would be prepared to agree that any modification of primary legislation should be subject to affirmative procedure or, alternatively, to give an undertaking that any significant or permanent modifications made to enactments using this power would be effected through textual amendment and so subject to affirmative procedure.

The Scottish Government does not consider that it would be appropriate to give an undertaking, in abstract, as to the way in which any modifications using this power will be effected. The Bill provides for textual modification of primary legislation to attract affirmative procedure. Normally, non-textual modification is confined to modifying particular pieces of text for certain limited circumstances, application or
adaptation - thus negative procedure would usually be appropriate in relation to such modifications. However, in the particular circumstances of this Bill, the Government is willing to bring forward amendments to ensure that any direct modification of primary legislation, whether textual or otherwise, will attract affirmative procedure.
Dear Bill

Sexual Offences (Scotland) Bill – Financial Memorandum

As you are aware, the Finance Committee examines the financial implications of all legislation, through the scrutiny of Financial Memoranda. At its meeting on 24 June 2008, the Committee agreed to adopt level one scrutiny in relation to the Bill. Applying this level of scrutiny means that the Committee does not take oral evidence or produce a report, but it does seek written evidence from affected organisations.

The Committee received four submissions, from the Association of Chief Police Officers in Scotland, the Crown Office and Procurator Fiscal Service, the Scottish Court Service and the Scottish Children’s Reporters Administration. I would draw your Committee’s attention to the comments made by the SCRA.

If you have any questions about the Committee’s consideration of the Financial Memorandum, please contact Allan Campbell, Assistant Clerk to the Committee, on 0131 348 5451, or email: allan.campbell@scottish.parliament.uk

Yours sincerely

Andrew Welsh MSP
Convener
SUBMISSION FROM ACPOS

ACPOS was involved in the consultation process for the Bill and also had the opportunity to provide comment in respect of the subsequent financial implications. That said, the latter response was particularly challenging within the limited time frame provided as the information in question referred to potential costs to be met by 8 forces and was not retained centrally.

In general, the Bill does not propose to criminalise any conduct not currently included within legislation and therefore additional costs in relation to reported crime should be minimal. Notwithstanding, the Bill is a significant piece of legislation, the contents of which require to be adequately communicated to staff in the form of training and awareness, in order to ensure comprehensive understanding prior to implementation. Whilst some of the necessary training can be absorbed into existing delivery mechanisms, there will be a requirement for supplementary training for existing officers which will be a single rather than recurring cost.

In keeping with the introduction of new legislation, it is anticipated that issues, such as legal precedent and supplementary legislation, will influence the need to develop any further guidance and direction as required, the extent and frequency of which is challenging to predict.

Every effort was made to ensure the accuracy of the ACPOS response as detailed in the Financial Memorandum; however a degree of flexibility is requested in this regard.

Harry Bunch
General Secretary
September 2008
SUBMISSION FROM COPFS

Consultation
1. Did you take part in the consultation exercise for the Bill, if applicable, and if so did you comment on the financial assumptions made?

Yes

2. Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?

Yes

3. Did you have sufficient time to contribute to the consultation exercise?

Yes

Costs
4. If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.

Yes

5. Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?

Yes

6. Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

Yes

Wider Issues
7. If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?

N/A

8. Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs?

Yes, there is the prospect of future costs. The Court’s interpretation of the provisions may in time require further training and guidance for prosecution staff. It is not possible to quantify accurately at this stage what those costs might be. In the event that a further one day course would be required it is
likely that that would incur an additional cost of between £50,000 and £60,000 as estimated for initial training.

Fiona Holligan
Principal Depute
Victim Policy Team
COPFS
September 2008
SUBMISSION FROM SCRA

Consultation

1. Did you take part in the consultation exercise for the Bill, if applicable, and if so did you comment on the financial assumptions made?

SCRA took part in the Scottish Government’s consultation exercise on the Scottish Law Commission’s (SLC’s) report on rape and sexual offences, and responded on 26 March 2008.

This consultation did not include financial assumptions. However, at the request of the Scottish Government, on 2 May 2008 SCRA provided general views on areas where costs may be incurred if the SLC’s recommendations were introduced.

2. Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?

The provisions of the Sexual Offences (Scotland) Bill differ in some important respects from the SLC’s recommendations, most notably that the Bill does not create a new ground for referral to the Reporter. SCRA’s comments to the Scottish Government on possible costs related solely to the SLC’s recommendations and are not reflected in the Financial Memorandum.

3. Did you have sufficient time to contribute to the consultation exercise?

SCRA had sufficient time to contribute to the Scottish Government’s consultation exercise on the SLC’s report on rape and sexual offences.

Costs

4. If the Bill has any financial implications for your organization, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.

At this stage it is not possible to accurately predict the costs that SCRA would incur for two main reasons:

- It is not known what the final provisions will be; and
- Any changes to the numbers of children referred to the Reporter will be dependant on the practices of referring agencies. It is not known at this early stage, how referring agencies will interpret the provisions of the Bill.

It is therefore not possible to predict if there will be changes in the numbers of children referred and if these will result in increased workloads for Reporters. SCRA would question the figures included in the Financial Memorandum based on estimates of costs and predicted increases in numbers of children referred. In addition, SCRA would question the validity of average costs per referral given in
the Financial Memorandum, when cases of children referred vary greatly in terms of complexity and their process within the Children’s Hearings System.

However, SCRA is likely to incur costs in making changes to incorporate the new legislation into its practices. These include, but are not restricted to:

- Scoping and implementing changes to SCRA’s Referrals Administration Database to allow effective case management and the reporting of management information.
- Developing and delivering training for Children’s Reporters.
- Support training for Panel Members.

5. Are you content that your organization can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?

At present it is not possible to predict the financial costs to SCRA. However, if these are significant, SCRA will explore with the Scottish Government how best to meet them.

6. Does the Financial Memorandum accurately reflect the margins of uncertainty associated with estimates and the timescales over which such costs would be expected to arise?

No, for the reasons given above.

**Wider Issues**

7. If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?

N/A

8. Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs?

As explained in the answer to question 4, the impact on SCRA of any changes in referrals to the Reporter will largely be determined by the practice of referring agencies. Referral practices will be based on guidance from Scottish Government and/or the agencies themselves.

Dr Gillian Henderson
Head of Policy
SCRA
September 2008
SUBMISSION FROM SCS

Consultation

Did you take part in the consultation exercise for the Bill, if applicable, and if so did you comment on the financial assumptions made?

No.

Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?

Not Applicable

Did you have sufficient time to contribute to the consultation exercise?

Yes.

Costs

If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.

Yes. The figures provided in the Financial Memorandum reflect the submissions made to the Scottish Government.

Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?

We are content that the estimates set out in the Financial Memorandum are sufficient to deal with the level of increase as estimated by the Scottish Executive.

Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

Yes

Wider Issues

If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?

Not Applicable

Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs?
No.

Jane MacDonald  
Policy and Legislation Branch  
Policy and Strategy Directorate,  
Scottish Court Service, September 2008
Sexual Offences (Scotland) Bill

At its meeting of 9 September, the Equal Opportunities Committee agreed to invite written evidence from various organisations on whether the Sexual Offences (Scotland) Bill provides adequate protection from abuse to prostitutes and trafficked women. On 30 September, the Committee considered three responses it had received and agreed to pass this evidence to the Justice Committee for its consideration as part of Stage 1 scrutiny. Responses from the Cabinet Secretary for Justice; Glasgow City Council, on behalf of the Routes Out Partnership and the Trafficking Awareness Raising Alliance Project; and the Scottish Trades Union Congress (STUC), are attached.

The Committee further agreed to highlight a number of specific issues raised in the written evidence, namely:

Section 10
The Cabinet Secretary for Justice draws attention to Section 10 of the Bill, which provides a “non-exhaustive list of factual circumstances under which consent is never present, may be of particular relevance to those trafficked for sexual exploitation or otherwise forced into prostitution”. The STUC, however, believes that the experiences of trafficked women should be included within the list of “circumstances in which conduct takes place without free agreement” in Section 10. Glasgow City Council also suggests that the list in Section 10 be extended to include “where a complainer has been subject to behaviour consistent with grooming for the purpose of sexual exploitation”.

Other issues
Glasgow City Council had further concerns that the issue of sexual history and character evidence is not adequately addressed within the Bill, whilst the STUC seeks assurances that the Bill provides sufficient protection against sexual abuse and violence for those children and young people who have been trafficked.
The Committee understands that the Justice Committee is due to take oral evidence on the Bill from women’s and children’s organisations on 28 October and 4 November and hopes that the attached evidence and comments will be useful in informing these evidence sessions.

Margaret Mitchell MSP
Convener
Equal Opportunities Committee
Equal Opportunities Committee

13th Meeting, 2008 (Session 3), Tuesday 30 September 2008

Sexual Offences (Scotland) Bill – written evidence

Background

1. The Committee has agreed to seek written evidence on whether the Sexual Offences (Scotland) Bill provides adequate protection from abuse to prostitutes and trafficked women, with a view to identifying whether there are any issues it would like to highlight to the Justice Committee to inform its consideration of the Bill at Stage 1.

2. The Committee agreed to request written evidence from the following organisations:
   - Children 1st;
   - British Red Cross;
   - Say Women;
   - Barnardo’s Scotland; and
   - Glasgow City Council, on behalf of the Routes Out partnership and the Trafficking Awareness Raising Alliance project.

3. The Convener further invited Kenny MacAskill MSP, Cabinet Secretary for Justice, to provide written evidence.

4. At the suggestion of the Routes Out partnership, Strathclyde Police agreed to provide views, based on experiences of working with prostitutes and trafficked women. After reading the Committee’s minutes of 9 September, the Scottish Trades Union Congress also submitted comments.

5. Written submissions, which are contained in the Annexe, have been received from:
   - Kenny MacAskill MSP, Cabinet Secretary for Justice, Scottish Government;
   - Glasgow City Council, on behalf of the Routes Out partnership and the Trafficking Awareness Raising Alliance project; and
   - the Scottish Trades Union Congress.

Summary of comments

6. In his response, the Cabinet Secretary for Justice highlights certain provisions within the Bill that “may be relevant to victims of trafficking or those forced into prostitution”. In particular, he draws attention to Section 10, which provides a “non-exhaustive list of factual circumstances under which consent is never...”

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224 The Justice Committee is the lead Committee on the Bill.
present, which may be of particular relevance to those trafficked for sexual exploitation or otherwise forced into prostitution”.

7. Other responses, whilst welcoming the Bill, raise a number of issues. For example, the STUC believes that the experiences of trafficked women should be included within the list of “circumstances in which conduct takes place without free agreement” in Section 10. Glasgow City Council also suggests that the list in Section 10 be extended to include “where a complainer has been subject to behaviour consistent with grooming for the purpose of sexual exploitation”.

8. Glasgow City Council has further concerns that the issue of sexual history and character evidence is not adequately addressed within the Bill. The STUC also seeks assurances that the Bill provides sufficient protection against sexual abuse and violence for those children and young people who have been trafficked.

Decision

9. The Justice Committee is due to take oral evidence on the Bill from women’s and children’s organisations on 28 October and 2 November.

10. Members are invited to consider the written evidence received and to decide whether to highlight any issues to the Justice Committee, in order to inform its consideration of the Bill.

Terry Shevlin  
Clerk to the Committee  
September 2008
Thank you for your letter of 16 September concerning the Equal Opportunities Committee’s consideration of the Sexual Offences (Scotland) Bill. You ask for the Government’s comments on the question of whether the Sexual Offences (Scotland) Bill provides adequate protection from abuse to prostitutes and trafficked women.

The Bill is intended to reform the current law on sexual offences, creating a range of new statutory offences which criminalise sexual conduct which takes place without consent and replacing a complex mix of common law and statute with a clear legal framework which more accurately reflects the values of modern society.

The Bill is therefore not specifically concerned with prostitution or trafficking but certain of the Bill’s provisions may be relevant to victims of trafficking or those forced into prostitution and the existing offence provisions concerning trafficking, brothel-keeping and controlling prostitution will continue to apply where relevant. The offences of rape, sexual assault and other coerced sexual activity contained in the Bill criminalise sexual activity with another person without that person’s consent, and without any reasonable belief that they consented, and will apply equally where the victim has been trafficked or is engaged in prostitution.

Consent is central to the Bill’s approach to sexual offences and it therefore provides for a statutory definition of ‘consent’ as ‘free agreement’ (section 9). It supplements that definition of consent by explicitly providing that consent to one form of sexual activity does not of itself imply consent to any other form or instance of sexual activity. It also makes clear that consent may be withdrawn at any time and that if conduct takes place, or continues to take place after consent has been withdrawn, it takes place without consent (section 11). This sends a clear message that consent is active and may be withdrawn at any time.

Those trafficked for sexual exploitation are likely to be victims of sexual offences and we recognise that those involved in prostitution are often particularly vulnerable to sexual victimisation. As such, it is important that the Bill provides protection to these groups in a way similar to that in which it protects other victims. In addition, there are a number of specific provisions which may be of relevance where someone has been trafficked for sexual exploitation or otherwise forced into prostitution.

It is known that traffickers and others who force women into prostitution often commit acts of rape and sexual assault against their victims themselves. As well as defining consent, the Bill also provides a non-exhaustive list of factual circumstances under which consent is never present (section 10) which may be of particular relevance to those trafficked for sexual exploitation or otherwise forced into prostitution.
Section 10(2)(c) provides that consent is not present where the victim agrees or submits to the conduct because of violence used against the victim, or against any other person, or because of threats of violence against the victim, or against any other person. Section 10(2)(d) provides that consent is not present where the victim agrees or submits to the conduct because he or she has been unlawfully detained by the accused and section 10(2)(g) provides that consent is not present if the only expression or indication of agreement to the conduct is from a person other than the person with whom sexual activity takes place.

The Bill also contains an offence of sexual coercion (section 3) which may also be relevant to someone trafficked for sexual exploitation or otherwise forced to engage in prostitution. This provides that it is an offence for a person to intentionally cause another person to participate in a sexual activity without that person’s consent and without any reasonable belief that they consent. This offence would criminalise a trafficker or other person who knowingly forces or coerces another to engage in sexual activity.

I hope this information is helpful.

Kenny MacAskill MSP
Cabinet Secretary for Justice
Scottish Government
September 2008
WRITTEN SUBMISSION FROM GLASGOW CITY COUNCIL, ON BEHALF OF THE ROUTES OUT PARTNERSHIP AND THE TRAFFICKING AWARENESS RAISING ALLIANCE PROJECT

1. Response from Glasgow Community and Safety Services

1.1 Routes Out and Trafficking Awareness Raising Alliance are based in Glasgow Community and Safety Services, a joint partnership between Glasgow City Council and Strathclyde Police which was set up to prevent crime, tackle antisocial behaviour and promote community safety in the city. Prostitution is recognised as harmful, survival behaviour resulting from a lack of real choices for women and the male demand for prostitution. Few women are so disadvantaged and marginalised. This response aims to assess whether the Sexual Offences (Scotland) Bill provides adequate protection from abuse for women involved in prostitution and trafficking.

Introduction

1.2 Glasgow Community and Safety Services welcomes the Scottish Government’s intention to reform the law on rape and other sexual offences and also the opportunity to comment on whether the Bill provides adequate protection from abuse for women involved in prostitution and victims of trafficking. Women’s accounts of involvement in prostitution are harrowing and involve a range of abusive behaviour by men.

1.3 Currently people who have been raped or sexually assaulted do not report positive experiences of the criminal justice process in Scotland. Additionally, figures suggest that only 4% of rapes reported to the Police results in a conviction. There is clearly a need for legislative reform.

1.4 We are concerned that the issue of sexual history and character evidence is not addressed in the Bill. Although the Scottish Government has previously legislated on this issue, a recent evaluation commissioned by the Scottish Government found that 7 out of 10 women in rape trials will be questioned about their sexual history or character. Complainers of sexual offences do not speak highly of their experience of the criminal justice system: many women describe giving evidence in particular as akin to retraumatisation or being raped again. This type of questioning adds to their distress, is potentially prejudicial to juries and acts as a deterrent to women coming forward to report rape in the first place. This is a particular barrier for women engaged in prostitution in reporting incidents of rape; due to fear that their background will affect their case and that the harm experienced will be taken less seriously. It is completely unacceptable that women in Scotland continue to be treated in this way.

1.5 It remains unclear whether it is the law itself or the way in which it is being implemented which is the cause of the inappropriate questioning of women who have been raped. The Crown Office has issued new guidance on this issue which may improve the situation. What is crucial, however, is that this aspect of the law remains under regular review to determine whether or not further legislation is
required. It is strongly recommended that a further evaluation of the impact of the legislative provision relating to sexual history and character evidence is carried out in 2009 to ascertain whether or not there has been any improvement in the ability of the law to protect women from intrusive, humiliating and irrelevant questioning.

2. Response

Part 1 – Rape

2.1 Glasgow Community and Safety Services welcome the extension of the definition of rape to include oral and anal rape as this is increasingly in line with what women are experiencing. We also support the introduction of a gender neutral legal framework whereby men can also now be the victims of rape. From our perspective this is important, as we are aware of the often hidden but equally vulnerable population of men who engage in prostitution in our city. However the number of women exploited through the sex industry continues to be significantly higher than the number of men.

2.2 We are pleased that emphasis now is on the lack of consent as opposed to the use of force, as the previously narrow definition of rape coupled with the evidential requirement of corroboration, presented a major challenge for women wanting to report an incident of rape. The creation of a new crime of “sexual assault” is useful, and having these offences set out in a clear and concise way is undoubtedly helpful.

2.3 The new offence of “sexual coercion” set out in Section 3 may be of relevance in the case of women who have been trafficked for the purpose of commercial sexual exploitation as often trafficked women are forced to have sex with their trafficker first so he can “test” her out before she is made more widely available to men wishing to purchase sex. We welcome the recognition that such actions are a serious invasion of the victim’s autonomy and bodily integrity and thus merit the possibility of a maximum life imprisonment penalty.

Part 2 - Consent and Reasonable Belief

2.4 Glasgow Community and Safety Services strongly support the development of a statutory definition of consent given the myths and prejudices which surround female sexuality and rape. It is essential that the law provides as clear a framework as possible as to what is meant by consent. The issue of consent can be a contentious issue as in many trafficking cases there appears to be “initial consent or co-operation between victims and traffickers, followed later by more coercive, abusive and exploitative circumstances”. Indeed, often lured with the false promise of legitimate work the victim of trafficking is unaware they are consenting to what will in effect amount to enslavement in the destination country. It is for this reason that the element of consent should always be considered irrelevant in trafficking cases. We continue to believe that a rape prosecution should always be considered in circumstances where it can be shown that the accused knew or was reckless to the fact that the complainer was being held against her will by a third party.
2.5 Certain provisions of Section 10 which outlines “circumstances in which conduct takes place without free agreement” are particularly relevant to women involved in prostitution and trafficking.

(c) where B agrees or submits to the conduct because of violence used against B or any other person, or because of threats of violence made against B or any other person.

2.6 This provision may apply in cases of trafficking as victims often submit to the sexual exploitation due to threats of violence from the trafficker against them or threats that if they do not obey harm will happen to their family back home. Similarly women involved in street prostitution are often subject to physical abuse from men purchasing sex and although they may have agreed to perform one particular sex act, violent behaviour or threats may force them to go beyond what was agreed. Women often engage in prostitution to fund drug use, their own and sometimes that of their partner and/or families. Street prostitution is survival behaviour and the root causes can involve violence, experiences of multiple forms of abuse, poverty, homelessness and addiction. Arguably, there is no free choice in prostitution apart from that of the purchaser who chooses when, where and how he buys sex from a vulnerable woman.

(d) where B agrees or submits to the conduct because B is unlawfully detained by A

2.7 Provision (d) clearly applies to a situation whereby a woman has been trafficked and held against her will, or in the case of street prostitution where a woman is held in e.g. a flat or car against her will. The detention should not have to involve any force or violence in order to fall under this provision, the key thing is that it is an unlawful detention and against her will. We wholly support this provision and hope that it will improve the chances of successful prosecution against traffickers and those that buy sex from trafficked women. In circumstances where consent is clearly void we would welcome a charge of rape if the accused knew or was reckless to the fact the woman was being detained unlawfully.

(g) where the only expression or indication of agreement to the conduct is from a person other than B.

2.8 In some cases of prostitution and trafficking, the negotiation to buy sex is done purely between the client and trafficker/pimp so at no point does the women “consent” to the arrangement. For this reason, we believe buying sex from a trafficked woman effectively amounts to paid rape.

2.9 Finally, although Section 10 does cover a fairly wide range of circumstances we would suggest this additional provision to be one circumstance which shows an absence of consent:

Where a complainer has been subject to behaviour consistent with grooming for the purpose of sexual exploitation.
2.10 Section 11 (Consent: Scope and Withdrawal) contains a useful provision highlighting that consent can be withdrawn at any time and that consent to conduct does not of itself imply consent to another conduct.

2.11 We strongly support this approach and welcome it being written into the Bill. It is a commonly held myth that a woman, having consented to engage in some level of intimate activity, loses the right to refuse consent to sex and it is vital that this is challenged directly within statute as well as elsewhere. This is particularly relevant for women involved in prostitution – although they may give consent to one particular sex act e.g. oral sex; this does not of itself imply consent to other sexual conduct such as penetrative sex. We welcome the prime purpose of this rule which is to prevent any implied escalation of consent. People, irrespective of involvement in prostitution, should be free to choose to engage in certain types or levels of sexual activity without that consent being implied to cover other types/levels of sexual activity.

Glasgow Community and Safety Services
September 2008
WRITTEN SUBMISSION FROM THE SCOTTISH TRADES UNION CONGRESS (STUC)

Introduction

The Scottish Trades Union Congress welcomes the opportunity to respond to the Equal Opportunities invitation for specific comment on the question 'Does the Bill provide adequate protection from abuse to prostitutes and trafficked women?'

The STUC is Scotland’s trade union centre, bringing together over 640,000 workers and linking with their communities, families, and with people not in work. Our organisation includes representative structures for women, for black and ethnic minorities, and for young workers. The STUC affiliated trade union membership organises workers in many different environments in the public and in the private sector.

In recent years, the STUC Women’s Conference and the STUC Women’s Committee have discussed issues of violence against women, of prostitution, and trafficking of women and children. A multi-agency conference hosted by the STUC Women’s Committee in October 2007, looked at the extent of trafficking of women and children in Scotland and considered a number of policy initiatives that could be taken to tackle the growing problem.

The STUC annual Congress in April 2008 expressed strong concern at the increase in the trafficking of women and young people into the UK for purposes of sexual exploitation. The STUC is committed to supporting those projects and initiatives, such as the Trafficking Awareness Raising Awareness project in Glasgow, which challenge the practice of trafficking but also support women who have come into the UK by this means, and seek to provide alternatives for these women to make choices about their lives.

Submission on Sexual Offences (Scotland) Bill - with regard to prostitution and trafficking.

The STUC has already welcomed the progress made in the Sexual Offences Bill, to bring together disparate pieces of legislation and to clarify the definitions of rape, of consent (‘free agreement’), and of coercion. This is long overdue in Scotland. We also share the Government’s view that legislation alone will not tackle the unacceptable level of rape and violence against women, and that campaigns and suitable services are also needed to change attitudes, and to bring equality.

With that framework in mind, we understand that the Sexual Offences (Scotland) Bill is not the only route through which protection can be improved for prostitutes and trafficked women.

However, that is not a reason for avoiding looking at how to use every option that arises. Each step that is taken will add to the change in culture and attitude that will be required throughout society, if we are to see an end to the violence against women in prostitution and in the trafficking trade.
The Criminal Justice (Scotland) Act 2003 made clear that trafficking itself was a criminal offence. But this legislation does not address the question of responsibility resting with any other party, namely those who then abuse and exploit those who have come into the country via trafficking.

The Sexual Offences (Scotland) Bill already provides the opportunity to clearly state a range of circumstances in which sexual abuse or rape could occur, with no free agreement.

Section 10 of the Sexual Offences (Scotland) Bill lists some of the ‘circumstances in which conduct takes place without free agreement’.

We think that the experiences of trafficked women should be reflected in specific clauses in Section 10.

Trafficked women are held against their will; all options removed regarding their place of residence or income, having had their documents retained; no access to independent income; facing language barriers; in an abusive relationship with their trafficker; or living in fear of deportation – all factors which contribute to sexual exploitation and abuse.

We would suggest that:

a) it should be made clear on the face of the Bill that this list is non-exhaustive, rather than simply in the Policy Memorandum.

b) specific clauses could be added i) which consider behaviour consistent with grooming for the purpose of sexual exploitation ii) which consider protecting the position of trafficked women (or women involved in prostitution) where it can be shown that the accused knew or was reckless to the fact that the complainant was being held against her will by a third party.

We do not believe that arrangements made with the involvement of a third party are at all likely to be based on ‘free agreement’, and the legislation should be more explicit in providing protection to a complainant in a position of vulnerability.

There may also be other sections of the Bill where appropriate amendment could be made to take account of this view.

Children and Young People

We would also be keen to seek some assurances that the provisions of the Bill relating to young people and children also provided sufficient protection against sexual abuse and violence for those children and young people who have been trafficked.
Summary

Previous Parliamentary debates have referred to the dreadful crime of trafficking and the illegality of the trade. This is to be welcomed, but does not sufficiently speak up for those women who cannot speak freely for themselves, nor does it place enough responsibility on those who abuse the women.

The Sexual Offences (Scotland) Bill will make a significant difference in clarifying definitions, and placing responsibility regarding free agreement and reasonable belief, and will hopefully see an increase in successful convictions for rape and sexual assault.

We understand that providing protection for trafficked women and for prostitutes against abuse and sexual exploitation requires complex and varied measures, and that the issues will not always be exactly the same for prostitutes as for trafficked women – but the Sexual Offences (Scotland) Bill provides an opportunity to put down another marker that our society respects and values women’s lives, giving the most vulnerable women another way of beginning to challenge the abusive situation in which they find themselves.

STUC
September 2008
ANNEXE D: EXTRACTS FROM THE MINUTES

JUSTICE COMMITTEE
EXTRACT FROM MINUTES
17th Meeting, 2008 (Session 3)
Tuesday 24 June 2008

Work programme (in private): The Committee considered its work programme and agreed its approach to its scrutiny of the Scottish Government's draft budget 2009-10. In addition, the Committee agreed its Stage 1 approach to the Damages (Asbestos-related Conditions) (Scotland) Bill and the Sexual Offences (Scotland) Bill. The Committee also agreed its preferred candidates for appointment as advisers in connection with its scrutiny of the draft budget and the Sexual Offences (Scotland) Bill.

JUSTICE COMMITTEE
EXTRACT FROM MINUTES
25th Meeting, 2008 (Session 3)
Tuesday 28 October 2008

Decision on taking business in private: The Committee agreed to take item 6 in private.

Sexual Offences (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—Sandy Brindley, National Co-ordinator, Rape Crisis Scotland; Louise Johnson, National Legal Issues Worker, Scottish Women's Aid; Susan Gallagher, Head of Policy and Research, and Frida Petersson, Policy Executive, Victim Support Scotland.

Sexual Offences (Scotland) Bill: The Committee agreed to accept written evidence received after the deadline for submission of evidence.

JUSTICE COMMITTEE
EXTRACT FROM MINUTES
26th Meeting, 2008 (Session 3)
Tuesday 4 November 2008

Decision on taking business in private: The Committee agreed to take item 3, and all future consideration of the main themes arising from the evidence sessions on the Sexual Offences (Scotland) Bill, in private.

Sexual Offences (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—Jan McClory, Assistant Director, Children and Family Services, Children 1st; Dr Jonathan Sher, Director of Research, Policy & Practice Development, Children in Scotland; Martin Crewe, Director, Barnardo's Scotland; Kathleen Marshall, Scotland's Commissioner for Children and Young People; Netta Maciver, Principal Reporter, and Karen Brady, Head of Practice, Scottish Children's Reporter Administration.

Sexual Offences (Scotland) Bill (in private): The Committee considered the main themes arising from the evidence session.

JUSTICE COMMITTEE
EXTRACT FROM MINUTES
27th Meeting, 2008 (Session 3)
Tuesday 11 November 2008

Decision on taking business in private: The Committee agreed to take item 6 in private.
Sexual Offences (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—
Euan Page, Senior Parliamentary Affairs Officer, The Equality and Human Rights Commission;
Mhairi Logan, Manager, LGBT Domestic Abuse Project;
Tim Hopkins, Policy and Legislation Officer, Equality Network;
Norman Dunning, Chief Executive, Enable Scotland;
Rev Graham Blount, Scottish Churches Parliamentary Officer;
Alistair Stevenson, Public Policy Officer, Evangelical Alliance;
Dr Gordon Macdonald, Parliamentary Officer, CARE for Scotland.

Sexual Offences (Scotland) Bill (in private): After discussion, the Committee agreed to accept
two late written submissions into evidence. In so doing, the Committee expressed its
disappointment that these submissions had been received so long after the stated deadline. The
Committee agreed that, in future, late submissions would only be considered in exceptional
circumstances.

Sexual Offences (Scotland) Bill (in private): The Committee considered the main themes arising
from the evidence session.

JUSTICE COMMITTEE
EXTRACT FROM MINUTES
28th Meeting, 2008 (Session 3)
Tuesday 18 November 2008

Sexual Offences (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—
Temporary Deputy Chief Constable Bill Skelly, Family Protection Portfolio, and Detective Chief
Inspector Louise Raphael, ACPOS;
Professor Pamela Ferguson, School of Law, University of Dundee;
James Chalmers, School of Law, University of Edinburgh;
Professor Michele Burman, The Scottish Centre for Crime and Justice Research, University of
Glasgow;
Professor Gerry Maher QC, Former Commissioner, Scottish Law Commission;
Bill McVicar, Convener of the Criminal Law Committee, and Alan McCreadie, Secretary to the
Criminal Law Committee, Law Society of Scotland;
Ian Duguid QC, and Ronnie Renucci, Faculty of Advocates.

Sexual Offences (Scotland) Bill (in private): The Committee agreed to defer consideration of the
main themes arising from the evidence session to its next meeting.

JUSTICE COMMITTEE
EXTRACT FROM MINUTES
29th Meeting, 2008 (Session 3)
Tuesday 25 November 2008

Decision on taking business in private: The Committee agreed to take item 4 in private. The
Committee also agreed to take future consideration of draft reports on the Sexual Offences
(Scotland) Bill in private. Finally, the Committee agreed to take consideration of written evidence
submitted in response to the call for evidence and its approach to oral evidence on the Offences
(Aggravation by Prejudice) (Scotland) Bill in private at its next meeting.

Sexual Offences (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—
The Rt Hon Elish Angiolini QC, Lord Advocate;
Fiona Holligan, Principal Procurator Fiscal Depute, and Andrew McIntyre, Head of Victim Policy,
Crown Office and Procurator Fiscal Service;
Kenny MacAskill MSP, Cabinet Secretary for Justice;
Gery McLaughlin, Sexual Offences Bill Team Leader, Patrick Down, Sexual Offences Bill Team,
and Caroline Lyon, Legal Directorate, Scottish Government.
Sexual Offences (Scotland) Bill (in private): The Committee agreed not to accept written evidence received after the deadline for submission of evidence.

Sexual Offences (Scotland) Bill (in private): The Committee considered the main themes arising from the evidence session.

JUSTICE COMMITTEE
EXTRACT FROM MINUTES
30th Meeting, 2008 (Session 3)
Tuesday 2 December 2008

Sexual Offences (Scotland) Bill (in private): The Committee considered the possible contents of a draft Stage 1 report.

JUSTICE COMMITTEE
EXTRACT FROM MINUTES
31st Meeting, 2008 (Session 3)
Tuesday 16 December 2008

Sexual Offences (Scotland) Bill (in private): The Committee considered a draft Stage 1 report and agreed to continue consideration at its next meeting.

JUSTICE COMMITTEE
EXTRACT FROM MINUTES
1st Meeting, 2009 (Session 3)
Tuesday 6 January 2009

Sexual Offences (Scotland) Bill (in private): The Committee considered a draft Stage 1 report and agreed to continue consideration at its next meeting.

JUSTICE COMMITTEE
EXTRACT FROM MINUTES
2nd Meeting, 2009 (Session 3)
Tuesday 13 January 2009

Sexual Offences (Scotland) Bill (in private): The Committee agreed its Stage 1 report. In so doing, various changes were agreed to.
10:23

On resuming—

Sexual Offences (Scotland) Bill: Stage 1

The Convener: Item 4 is our first evidence session for the Sexual Offences (Scotland) Bill. The committee will take evidence from Rape Crisis Scotland, Scottish Women’s Aid and Victim Support Scotland.

I welcome the first witness panel: Sandy Brindley, national co-ordinator of Rape Crisis Scotland; and Louise Johnson, national legal issues worker for Scottish Women’s Aid. We are grateful that you have already made written submissions, which we have found particularly useful. That being the case, we will go straight to questions.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): Good morning. In their evidence on section 1 of the bill, both your organisations agree that there should be an offence of sexual assault by penetration. What sort of conduct would be covered by such an offence?

Sandy Brindley (Rape Crisis Scotland): It would be penetration by objects. Committee members will remember that, in its first consultation report, the Scottish Law Commission proposed a separate offence along such lines. However, the commission changed the proposal in its final report and subsumed the offence within an offence of sexual assault. We would prefer to revert to the original proposal.

Louise Johnson (Scottish Women’s Aid): Scottish Women’s Aid agrees with Rape Crisis Scotland’s interpretation.

Cathie Craigie: Have you had any discussions with the Government on possible amendments to the bill to incorporate your proposal?

Sandy Brindley: It would be penetration by objects. Committee members will remember that, in its first consultation report, the Scottish Law Commission proposed a separate offence along such lines. However, the commission changed the proposal in its final report and subsumed the offence within an offence of sexual assault. We would prefer to revert to the original proposal.

Louise Johnson (Scottish Women’s Aid): Scottish Women’s Aid agrees with Rape Crisis Scotland’s interpretation.

Cathie Craigie: Have you had any discussions with the Government on possible amendments to the bill to incorporate your proposal?

Sandy Brindley: It seems to be that it would be penetration by objects. Committee members will remember that, in its first consultation report, the Scottish Law Commission proposed a separate offence along such lines. However, the commission changed the proposal in its final report and subsumed the offence within an offence of sexual assault. We would prefer to revert to the original proposal.

Louise Johnson (Scottish Women’s Aid): Scottish Women’s Aid agrees with Rape Crisis Scotland’s interpretation.

Cathie Craigie: But have you had discussions with the Government on this?

Sandy Brindley: Yes, we have had some discussions.

Cathie Craigie: What advantages would there be if your proposal were included in the bill?

Louise Johnson: It would emphasise the severity of the behaviour and of the act perpetrated on someone’s personal integrity. We are talking in particular about violence against women, but the violation of someone’s person by an object should be acknowledged as being equal in severity to rape. If that offence were enshrined as a separate offence, and not subsumed among other offences, it would give weight to that view of the severity of the offence.

Cathie Craigie: Is your view based on your experience of supporting women through difficult times?

Louise Johnson: Women have commented that violation of their person by an object is as distressing as penile penetration. Although we clearly wish to differentiate between penile penetration and penetration by an object, they are equal in severity. When someone’s personal integrity has been transgressed and abused by someone else in either of those ways, the trauma is equal. From what women have told us, that has to be acknowledged.

Cathie Craigie: Those were very clear answers. Thank you.

The Convener: We will now turn to the questions of consent and reasonable belief.

Robert Brown: Good morning. I think that everyone would accept that these are tricky areas. Both of you have made observations on the question of advance consent. Rape Crisis Scotland has suggested that it is “absurd” to argue that advance consent given at 6 o’clock in the evening should still apply at 1 o’clock in the morning after people have got drunk. Will you elaborate on that, bearing in mind the indefinite nuances of human behaviour?

Sandy Brindley: We are really concerned about the introduction of the concept of prior consent into legislation. At the moment, if someone says that they were asleep, the Crown has to prove that they were asleep. If the notion of prior consent is introduced, it will make rape even harder to prove—and it is already extremely hard to prove. The Crown would need to disprove the existence of prior consent in a rape trial. That goes against the philosophical underpinnings of the bill, which are based on sexual autonomy—that is, that a person can withdraw consent at any time. The notion of prior consent is problematic.

If the bill is passed as it stands, it is not hard to imagine that every single accused person in rape trials will be considering a defence of prior consent. How can the Crown disprove a negative? I suppose that the Crown already has to do that, but we would have concerns about giving it another negative to disprove.

Robert Brown: Is this a question of principle, or a question of where the burden of proof should
lie? If the burden of proof lay with the defence, the proposition might be different.

**Sandy Brindley:** I think that, as drafted, the bill does not put the burden on the accused—although I could be wrong about that. However, it is unclear how the question of advance consent would be proved in court.

**Robert Brown:** I presume that whether people have consented is raised from time to time anyway. Often, that goes to the heart of the offence. Is it possible by however the thing is defined to avoid that being raised by the accused in such cases?

10:30

**Sandy Brindley:** Our experience with legislation on sexual offences is that we need to be cautious about unintended consequences. For example, the legislation on sexual history, which was supposed to improve protection, has had the opposite effect. That is why we are cautious about the wording of paragraphs (a) and (b) of section 10(2). We are concerned that introducing the concept of prior consent could have the unintended consequence of worsening the situation.

**Robert Brown:** One way or the other, does the law not have to deal with the huge practical issues that arise from such situations? That gives everybody problems. What arrangement would you prefer for dealing with the matter?

**Sandy Brindley:** I would not say that we have an absolute solution to propose. The concept is problematic. We feel that prior consent has no place in any legislation that is based on sexual autonomy. However, I understand the intention behind including it, which is not to criminalise consenting behaviour, such as that between a long-standing couple. Prior consent is problematic and we are interested in what solutions are possible.

**Robert Brown:** The committee is interested in any further views from you on alternatives that might be developed, because pulling all that out is important.

I will take the issue further. Consent is important in many other circumstances. One example that has been given to us is that people give consent to anaesthesia before an operation, although it is obvious that that is not quite the same situation. Given that advance consent is used in other realms of the law for perfectly legitimate purposes, why should it be considered “absurd”?

**Sandy Brindley:** The concept goes against the bill’s principles that consent is not a contract and that consent can be withdrawn at any time. In our submission, we gave the example of someone who gives consent at 6 pm to sex at midnight but who is so drunk at midnight that they cannot withhold their consent. In that situation, the provisions would be contrary to the principle of sexual autonomy, because if that person was drunk to that extent, they could not withhold their consent.

**Robert Brown:** The difficulty is that people do not analyse matters in the legal way that we are trying to apply. We are dealing with a serious crime that leads to serious consequences for someone who is convicted of it. I still have difficulty in getting to the heart of what advance consent means. A common example, which you gave, is of someone who is all set for sex later in the evening but who becomes drunk. In those circumstances, is the conduct rape? Consent has not been withdrawn, but it has not been renewed, either. Where does the balance lie for the definition of the offence?

**Sandy Brindley:** I appreciate that the question is complex. Our view is that if somebody is so drunk by midnight that it is clear that they have no capacity to consent, any prior indication should not hold. Such consideration of sexual matters and how they are negotiated is difficult but, if somebody is almost unconscious, do we really think that it is acceptable for somebody to have intercourse with them because of something that they said at 6 pm? That approach is not helpful.

**Robert Brown:** The problem is that the matter often boils down to difficulties with the burden of proof rather than with the principle, which is—oddly—sometimes a little more straightforward.

Section 10(2)(c) concerns violence that has been used against the complainer, which is a tortuous subject for the same sorts of reasons. Under that provision, “free agreement to conduct is absent” when someone “agrees or submits to the conduct because of violence … or … threats of violence”.

Rape Crisis Scotland says that it is not convinced that that will cover agreement or submission because of earlier violence or threats of violence. In a slightly different way, we are dealing with the same issue as before. Why should that not apply? Obviously, under the bill, the submission or agreement has to be a consequence of the violence. Why is that unsatisfactory?

**Sandy Brindley:** The Scottish Law Commission made it very clear that it did not intend what it proposed to be interpreted as the violence or threat of violence having to take place at the same time as the rape. I am not clear that that is the message that we get from the bill. That may be the intention, but it is not our reading of the bill. In
Robert Brown: So, your proposition is that account should be taken of the threat of violence or actual violence, whether committed contemporaneously with the crime or at an earlier point, provided that it caused the result. Is that fair?

Sandy Brindley: Yes.

Robert Brown: That may be a matter of tinkering with the wording.

Sandy Brindley: Exactly.

Robert Brown: Do you have any suggestion as to how that could be done or is the question one for the lawyers to take forward?

Sandy Brindley: It is for the lawyers.

Louise Johnson: We would like there to be a reference in the bill to a pre-existing relationship of violence or sexual exploitation, to show that the threat or violence of violence would not have to occur immediately before the rape. For a woman who has been abused for a length of time, the threat of violence will exist, and will have done so for some time. The threat does not need to have been made at the time of the rape; it is enough for there to have existed a threat—or the threat of a threat—that violence could be used. The drafting needs to take account of the historical context of relationships in which violence or abuse are, unfortunately, present. I think that the Zero Tolerance Charitable Trust commented on that in its submission. The draftspeople could look at that.

Robert Brown: Yes.

Scottish Women’s Aid suggested that a “presumption of ‘no consent’ should apply in circumstances in which the complainer had been the victim of sexual or physical abuse at the hands of the accused on previous occasions.”

For clarification, are you referring to previous convictions or allegations? What is the cut-off point for those?

Louise Johnson: That is an interesting point. Finding evidence of such abuse is one of the main difficulties. If there were evidence of a pre-existing relationship in which there was a history of one party—in our case, obviously, it will be the woman—being subject to violence or domestic abuse, and perhaps a history of complaints being made about coercion, it should be possible to use that. The problem is finding evidence of that and proving it. We are looking for a presumption that takes account of prior offences or behaviour.

Robert Brown: Is any qualification needed? Clearly, it is one thing for someone to have committed 10 offences of violence over the previous two years, but what if they had committed one such offence 10 years ago? What is the cut-off point? What would lead to the presumption that you propose?

Louise Johnson: A number of organisations raised the question of a cut-off point. I cannot say what it would be; the interpretation would have to be made by the Crown in prosecuting the offence. The Crown would have the evidence and it would have to take the decision.

It could be dangerous to put time limits on offences. Even if given evidentially, prior convictions do not fully reflect the fact that a relationship involved violence and sexual abuse—after all, we are talking only about someone who has been caught or reported to the police. Obviously, concrete evidence is required. The concept that we propose is inchoate and difficult to get across. As I said, we would like to see the bill reflect historical violence or sexual abuse.

Sandy Brindley: Obviously, the Crown would need to prove consequence. As Louise Johnson said, it would have to prove that the offence was a direct effect of previous violence. Ultimately, without the qualification of consequence, one would be saying that, where there is domestic abuse, there is no possibility of consensual sex. We are not saying that; we are saying that there are times when direct consequence can be considered.

Robert Brown: One has to be very careful about including things other than formal court convictions because, as with everything else in such cases, they would be subject to uncertainty.

Louise Johnson: We do not want to persecute women who, although experiencing domestic abuse, still have a consensual sexual relationship, but we want to cover the women who—frequently, I have to say—do not. As Sandy Brindley said, the Crown is probably the best source of advice on this matter.

Robert Brown: Bearing in mind that they are “without prejudice” to the general proposition in section 9, are the circumstances that are set out in section 10(2) adequate? Should anything be added or removed?

Sandy Brindley: We are concerned about the operation of section 10. For example, we are unclear whether the accused will still be able to use the defence of consent if the Crown has proved the existence of any of the circumstances in section 10(2). We—and, indeed, a number of other people—had assumed that that would not be the case but, having looked at the detail of the bill, we are not so sure. The point requires consideration because, after all, there is not much point in having such a list if the whole thing comes...
back to the question whether the accused had a reasonable belief in consent. As a result, section 10(2) needs to be clarified.

Nigel Don (North East Scotland) (SNP): I wanted to come in much earlier, but I must say that I was interested in your comments about the presumption against consent in an on-going relationship in which there has been violence. I think that your responses have highlighted my own concern not only about the difficulty of knowing how much weight to give to evidence of something that is to an extent—however small—present in many relationships and how on earth we balance such considerations but about whether the presence of such evidence means that consent is impossible. Taking such a position might make good law but is actually a social nonsense.

I am not sure that I have even got a question for you. It is clear from what you have said that it is very difficult to be black and white on this matter. Given that this is a grey area, we must ensure that the provision is written in such a way that the court and the prosecution can, between them, consider the right issues and how on earth we balance such considerations but about whether the presence of such evidence means that consent is impossible. Taking such a position might make good law but is actually a social nonsense.

I see that the witnesses agree with me.

The Convener: I think that they very fairly accept that fact.

Louise Johnson: We do.

The Convener: Paul Martin has some questions on reckless behaviour.

Paul Martin (Glasgow Springburn) (Lab): Why has Scottish Women’s Aid recommended that a number of offences in the bill be extended beyond intentional wrongdoing to include reckless behaviour?

Louise Johnson: In examining this issue, we focused in particular on children. In cases of domestic abuse, a child might be present when other things such as the presentation of sexual images, indecent communication and sexual activity are going on. The person responsible might in certain circumstances not have any deliberate intention, but we feel that their recklessness in not considering the consequences of their behaviour on a child and whether their actions are incorrect should be enough with regard to these offences.

Paul Martin: Does existing legislation not cover that kind of behaviour?

Louise Johnson: I believe that the bill refers to intentional behaviour, which means that a person intends their actions to have certain consequences for a child. However, the bill should also recognise situations in which, without necessarily intending it, people recklessly participate in certain activities without being concerned that a child might be present or, indeed, recklessly encourage them to be present at a viewing of or to view pornography, for example.

Paul Martin: Do you feel that the matter should be dealt with through the various sentencing tariffs and that the available tariffs should be increased?

10:45

Louise Johnson: The problem is that recklessness is not included in the wording. You would have to speak to the Crown Office and draftspeople to do this, but we would suggest changing the wording to cover recklessness, in addition to intentional behaviour. We have not considered sentencing, but if a child was affected as a consequence of the behaviour, there would be a case for the sentencing to reflect that.

Paul Martin: Would you refer only to children in that?

Louise Johnson: Children are powerless in a number of situations. They can be in a situation—in front of a television or other people—that they cannot take themselves out of, and they can be prevented, intentionally or otherwise, from leaving. While they are unable to protect themselves, we have the responsibility to protect them by ensuring that people are held accountable for the consequences of their reckless behaviour on a child. That should be covered.

Sandy Brindley: We would be keen to consider the matter in relation to both children and adults. At the moment, the barrier of proof is set quite high, and the Crown Office would need to prove both intent and purpose. The purpose could be problematic to prove, so the concept of recklessness—or just removing the provision dealing with purpose—could deal with the concerns.

The Convener: We move now to the issue of sexual abuse of a position of trust with reference to mentally disordered persons.

Nigel Don: Scottish Women’s Aid has expressed concerns about the availability of the defence under section 36(2) that the accused was the complainer’s spouse or civil partner. Do you believe that it should never be a defence in such a case that the accused was married to the complainer at the time?

Louise Johnson: That question probably takes us to a discussion that is similar to our earlier discussion on consensual sexual relations in a relationship where abuse is present, and our argument is the same. We are concerned about a situation in which a mentally disordered person is not coerced but persuaded into a sexual
relationship that is not in their interest and in which they are abused.

I do not know how the issue of consent could be covered; you would need to ask the Crown how it would prosecute and what the best wording would be. However, we need to consider situations in which the original sexual relationship was not consensual. Again, proof might be an issue, but we are back to the same situation as with domestic abuse: a broad-brush presumption would not necessarily be the way forward, but the eventuality must definitely be covered.

Nigel Don: In all the situations that I can get my mind around, the partnership will surely have been of long standing.

Louise Johnson: Not necessarily.

Nigel Don: Is it really likely that people will form a partnership in which one party is mentally disordered? Are we not dealing with situations in which one party probably has a degenerative disease, which by definition takes time?

There is a serious risk of situations developing in which one party in a long-standing couple develops some kind of dementia—given the nature of human life these days—with the other party to that marriage of decades suddenly being told that sex is off limits because their partner can no longer give the consent that they gave before. Is there not that risk?

Louise Johnson: You would probably have to consider the nature of the relationship beforehand.

If someone had a degenerative disease, the issue of on-going consent would have to be considered, including what the person was consenting to and their general relationship with the person with whom they were engaging in a sexual relationship.

We are more concerned about someone who has had a mental disorder from childhood and who is being preyed on. The situation that we envisage is that of a woman who, for whatever reason, is being preyed on by someone in a position of trust such as a friend or acquaintance—they are abusing that position for the sole purpose of sexually abusing that woman. In that situation, we would have to consider whether the person, when they entered into the sexual relationship with the person with a mental disorder, had checked what was going on with that individual and whether there seemed to be acquiescence or consent. That can be explored. Obviously, the issue depends on how the Crown can prosecute. Again, that comes down to checking consent and reasonable belief.

Nigel Don: Does the provision not presume that there is a marriage or civil partnership? That is what section 36(2) says.

Louise Johnson: It actually mentions spouses, civil partners and, I think, sexual partners. Is that right? I think that there is wording about sexual partners so, off the top of my head, I do not think that a formal relationship needs to be involved.

Nigel Don: I confess that that is not my reading. To me, section 36(2) says that person B is person A’s spouse or civil partner.

Louise Johnson: It would be a defence if they were a spouse or civil partner. However, we are also talking about situations in which people are in sexual relationships and are not spouses or civil partners. We are back to the situation of rape in marriage—that is a parallel. A civil partner or spouse has the same protection as anyone else, whether or not they have a mental condition. I think that the section is trying to refer to people who are in a long-standing relationship. As I said, we would need to consider abuse within such relationships, which could be comparable to rape in marriage. However, we are mostly concerned about people who are having improper sexual relations with women who did not have the capacity to consent when the relationship started in the first place.

Nigel Don: In your defence, I point out that section 36(2)(b)(i) seems to cover sexual relationships. I think that that is what you were referring to.

Louise Johnson: Thank you.

Nigel Don: I correct myself—I see where you are coming from.

Now that we have had that discussion, I would still like to know how, in general terms, you want the provision to be modified. The text is a matter for lawyers, so we will not consider that, but what would you like to be added or perhaps taken away to deal with your concerns?

Louise Johnson: Somewhere along the line, we would like a statement to the effect that the giving of consent to one sexual act does not by itself give consent to a different sexual act. If I remember correctly, that was mentioned in the Scottish Law Commission’s recommendation. Our submission on the bill states:

“However, it is perfectly possible for the spouse, civil partner or sexual partner to exploit and abuse the other person, which can happen in relationships where the person does not have a mental disorder, as highlighted in Recommendation 6 of the 2007 consultation which states, "The giving of consent to one sexual act does not by itself constitute consent to a different sexual act."

We perhaps need reference to consent. We probably need to speak to the Crown and perhaps the draftspeople about the precise wording that we could use. That would be a good idea.
Nigel Don: I accept entirely the general point about consent to one thing not being consent to another—I suspect that that applies throughout. Forgive me, but I am still slightly confused about how that relates to section 36(2), because that is about defences to charges under section 35, which, as I read it, is about abuse of trust, rather than consent to one thing or another.

Louise Johnson: Let us take rape in marriage as a parallel to a situation in which there is an abuse of trust. Just because someone is a spouse or civil partner, that does not mean that their partner cannot commit an offence against them if they did not consent on a particular occasion. Off the top of my head, I cannot tell you the exact wording that we are looking for in sections 35 and 36. However, I would welcome additional discussions with the Crown and the draftspersons about the wording that we could use to cover all the bases, as you said, but not in a way that would be overly restrictive and therefore penalise people who did not have intent. Part of the wording should address intention—when the Crown considers prosecuting a case, it should ask what the person’s intention was. Mens rea would be very important in that regard. I hope that that answers your question.

Nigel Don: I do not think that we can take it any further at the moment, but thank you for the discussion.

The Convener: Stuart McMillan has a question about relationships between older children.

Stuart McMillan (West of Scotland) (SNP): Good morning. In its evidence to the committee, the Church of Scotland said:

“We believe that the law is brought into disrepute if legislation is passed which is not intended to be enforced.”

Rape Crisis Scotland says in its submission that it supports the Scottish Government’s policy of continuing to criminalise sex between older children

“as long as this is supported by a policy of non-prosecution in cases which are genuinely consensual.”

What value is there in enacting criminal laws that everyone knows will not result in criminal proceedings?

Sandy Brindley: We have taken a pragmatic approach to the provisions. Our concern about moving to the decriminalisation of consensual sex between older children is based on the question whether there is a difficulty with the current position, which is that such sex is criminalised but cases are not actively prosecuted when there is genuine consent. We are not aware of evidence that there is significant difficulty with the current position.

In being pragmatic, we are aware of the conviction rate for rape. As it is almost impossible to get a conviction, having a possible charge of unlawful sexual intercourse at least gives prosecutors an option in cases in which, although there might not be enough evidence for rape, the sex was not consensual but coercive.

Louise Johnson: I agree with Sandy Brindley. Our view is that there should be a case-by-case approach and that prosecution would take place where it had to take place, as it were. We cannot move away from protecting children. If the relevant provisions were not in the bill, children would be at risk. We have to protect children from situations in which consent is not present. There is a great debate about what consent means to young teenagers who are under pressure from the media and their peers to acquiesce, be grown up and engage in a sexual relationship with someone. There has to be the opportunity to protect children in such circumstances, which is why the provisions would be used when they had to be used—if that makes sense.

Sandy Brindley: The area is difficult. I get the impression that England and Wales really struggled with it and have not come up with a helpful solution. Having weighed up the policy’s implications against the proposal from the Scottish Law Commission to decriminalise, our pragmatic view is that the policy in the bill takes the best approach, although there are arguments on both sides.

Stuart McMillan: The bill extends the criminal law to bring young women within its ambit as offenders. For example, a 15-year-old girl who allows or encourages her 15-year-old boyfriend to have intercourse with her does not, under the current law, commit an offence; however, she would commit an offence under section 27(4) of the bill. Does Rape Crisis Scotland support the extension of criminal liability to include young women?

11:00

Sandy Brindley: It depends what the prosecution policy is. I certainly would not support prosecution in situations in which activity was genuinely consensual. I do not think that that would be in anyone’s interests. It all depends on the circumstances. I see the provision being used in cases in which there are questions about whether the activity was genuinely consensual.

The Convener: If we were not to prosecute in such circumstances, what would you consider to be the appropriate response?

Sandy Brindley: It would depend very much on the circumstances. It would not necessarily be helpful for every single case to be referred to the
children’s panel. For a start, the children’s panel would struggle to cope with the level of referrals. We would need to respond on a case-by-case basis, depending on whether there were concerns about the behaviour.

The Convener: You may well be right—that is a sad commentary on our times.

Nigel Don: Ms Brindley said that the section on older children should be used when it needed to be used—it should be available. Can you envisage circumstances in which that section would need to be used but in which the use of section 1, section 2 and the following sections would be inappropriate? Most of the things that I conceive of as being non-consensual would be covered by the general principles in section 1, section 2 and the following sections.

Sandy Brindley: At the moment, the Crown has the option of going for a conviction of unlawful sexual intercourse where it is not able to prove rape. There could be an alternative charge in such cases.

Nigel Don: Section 2 covers unlawful sexual intercourse without consent. Are we talking about considering prosecuting older children in circumstances in which consent was present? That seems to be the only circumstance in which section 1 and section 2 would not apply.

Sandy Brindley: Although those sections might apply, the question is whether the offence can be proved. We know that in Scotland the conviction rate for rapes reported to the police is 2.9 per cent. There might be circumstances in which using section 27 is another option for prosecutors.

Nigel Don: Forgive me, but I still do not see why that is another option. I do not think that the burden of proof for offences under section 1 and section 2 is different from the burden of proof for offences under section 27, which covers older children. I am struggling to see why we need the provisions in section 27 as well as the provisions in section 1 and section 2 if we are dealing with cases in which the behaviour is non-consensual.

Louise Johnson: The difficulty is proving when activity between children who are over 13 and under 16 is consensual and when it is non-consensual. I do not know whether the policy intention was to say to children who are engaged in such conduct that we are not going to charge them with rape. I have no idea whether the policy intention was not to stigmatise such behaviour.

Sandy Brindley: This is about questions of consent. With rape, it is obvious that lack of consent needs to be proved. Rape is incredibly difficult to prove, and that will continue to be the case if the bill is passed as drafted. The provisions in section 27 would provide another option in cases in which there were serious concerns about non-consensual behaviour. The way that we formulate the offence of rape makes it very hard to get a conviction.

Nigel Don: I will put my teenage hat on at this point. If I were a teenager in circumstances in which there was consent, as I saw it, I would think that you were generating an offence that was specifically designed to penalise me. It would seem to me that you could not prove lack of consent, but you were going to get me anyway.

Sandy Brindley: We are taking a pragmatic approach. Ideally, we would have a formulation for rape that was provable in more than 3 per cent of cases. Prosecutors are being offered another option in cases in which there are serious concerns about a pattern of behaviour around non-consensual or coercive sex, to which our law cannot currently respond because of the way in which it is formulated.

Nigel Don: If I may, I will play devil’s advocate for a little bit longer. As I understand it, we are proposing that the law should be a convenient tool for the prosecution to use in cases in which there are serious concerns—those are your words—leading to a criminal conviction and record, but that we will turn a blind eye in the majority of cases. If I could turn the clock back to when I was a teenager, that would seem a tad unfair to me. I am not sure that I am desperately happy that we should be writing the law of the land in that way.

Sandy Brindley: Both options have significant consequences, such as criminalising or decriminalising, or having a policy of non-prosecution. I understand why the Scottish Law Commission has recommended not legislating for an offence when there is no intent to prosecute in most cases. We support the bill’s approach for a pragmatic reason. There are real concerns about coercive sex and the pressure on young people to have sex, and there are also worries about what decriminalising consensual sex would mean for children under the age of 16.

Nigel Don: I am not sure how we write the law; perhaps we should let the people who use the words worry about that. Could the law say that, in some sense, it is unlawful to have sex in such circumstances and, if someone does, they will be liable to be referred to the children’s panel—although I take the point about resources—and leave sections 1 and 2 as the criminal part? In other words, we would still have the adult law on rape and sexual assault, but we could make sure that it is understood that sex between the ages of 13 and 16 has consequences, albeit not criminal ones. That was all very convoluted, but does it sound like a way forward?
Sandy Brindley: I think that the Scottish Law Commission’s proposal has been changed in the bill.

Louise Johnson: If I remember correctly, the Scottish Law Commission’s original proposal in its draft bill was that such cases should be referred to the children’s hearings system, about which there were a number of concerns. For example, people were concerned about the possibility of the children’s hearing making an order to send a child to a residential establishment. What would that mean? Are we going to lock up young people for having sexual relations, whether consensual—obviously, the cases that we are discussing involve consent—or otherwise?

Sandy Brindley and I acknowledge that this is a very difficult area of law. How do we deal with making sure that children are protected, that the Crown has discretion to decide when to prosecute and when not to prosecute, but that young women—with whom we are concerned—are protected when consent might not necessarily be what we, as adults, would recognise as consent? As adults, we would consider the pressures that are put on young children.

Unfortunately, I do not think that we have any answers. I agree with Sandy Brindley that the situation is difficult and that neither of the two options is ideal, but what do we do? It is dangerous to give out a carte blanche, which would not protect young people at all; it would also remove the consequence of young people looking at and taking responsibility for their behaviour.

The Convener: It is fair to say that under schedule 2 to the bill there is the facility for alternative charges—if, of course, the Crown is disposed to prosecute in the first place—on the basis that one cannot change in an indictment any allegation about what the accused person has done. Interpretation would be a matter for the court and subject to judicial direction.

Robert Brown: Could the discretion of the Lord Advocate and the children’s reporter in such circumstances square the circle? The bulk of cases in which there was no real concern—beyond the fact that underage sex had taken place—would not go any further. However, in cases in which there were extra elements, such as an age gap or other causes of concern, people could be prosecuted or taken to the children’s panel. Would discretion for the prosecution not square the circle in those circumstances?

Sandy Brindley: I agree. Each case would have to be considered according to its circumstances, but if there is genuine consent, no cause for concern and no pattern of behaviour, it is hard to see how it would be in the public interest to prosecute. There might be other cases in which it would be in the public interest to prosecute.

Cathie Craigie: I am concerned by part 4 of the bill, and in particular by the suggestion that neither the option of reporting someone to the children’s hearings system nor what is proposed in the bill is ideal. Given that we are talking about a very important group of young people, is it right that the Parliament should legislate when the situation that the legislation would create is not ideal? We may have an opportunity to consider the matter more widely. Children 1st points out in its evidence to the committee that sex before the age of 16 is not the norm—a minority of young people engage actively in sexual activity before the age of 16.

Sandy Brindley: Both the Scottish Law Commission and the Government, in its consideration of the SLC’s proposals, have given the issue significant consideration. I am not aware of a better formulation. The formulation in the bill is far better than the legislation down south, which criminalises all sexual activity between older children. That is not helpful. I am not sure that there is a better formulation, as long as we square the circle, as Robert Brown said, through giving the prosecution discretion.

Louise Johnson: I agree with Sandy Brindley. Prosecution discretion and the guidelines from the Lord Advocate are probably the way to ensure that the approach will work.

The Convener: Angela Constance has some final catch-all questions.

Angela Constance (Livingston) (SNP): Ms Brindley said in previous answers that the conviction rate for rape in Scotland is 2.9 per cent. I understand that Rape Crisis Scotland has intimated that the bill’s proposals will not change that significantly. What measures would change the conviction rate for rape?

Sandy Brindley: The bill, which represents a very important group of young people, is it right that the Parliament should legislate when the situation that the legislation would create is not ideal? We may have an opportunity to consider the matter more widely. Children 1st points out in its evidence to the committee that sex before the age of 16 is not the norm—a minority of young people engage actively in sexual activity before the age of 16.

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must consider such issues, which cause us grave concern.

We need much better information about why cases are dropping out and where in the system that is happening. We need a full attrition study for Scotland. The data are currently so poor that we do not even know how many cases fall because of complainant withdrawal as opposed to prosecution decisions. We need much better data about what is happening.

Angela Constance: Is the bill the place to make those changes? What you describe is essentially court practice. Does that require action elsewhere or could the issues be addressed in the bill?

Sandy Brindley: I would be reluctant to suggest that sexual history and character evidence should be dealt with in the bill, because in Scotland we have now tried twice to legislate on the matter and we have failed. We should not try quickly to resolve the problem as the matter requires serious consideration.

We are unclear at this stage whether the referral to the Scottish Law Commission included consideration of sexual history and character evidence, but that would be a helpful way forward. We need to consider how to address the difficulties that exist with rape trials in Scotland and why it is difficult to get a causal link. Is our conviction rate so low because of the use of medical records and sexual history evidence? We know that most cases do not get to court.

Our priority is for the bill to address the issue of prior consent—that is the thing that we are most worried about. I believe that it will make rape harder to prove, and I do not think that any of us wants the conviction rate to fall any further.

Louise Johnson: We are concerned about the prior consent issue, and we are also concerned about expanding the definition of violence or threat of violence. We need to concentrate on what is going on. I defer to Sandy Brindley’s superior knowledge of which legislative provisions should be considered, but I echo her comments on the attempts that have been made so far to deal with character evidence. Unfortunately, the legislation has not worked. That is a shame, because there is nothing to prevent it from working. Perhaps the committee will investigate that further.

The Convener: Thank you for your evidence this morning. We are dealing with sensitive matters that are also difficult and complex. Issues of human behaviour will always be difficult and complex, but your evidence has been welcome and useful. Thank you.

11:16

Meeting suspended.
part might not be seen as a crime at all, especially not a sexual crime. We propose to keep that in, because it is already included in the bill, under sexual assault in section 2. Oral penetration is already included in the same offence as penile penetration, and it gives access to the same range of penalties. We do not choose to argue for the removal of that offence, but we do not argue for the addition of anything new to the offences. We simply wish to collect all non-consensual penetrative acts into one section.

Nigel Don: Do you agree that everything that you wish to be considered as criminal is covered by sections 1 and 2, and that your concern is more about where those offences are put and how they are described?

Frida Petersson: Yes.

Nigel Don: One of the defences that has been used by those who drafted the bill—the people who put the words together—is that some overlap or uncertainty is almost inevitable. The analogy that springs to my mind comes from sailing. It is easy for someone to say that they are sailing on the sea, or up a river, but it is relatively difficult for them to say at what point they penetrate the river. Sometimes it is pretty obvious, but the precise location of the mouth of a river can be uncertain. Without wishing to overdo it, I suggest that that describes some of the relevant body parts. If it is not known in court, as a matter of fact, quite what happened, some uncertainty and overlap in the law is surely useful. Is there a particular value in segmenting the various offences in that regard?

Frida Petersson: We understand that comment, and a case may be heard under either section 1 or section 2, but it would usually be known whether there had been penetration. We believe that it would be more difficult to know what was used to penetrate. Therefore, it would be beneficial to have all penetrative acts under one section.

Nigel Don: If we accept that everything is covered by sections 1 and 2, and that the maximum penalty is the same for offences under sections 1 and 2, then why worry, why distinguish and why fret about it? In section 1, we have simply codified the law of what we have historically called rape. We have covered absolutely everything else that we want to worry about as sexual assault in section 2. Why is it an issue? I understand that it is, but I would like to clarify why you feel that it is an issue. It seems to be only a matter of words.

Frida Petersson: We do not want to make a judgment that all non-penetrative acts are necessarily less serious. However, we would like the law to distinguish between penetrative and non-penetrative acts and we would like such acts not to be assembled in the same section, as they are currently, as sexual offences, in section 2. We listened to our colleagues from Rape Crisis Scotland and Scottish Women’s Aid speaking earlier, and they suggested an alternative, particular crime of penetration by objects being specified. We would be quite happy with that, too.

The Convener: I have some slight difficulty with what you are suggesting. Some years ago, there was an appalling case in Aberdeen, in which a man inserted a police baton into a woman’s vagina. That was an appalling offence. Suppose that that offence had been carried out by a woman: would you define that as rape?

Frida Petersson: Under our definition, yes. Our definition would make the crime completely gender neutral, which would have the effect that women, too, could be convicted of rape.

The Convener: Fine.

Stuart McMillan: Your submission suggests that the law should be changed so that the crime of rape might be committed when a person forces their tongue into a victim’s mouth. Is there a danger that that could be seen to downgrade the crime of rape? Would juries be willing to convict a person of rape in such circumstances?

Frida Petersson: Absolutely. We acknowledge that oral penetration both with body parts other than the penis and with objects is an extremely difficult area of consideration. We thought long and hard about whether to recommend that it be included in section 1. We decided to do so because it is covered under section 2 on sexual assault. We have simply suggested moving the offence into section 1. The danger that you mention exists, but the range of penalties that is available under section 1 would enable the severity of the act to be mirrored.

Stuart McMillan: Do you have anything to add, Ms Gallagher?

Susan Gallagher (Victim Support Scotland): I concur with what Ms Petersson said.

Stuart McMillan: Does Victim Support Scotland think that there is a role for an offence of sexual assault by penetration that is different from rape and non-penetrative sexual assault?

Frida Petersson: We do not see a need for such an offence.

The Convener: We turn to the issue of consent and reasonable belief.

Robert Brown: I think that you heard some of the previous witnesses’ evidence on a difficult area. You take issue with the bill’s definition of consent as “free agreement”. Will you elaborate on that? In your submission, you suggest that “free agreement”, involving understanding and knowledge of the other person’s will (as opposed to indifference),
expressed through dialogue or actions, would be the most suitable definition."

What would be the advantages of such a definition? Your proposed definition sounds more complex, without adding much.

**Frida Petersson:** We are happy to see the introduction of the reasonable belief provision, whereby the accused must have had reasonable belief that the victim consented to the act. It would be interesting to consider what different steps the accused took to ascertain that there was consent. That is what we are referring to—the steps that were taken, which are mentioned in section 12 on reasonable belief. Section 12 states that it is important to establish what steps the accused took to ascertain that there was consent to the act.

**Robert Brown:** Is that not a different aspect of consent, which the bill deals with quite adequately in section 12, which objectifies the issue?

**Frida Petersson:** Yes. We are happy with that section.

**Robert Brown:** So what would be the advantage of extending the definition of “free agreement” in section 9?

**Frida Petersson:** We believe that the issue is covered—we are quite happy with the definition in the bill and the steps that the accused must take to ascertain that the other person has given consent.

**Robert Brown:** So you are not seeking a change in the terms of section 9, notwithstanding what you said in your submission.

**Frida Petersson:** No. We are happy with the bill.

**Robert Brown:** Okay.

On section 10, in general, you welcome the list of circumstances in which consent would be considered to be absent. Should any other examples be included? Do you have any other comments about the effectiveness of section 10?

**Frida Petersson:** Yes. It is important that we stress that the list is non-exhaustive statutory list and that it is not a complete checklist of situations in which consent is not given. It is important that it is stated in the bill that the list is non-exhaustive and that if a situation that arises is not on the list, it could still be the case that consent was not given.

**Robert Brown:** Section 10(1) says:

"without prejudice to the generality of"

section 9,

"free agreement to conduct is absent in the circumstances set out in subsection (2)."

In other words, section 10 makes it clear that the circumstances described are examples. Do you have concerns about that phraseology?

**Frida Petersson:** We just think that it should be stressed further that the list is non-exhaustive, to ensure that the meaning behind it is taken into account when the bill is used in court. We are quite happy with the general idea of the introduction of a non-exhaustive list and the fact that when the Crown has established that one of the situations that are listed has occurred, it will have proved lack of consent.

However, we have a problem with the idea of someone giving prior consent. It is extremely important that consent is given at the time that sexual activity takes place, which is why we have a problem with section 10(2)(b). As was mentioned in the previous evidence session, the bill does not state for how long such consent is valid. If one accepts the interpretation that consent is valid until it is withdrawn, the victim must surely have an opportunity to withdraw it, which he or she would not have if they were asleep or, indeed, unconscious.

11:30

**Robert Brown:** As we touched on before, this issue is tricky to pin down. When people go out, they may over the course of the evening move from being sober to being more or less drunk or more or less incapable of giving consent afresh. We are dealing with human circumstances that may be difficult to establish in situations that come before a jury. What is your position on prior consent that is given at an early stage? I refer to instances in which people go out on the understanding that they will end up in a sexual situation, but one of the parties gets drunk during the evening and is not capable of giving consent anew. People could be landed with a serious criminal offence. Is the proposition that, unless there is a specific further agreement, we are dealing with a crime of rape?

**Frida Petersson:** Yes. We wish to remove the possibility of prior consent. Only consent that is given at the time when the sexual act takes place should be valid. That would take away the worry about whether consent must be renewed and when it must be withdrawn.

**Robert Brown:** It would, but would it not cause a considerable hiatus, given that criminal statutes are normally to be construed strictly? If people were convicted in the circumstances that you describe, they could go to jail for a long time. Are we not getting away from the reality of human behaviour in some sexual situations?

**Frida Petersson:** We are dealing with very difficult situations. The bill states that consent can
be withdrawn at any time—we believe that it should be possible for a person to withdraw consent. It is suggested that someone who is asleep or unconscious is incapable of doing that. The policy memorandum states:

“The definition makes clear that people who are asleep or unconscious lack capacity to give or express consent while in that state.”

They are also incapable of withdrawing consent at that stage. The notion of prior consent is problematic. Arguably, it would lead court cases to focus on whether the victim gave prior consent, rather on whether consent was given at the time when sexual activity took place, which is the most important issue for us.

Robert Brown: Is that not a slightly overanalytical approach to the matter, given that people do not sign written documents in this context? Will not having prior consent not land us in as many problems as having it would?

Frida Petersson: We do not see the benefit of prior consent. We believe that it takes away some of a person’s sexual autonomy and her ability to change her mind. It is up to the person to consent or not at the time when sexual activity takes place.

Robert Brown: We are dealing not with situations in which someone has changed their mind, but with situations in which nothing is said.

Susan Gallagher: The onus must be on the accused to demonstrate what reasonable steps they took to ensure that consent was given.

Robert Brown: Or that consent still exists.

Cathie Craigie: Your evidence on this provision is very strong. You may want to suggest a form of words to amend the bill. If a woman agrees at 6 o’clock at night—in company, within the hearing of others—to have sex with someone but withdraws consent later in the evening, could that be a defence for the accused under the bill as drafted?

Frida Petersson: We wish to remove the notion of prior consent. In our view, it could be used as a defence under the bill as drafted, which we find extremely problematic. It contradicts the possibility of the victim withdrawing consent.

Cathie Craigie: I think that the committee would be keen to hear any further suggestions from Victim Support Scotland on this issue.

Under the bill as drafted, if a man touched his sleeping wife in a sexual manner on the basis that consent had been given prior to her falling asleep, would that be a sexual assault?

Susan Gallagher: It is very problematic. That is the reality. It must be based on a reasonableness in the context of the particular relationship and what goes on in that relationship generally. We would state categorically that, if what goes on between a man and a woman as part of normal practice includes a threat of violence or attack against the woman and she has not given her consent, it could be a problem if the law offered a justification for what happened.

Another question that must be raised is how the victim feels about the act once it has been perpetrated or even before it has been perpetrated if the victim wakes up. If the victim does not consent during, after or before the act, we believe that there is an issue with consent.

Robert Brown: Let us assume that the provision on prior consent was removed from the bill. With the rape definition under section 1, we would still be left with an issue about consent or reasonable belief that the other party had consented. Would there not still be an issue that prior consent could be part of the circumstances that led to A having a reasonable belief that B had consented? The thing must be dealt with one way or the other, either by the interpretation of judges and juries or in the legislation.

Frida Petersson: I see your argument, but we do not believe that the one issue has to do with the other. It is difficult to pinpoint what reasonable belief would be, but we do not believe that it has to do with prior consent.

Robert Brown: Surely, reasonable belief could be the fact that there had been an indication of consent at an earlier stage, such as in the circumstances that Cathie Craigie mentioned.

Frida Petersson: But that does not categorically have to be prior consent.

Robert Brown: I take that point. Would it be preferable to have the greater uncertainty of the general definition without the specific reference to prior consent?

Frida Petersson: Yes.

Robert Brown: I think that we would be interested to receive any further thoughts that Victim Support Scotland has on that very complex and difficult issue.

The Convener: It is a difficult matter. As I said earlier, we come down to human behaviour and human relationships. Sometimes, one has great difficulty in codifying law under those headings.

Paul Martin: Victim Support Scotland’s written submission suggests that there is too great a disparity between the penalties, on the one hand, for rape or rape of a young child and, on the other, for the crime of having intercourse with an older child. The submission suggests that such crimes should be prosecuted only in the High Court. Can you provide some background on how you reached that conclusion?
**Frida Petersson:** The crimes of rape and of rape of a young child can be prosecuted only in the High Court, whereas the crime of having intercourse with an older child can be prosecuted in a summary court, which has a lower range of penalties available to it. We believe that there is too big a disparity between how cases would be dealt with depending on the age of the victim. We believe that having intercourse with an older child should still be seen as a very serious crime. We should show victims aged 13 to 15 that we take such crimes seriously. We should show the general public that offences involving that age group do not fall in a gap between rape and rape of a young child. We should not grade the severity of the attack based on the age of the victim. There is nothing to say that an older child will have a lesser or better reaction to a sexual offence than a younger child. Therefore, we do not agree that there should be a big gap between offences involving a 12-year-old and those that involve a 13-year-old.

In addition, there can be big differences between two people aged 13. Whereas some 13-year-olds might be very mature and able to fend for themselves, others might be still very much children. We believe that there is too big a difference between how the bill deals with offences involving young children and those involving older children. Given the severity of the attack, the penalty should be based on the merits of each case. Older children should be able to be heard in the same court and have access to the same rights as younger children and older victims.

**Paul Martin:** So the issue that has been raised involves the rights of the victim as well as the sentencing tariffs that are available only in the High Court.

**Frida Petersson:** We believe that such victims should have the right to have access to the same penalties as would apply in the case of younger victims and in the case of offences under section 1. Those who are aged 13, 14 or 15 do not have access to the same penalties, because their case can also be heard in a summary court.

**Paul Martin:** I share your concerns, but there may be issues to do with whether activities have been wholly consensual. Have you raised that matter?

**Frida Petersson:** With regard to older children? No. We have not commented on that.

**The Convener:** Would you summarise your position? You are not suggesting that someone aged 16 years and one month who has had consensual sexual intercourse with a girl aged 15 years and 11 months, for example, should be indicted in the High Court.

**Frida Petersson:** No.

**The Convener:** That is clear. Thank you.

As there are no more questions, I thank you very much for taking the time and trouble not only to submit your views in writing, but to submit yourselves to questioning. That is appreciated.

11:41

*Meeting suspended.*
Sexual Offences (Scotland) Bill:
Stage 1

10:27

The Convener: Our main business this morning involves the taking of evidence on the Sexual Offences (Scotland) Bill.

Early in our consideration of the bill, we identified certain themes that we were particularly keen to explore. In today’s evidence-taking session, which is our second on the bill, we will discuss aspects of the bill with specific relevance to children and young people.

On our first panel are Jan McClory, the assistant director of children and family services at Children 1st; Dr Jonathan Sher, the director of research, policy and practice development at Children in Scotland; and Martin Crewe, the director of Barnardo’s Scotland. We have received written submissions from the panel, so we will go straight to the questions.

Children 1st suggests that section 10 of the bill, which deals with situations in which there is no consent, should be extended to include cases in which the victim has previously been the victim of physical or sexual abuse by the accused, and cases in which the victim agreed to or submitted to the act because he or she was subject to emotional or psychological abuse. Can Jan McClory explain a little more about the kind of situations that she envisages? Why does Children 1st feel that they could not be included in section 10(2)(c)?

Jan McClory (Children 1st): We raised those two areas in recognition of the imbalance of power, because we are concerned about the impact of previous or current abuse by a perpetrator on any young person. Consent could not possibly be considered possible in a situation in which there is a differential in power between the two parties. The kind of situation that we anticipate would involve some form of previous coercive behaviour—whether sexual or otherwise—towards a young person, and cases in which a young person has been pressurised, either physically or emotionally, by a person who could be considered to be in a position of trust or who has power over them.

10:30

The Convener: So you are saying that section 10(2)(c), which refers to violence, would not cover such coercive behaviour.

Jan McClory: Yes.
The Convener: I would like to probe things a little further. The bill proceeds on the understanding that children under the age of 13 cannot give proper consent to sexual relations. Do members of the panel share that view?

Martin Crewe (Barnardo’s Scotland): Barnardo’s Scotland’s view is that drawing a line in the sand at the age of 13 may not be perfect, but it is perfectly reasonable to do so. Therefore, we are happy with that approach.

Dr Jonathan Sher (Children in Scotland): Drawing age boundaries is a necessary tool in legislation, and because doing so is a necessity, we agree with the approach that has been taken. It is worth noting that all such age definitions are no more than proxies; levels of maturity and knowledge and abilities vary widely among children of such ages. However, law cannot be created around individual variations among young people. Therefore, it makes sense to us that the line be drawn at that point.

The Convener: That is in line with the evidence that you submitted yesterday.

Let us take things further. The bill raises the possibility of children under 13 being guilty of a criminal offence if they engage in sexual activity of a consensual nature with other children under that age. What are the panel members’ views on that?

Jan McClory: We would argue—we agree on this—that if young people under the age of 13 are incapable of giving informed consent to sexual activity, a contradiction exists in the bill, in that they could be charged with a criminal offence. We would argue that young people under 13 are not capable of sexual offences of such a nature.

Martin Crewe: Our position is similar, but subtly different. We accept that there are occasions when children under 13 can commit offences, but we strongly suggest that, if the bill as it currently stands is passed, the Lord Advocate should issue guidance to the police and, by implication, to the child protection agencies that says that considerable discretion exists with respect to handling prosecutions. I say that because some cases that our services have dealt with are primarily child welfare and child protection cases.

The Convener: The Lord Advocate has, of course, unfettered discretion in all such matters.

Martin Crewe: Our concern is that, whether or not a charge is progressed, the police should have discretion in individual cases. The cases that we deal with, which sometimes involve charges of lewd and libidinous behaviour, are generally dealt with through the hearings system. The bill ups the ante, so that a child could be charged with the rape of a young child.

Dr Sher: I have two additional points to make. There are precise definitions of what constitutes sexual activity for the 13 to 15-year-old age range, but things are much less well defined for the under-13s. It appears that there are various sexual explorations that fall well short of the definition of penetrative sexual intercourse used in other parts of the bill that would subject younger children to a criminal charge and a criminal record. We think that that is not in children’s best interests, and that anything that leads to regarding younger children below the age of 13 as criminals and treating them as such is a mistake, especially when we are talking about their involvement in non-coercive, non-exploitative sexual explorations with each other. The bill should be clearer that there is no intent to criminalise young children when they engage in sexual explorations that are neither coercive nor exploitative.

The Convener: I think that Paul Martin will want to pursue that issue further, but in the meantime I call Nigel Don.

Nigel Don (North East Scotland) (SNP): I have listened to what the panel members have said, and I do not disagree with the tenor of the suggestions.

Do any of you agree that it would be unsatisfactory to have a law that says that something is illegal but which is routinely not enforced, and is only occasionally enforced when the circumstances require it? The Lord Advocate may very well be right, but it is the general idea of having a law that is not enforced that worries me. Does it worry any of you?

Martin Crewe: I think that you are right, but the cases that we deal with, particularly those that involve young children, are complex. I can give examples of cases in which behaviour has occurred that we would agree we do not want to see, but such things happen, and it is rarely in the best interests of the children to go ahead and prosecute.

Nigel Don: I would like us to try to write the law in such a way that we know what it is that we are prosecuting. I appreciate that that may mean that we have to use rather difficult words, and that we might end up with grey areas, but would it not be better to say that we will prosecute in situations in which—for example—there is a degree of coercion? Would that cover the circumstances in which one would hope the Lord Advocate would proceed?

We are struggling with the whole idea of underage criminality, but I would prefer there to be a form of words that tells the prosecution system when it should roll, rather than leaving that wholly to the—albeit perfectly reasonable—discretion of
those who do not tell society on what basis they operate.

**Martin Crewe:** Based on our casework, it would be quite a challenge to write a form of words that would actually be practical in the circumstances that we are dealing with. At some point, there has to be discretion in the system. A more direct line to take, if you wanted to do so, would be to ensure that a case that is referred to the procurator fiscal is also referred to the children’s hearings system at the same time; that could then be negotiated.

**Nigel Don:** Can any of the other panel members help me out? My primary concern is with creating criminal offences that we do not routinely prosecute. In other words, we say, “This is the criminal law but, actually, we don’t mean it.”

**Jan McClory:** I agree that we do not need more offences as a way of protecting children and young people. The crucial element with regard to what is written and enshrined in law on this issue is the accompanying guidance on the implementation of the law, in relation to the understanding of professionals who are working around it.

**Angela Constance (Livingston) (SNP):** I hope that I am not going too off-beam here—I have listened carefully to the evidence so far. Do you have any views on how the bill should or could impact on the age of criminal responsibility? You have already raised concerns about a contradiction in the bill with regard to children under 13—they are not eligible to give consent and yet can commit an offence—which led me to think about the age of criminal responsibility, which I appreciate is sometimes regarded as a rather contentious issue. Do you think that there is a crossover on those issues?

**Dr Sher:** That is an important issue, and the Government or Parliament might wish to consider it. However, if the age of criminal responsibility is going to be considered, it needs to be done directly and with a great deal of thought. The bill cannot sort out that much larger and more complex issue. If the bill has a relationship with the issue, it might be in signalling that there is an issue worthy of further consideration in other circumstances.

**The Convener:** If that were to happen, it would have to be done comprehensively, rather than in a piecemeal fashion, in relation to a particular type of offence.

**Robert Brown (Glasgow) (LD):** I will stick with section 15 for the moment. I accept the background about the age of criminal responsibility. However, most of us might be concerned not so much about discretion and going forward with proceedings that should not be taken up as about the offences in section 15 to do with kissing and touching involving young children who are under the age of 13—I will forget about the matter of the different age groups for the moment. Most people would not regard that behaviour as being criminal in any sense, or even necessarily reprehensible. Do you have any further concerns about the definitions in section 15 that you could tell us about today or on which you could come back to the committee?

There is also the subsidiary issue of criminal prosecution or referral on offence grounds to the children’s reporter. Nevertheless, something that ends up being an offence can end up giving someone a criminal record, which might have to be disclosed later under disclosure legislation. Do you have any thoughts about a way around that, leaving aside the age of criminal responsibility problem?

**Jan McClory:** I can only agree with you that many of the activities that are listed in section 15 would not give cause for concern about young people who are merely developing and growing as individuals in society. We do not want to see anything in the bill that underlines that such behaviour is offensive—within a criminal context—in any way. That is why it important that we remove from the bill the notion of an offence being committed by a child under the age of 13.

**Martin Crewe:** I go back to the earlier point about appropriate guidance. Quite a lot of the provisions in the bill that deal with children will rely on people exercising a degree of common sense in practice, and different parts of the bill lend themselves more to that approach. Good guidance could prevent such cases from being progressed.

**Robert Brown:** I am still concerned about the idea of there being criminal offences that most people would not regard as criminal offences but which could leave people with a criminal record—albeit theoretically in most cases. This might be a matter for the lawyers in your respective organisations, but is there scope for any form of defence under that heading, or any other way of getting at the problem that would allow the legal exclusion of such potentially criminal but, in fact, non-criminal situations?

**Dr Sher:** In the sections that deal with 13 to 15-year-olds, there are much more precise definitions of the activities that are considered to be criminal and those that are not. You will know that Children in Scotland favours decriminalisation rather than criminalisation, but even within that, there are much more precise definitions for the activities of older children than there are for those of younger children. Perhaps the way of moving the issue forward, if that is the path that the committee wants to take, would be to use more precise definitions that exclude all the behaviours that common sense and collective experience suggest
are not regarded as, and are not in fact, criminal behaviours. That can be done within the law.

10:45

I underscore my colleagues' point that one of the worst outcomes would be for younger children to be labelled as criminals for engaging in such activities and, therefore, to begin to think of themselves as criminals. One of the developmental truths about children under 13 is that they begin to live up or down to the expectations that we adults place on them. It would make much more sense, and would be much more helpful to their development, for them to be regarded as children who are engaging in behaviours that raise concerns that can be dealt with in a health and welfare context rather than a criminal justice context. In this arena, there seems to be remarkably little value in labelling children as criminals. It is not helpful.

Paul Martin (Glasgow Springburn) (Lab): My question is for Children 1st first of all. From its written evidence and from what Jan McClory has said this morning, Children 1st seems to be calling for a complete ban on criminal proceedings being taken against children under the age of 13 in any circumstances. I ask her to clarify whether that is the case.

Jan McClory: It is completely inappropriate and unacceptable for an under-13-year-old to be charged with a sexual offence.

Paul Martin: I will provide an example of something that might happen in real life. If a 12-year-old assaults a two-year-old, should criminal proceedings against the 12-year-old not be considered?

Jan McClory: When we deal with a young person under 13 who behaves inappropriately towards other children or causes them harm, there is great concern about the welfare and needs of that young person. The behaviour must be considered as a care and protection issue, not only for the other young children involved but for the young person who is behaving inappropriately. It would be more appropriate to make a referral that examined other concerns—such as whether the child is in moral danger themselves and whether they are beyond parental control—in an environment in which the young person can be looked after and supported, rather than prosecuting them for an offence that we believe they would be largely incapable of understanding.

Paul Martin: Will you go into more detail about that? You have made it clear in your written evidence and what you have said that there are two different forums—the children's hearings system and criminal proceedings—and that you do not believe that criminal proceedings are the way forward because you are concerned about the possibility of the individual being labelled if they receive a criminal conviction. Apart from that, is there no possibility of using criminal proceedings as an intervention, perhaps to send a message to such young people that their activities are unacceptable?

Jan McClory: The reality is that situations in which young people are likely to cause grave harm to other young people are extreme—they are not representative of the behaviour of the vast majority of young people—and dealing with such behaviour as a care and protection issue through the children's hearings system sends the right message. If a young person under the age of 13 is engaged in behaviour that is harmful to others, that needs to be understood, and they and their family need to be helped to seek to resolve some of the difficulties that the young person faces, instead of that young person being criminalised. It is important that the message that goes out to young people, their families and communities is that under-13-year-olds who cause grave harm need help and support and have little true understanding of the impact of their behaviour.

Paul Martin: So you want a complete ban on criminal proceedings, you do not want the Lord Advocate to be involved in any intervention and you want such behaviour to be reported to the children's hearings system. Is that the only way in which you would proceed, no matter the circumstances?

Jan McClory: As I said, we would like the notion of charging under-13-year-olds with a criminal offence to be removed from the bill. Obviously, there is the possibility of a very extreme situation—which I think is what you are referring to—but we would say that the most appropriate way for an under-13-year-old to be dealt with is through the hearings system, rather than referral to the Lord Advocate.

Paul Martin: I ask the same question of Barnardo's, which has given some indication of its views. Will Martin Crewe clarify how his organisation would proceed?

Martin Crewe: We run three services throughout Scotland that deal with harmful sexual behaviour by children. Even in those services, the situation that you describe is very rare. However, in extreme cases, we have to face the fact that criminal proceedings might be appropriate and will happen.

Paul Martin: So Barnardo's view is that the bill should not be amended and that the option of criminal proceedings should remain available to the Lord Advocate.
**Martin Crewe:** Our line is that although that option should be used extremely rarely, we do not contest that it should be provided for in the bill.

**Paul Martin:** I ask Dr Sher for his view on the same question.

**Dr Sher:** As a general principle, Children in Scotland is not in favour of the criminalisation of young children. Whether that presumption of non-criminalisation would be put aside in particular instances defined as very extreme is a matter for the committee to decide; I cannot bring you evidence about it.

I can say two things, however. First, what we know from many years of research and work in the area is that it is extraordinarily rare for young children to become sexual predators of any kind if they have not first been victims of severe sexual abuse. By and large, it is the children who have been badly harmed by adults who perpetrate such rare crimes.

That leads to my second point. Members might have discerned from my accent that I am not originally Scottish. One of the things that attracted me to come to Scotland is the tradition that is represented first and foremost by the children's hearings system, which has found a middle course between simply ignoring unpleasant social realities and unpleasant and bad behaviour and, conversely, turning everything into a criminal offence. There is a great deal of value in that Scottish tradition of viewing and treating children as children, even in the aftermath of their negative or worrying behaviour. I hope that the bill will reflect or extend that noble Scottish tradition of finding a middle path that neither ignores nor approves of such activities, and which does not criminalise them either. The Scottish approach understands that they are children and that it is overwhelmingly likely that they are children who have been harmed. There needs to be an appropriate welfare response both to help them get over the harm caused to them and to stop them harming anyone else as a result.

**Paul Martin:** I cited an example of a 12-year-old harming a two-year-old. Can you think of no examples in which criminal proceedings would be more beneficial than using the children's hearings system? There can be welfare interventions through the criminal prosecutions route as well.

**Dr Sher:** It might just be a failure of my imagination and there might be extreme circumstances that warrant an extreme response, but I cannot bring you evidence about that.

The basic principle is that we should not criminalise young children. If the committee can identify exceptions to that, that is the committee's prerogative, but I have no evidence to offer one way or the other; I have the principle.

**The Convener:** We will move on to sexual activity between older children.

**Cathie Craigie (Cumbernauld and Kilsyth) (Lab):** Before we do, I would like to pursue the same line a wee bit further, with your good will.

**The Convener:** It is infinite.

**Cathie Craigie:** The committee has been advised that in 2006-07 slightly fewer than 16,500 children were reported to the children's reporter for offences, whereas 99 children under the age of 16 went on to be prosecuted through the Scottish criminal court system. Is that the right balance? Do those figures provide enough comfort to the people who work with young children that the system is working on the social grounds that Dr Sher mentioned?

**Martin Crewe:** Broadly, yes. The ratio of prosecutions is very low compared with the number of cases that are referred to the children's hearings system.

**Jan McClory:** A major concern to our organisation, in addition to whether cases involving children lead to prosecution, is the help and support that are available to young people who, technically, commit offences through involvement in inappropriate sexual behaviour. Regardless of whether a case is dealt with through the criminal justice system or the children's hearings system, when it comes to the outcome that we are looking for, which is a change in the behaviour of young people, our greatest concern is about the absence of support services and treatment programmes for young people who exhibit sexually inappropriate behaviour. Regardless of the system that deals with them, if that behaviour is not addressed while those people are still relatively young, the chances are that it will not be resolved and their behaviour will not change. That is of as much concern as the legal process.

**Cathie Craigie:** To avoid any confusion, the figures that I quoted did not relate only to sexual offences; they relate to offences across the board.

**Jan McClory:** Yes—you were talking about offences across the piece.

**Cathie Craigie:** I will now move on to the next area of questioning. I note from its submission that Children 1st consulted young people on their sexual behaviour. It was one of the few organisations, if not the only organisation, to do so. How did you go about that? How many people were involved in the consultation exercise? What was the age range of the group that you worked with?
Jan McClory: As we mentioned in our submission,

"we held a conference in June 2008 jointly with ChildLine in Scotland to debate the issues raised within the Scottish Law Commission recommendations."

That national event involved participants from the many different agencies in the statutory and voluntary sectors, as well as children and young people who were users of the services of ChildLine and Children 1st.

Following on from the issues that were raised at the conference, consultations were held in some of our young people’s services, most prominently among users of our young people’s chill-out zone service in West Lothian, which has provided sexual health guidance and support to young people for about seven years. We held focus groups and the service’s staff conducted a specific consultation of 12 young people—young men and women—that dealt with a range of issues around the key areas that the bill addresses, particularly the age of consent and decriminalisation. We undertook that consultation internally to enhance the evidence from the conference in June.

Cathie Craigie: How many people were involved in the conference and the focus group?

Jan McClory: More than 120 people were involved in the conference in June and the more recent consultation involved a group of 12 users of our service in West Lothian.

11:00

Cathie Craigie: You have drawn together some interesting evidence from your consultation. As I said, Children 1st is one of the only groups to go that far, so I congratulate you on that work.

How did you express the findings of the consultation in your submission? Some of the points that the young people made do not marry up with the conclusions in your submission. I am thinking in particular about the messages that are sent out. The age of consent is not changing, but if a feeling exists out there that it is changing, the protection from pressure that some young people mentioned will be taken away.

Jan McClory: In our written evidence, we tried to embrace the different perceptions and concerns that young people expressed to us. We also tried to acknowledge that, although the age of consent will remain the same, as you say, the message might be communicated to them that, with decriminalisation, the age of consent will be reduced. We tried to embrace the difference of opinion that exists among young people, which is a major concern for us. We carried out a small consultation within our own services because we believe that consultation has been lacking and that it must take place.

We are all here because our major concern is the protection and wellbeing of young people. Children 1st does not want young people under 16 to engage in sexual activity without support, information and education. We believe that, for most young people, the age of consent is absolutely right. We accept that some under-16s will be involved in sexual activity and we believe it is important that Scotland has an equal distribution of services that young people can access to seek support, information and guidance.

We know from providing such services ourselves—and from other organisations’ experience—that being open to dialogue and discussion and being there for young people to raise issues around sexuality does not automatically lead to their engaging in sexual activity. It helps a lot of young people to make safe and wise decisions for themselves, which often equates to their disengaging from sexual activity or deciding not to become involved in it.

We heard from young people that changing the law to decriminalise could send out a clear message that, although the age of consent is still 16, sex between young people aged 14 to 16 is permissible and therefore an expectation. That was a particular concern for young women, although interestingly some of the young men who were involved in our consultation felt strongly that the message should remain that 16 is the absolute limit. They had concerns, perhaps not surprisingly given the group of young men, about predatory behaviour.

In our submission, we tried to embrace the complexity of the situation and the need to have messages that can be clearly understood by young people and everybody who is involved in working with them and providing support and guidance.

Cathie Craigie: Some of my colleagues might take the point a wee bit further.

Mr Crewe or Dr Sher, do you have any comments?

Martin Crewe: Barnardo’s position is that we unequivocally support the Scottish Law Commission’s position that sexual intercourse should be decriminalised for 13 to 15-year-olds—boys as well as girls—because of the difficulty with the current situation with an activity that is so common. I refer to Nigel Don’s earlier point about the intention of the legislation. If up to a third of children engage in sex before the age of consent but we consider prosecuting only a tiny minority of them, is it worth having the law in place at all? We acknowledge that the activity happens.
Our line is that persuading young people not to indulge in sex is less about making sex criminal and more about providing easy access to appropriate advice. I do not know whether anybody saw the awful Channel 4 programme “Embarrassing Teenage Bodies”, but the thing that seemed to bring home the message to young people was showing them the effects of sexually transmitted diseases and what it means to be a teenage mother. Opening up the advice will be far more effective in discouraging that behaviour.

Cathie Craigie: The reason why I raised the point is that Children 1st consulted with young people, who

“spoke about using 16 years old as a form of ‘buffer’ … to withstand peer pressure to have sex earlier than this age boundary.”

Some young people felt that an “actual or perceived change” in the age limit might lead to more pressure,

“more early sexual activity and more unwanted pregnancies.”

Has Barnardo’s spoken about the issue to young people who are involved with the organisation? Do you accept that point that young people are making?

Martin Crewe: It is admirable that Children 1st has undertaken that work, but I am sure that Jan McClory would agree that the sample was not statistically significant. We run services for children who have been sexually abused and services that deal with harmful sexual behaviour. I have spoken to the front-line workers, whose view is that criminalising will not have a significant deterrent effect on the sort of disadvantaged young people who, disproportionately, have sex early. I support more research on that, but it is too early to tell what would really have the effect that we all seek.

The Convener: To an extent, we may have anticipated some of the other members’ questions.

Stuart McMillan (West of Scotland) (SNP): I have a question for Dr Sher that is based on Children in Scotland’s written submission. In the section on criminalisation versus decriminalisation of consensual sex between 13 to 15-year-olds, which is in part 1 of the bill, you discuss the fact that very few children and younger people view consensual sex with people of their own age as a criminal activity and you highlight a few examples. Could it not be suggested that, if younger people in the 13 to 15-year-old category do not understand that 16 is the legal age of consent, they are not mature enough to have sexual activity in the first place?

Dr Sher: Children in Scotland, my colleagues who are giving evidence, committee members and the Scottish Government all agree that we ought actively and effectively to discourage sexual intercourse, not only among everyone who is under the age of consent—16—but among older teenagers who are not ready to become fully sexually active. There is no disagreement anywhere that I know of. No one argues that underage sexual intercourse is a good thing—it is not and all of us should discourage it actively through whatever means we have.

However, that must be coupled with our actively and effectively encouraging all children below the age of consent who, despite our robust and sincere advice to the contrary, choose to engage in sexual activity and intercourse—which we all regard as an unwise and unhealthy choice—at least to behave in a manner that will have the fewest and least serious negative consequences for them, their partners and society as a whole. We all agree that that means providing easy and confidential access to first-rate information, providing support for avoiding pregnancy and preventing the transmission of sexually transmitted infections, and dealing well with the social and emotional problems that arise.

What is the message of the bill? As we stated in our written submission, we think that there is a problem with having an empty threat, but also with criminalisation. Our suggestion—together with the Scottish Law Commission and a variety of other groups—is to decriminalise consensual sexual intercourse below the age of consent, but to couple that with a new robust public health campaign, which says that the age of consent is still 16. All of us believe that it is unwise and unhealthy for people to engage in sexual activity below the age of 16. However, if people are going to do so, they should not make things worse: they should not compound the problem by becoming pregnant, by transmitting STIs or by causing other problems.

We all understand that there is an intended message in the bill. The problem is serious and under-16s should get the message that it is so serious that it has been made a crime, and therefore not engage in sexual activity until they are over 16. I hope that everybody will take that message on board. Frankly, however, I have no confidence that that is the actual message that will be taken on board by under-16s. In our submission, I specified a set of plausible other meanings and interpretations that young people will give to the bill as it stands. In my view, those are unhelpful—but very likely—interpretations.

The best strategy is twofold. First, it is to decriminalise, and to couple that decriminalisation with a robust public health campaign saying that the age of consent is still 16, and that we do not approve of the behaviour of engaging in sexual
activity under that age. Those two things should tie together.

Secondly, we should now do what should have been done by the Government earlier. As commendable as the efforts of Children 1st are, they cannot replace a meaningful full-scale Government-led national consultation of a wide cross-section of children and young people. That should happen now, so that whatever the provisions of the bill that is passed, the guidance and practice are informed by what will actually work with children and young people, because we will know what they are thinking, instead of guessing what they might be thinking or how they might interpret our messages. That last element has been missing, so we need to engage in a broad national consultation of the children and young people whom we are trying to help and give good counsel.

**The Convener:** That was a comprehensive answer.

**Angela Constance:** Dr Sher has given a detailed response on the advantages of decriminalising consensual sexual activity between older children. I understand that Barnardo’s Scotland also supports that. Does the panel see any disadvantages or potential risks in such a move? We have already heard Cathie Craigie speak about how young people themselves view the situation. They have intimated that there is a protective factor from the law as it currently stands in respect of resisting peer pressure.

**Jan McClory:** That is covered in our evidence, and we have listened to young people’s views on that. To return to what Jonathan Sher was saying, we took a small sample of views from among our services, and we consulted people at our conference. There is much more that could be learned and understood about how young people will receive the message. We do not want unnecessary criminalisation where consensual sex has taken place, but we caution that sex is not always consensual in the age group that we are discussing. There is still a need for protective factors for young people. Our position on that is clearly laid out in our evidence.

**The Convener:** Would anyone else like to add anything?

**11:15**

**Martin Crewe:** The only risk is the risk of sending a message that could be misunderstood. As Dr Sher said, we have to manage the message carefully. It is important to say that we are not changing the age of consent. If we adopt the proposals of the Scottish Law Commission, we are not saying that Children under 16 can have sexual relations with whomever they want.

**Nigel Don:** The point that underage sex might not be consensual is entirely obvious to us, as adults. However, is there any reason why that lack of consent is not covered by the criminal offences in sections 1 and 2, the latter of which seems to be all-embracing?

**Jan McClory:** It is covered by those sections, obviously. However, our concern is to do with the message that is sent to young people, how they understand it and how they cope with the notion of when sex is permissible in terms of their own personal decision making and when it is an offence for anyone to be sexually active. Our concern is about young people’s decision making and the pressures and permissions that exist in society.

**Cathie Craigie:** The evidence that we are hearing seems to suggest that, in relation to sexual activity between older children, part 4 of the bill is not yet right. The Government did not consult young people, and the children’s commissioner has suggested that we seek to ensure further involvement with and consultation of young folks. Given that we all seem to agree that what we have before us is not ideal, do you agree that we should not rush to legislate but should, instead, leave that part of the bill for another day, by when we will have been able to listen to young folk and examine legal issues and the needs of young people?

**Martin Crewe:** It is fair to put some sort of caveat on any research of that nature. We need to remind ourselves what we are talking about. It would be good to undertake that research, but you would be asking young people to talk about a situation that they would not be in at that moment in time. Two 15-year-olds, in a moment of passion, might not behave as rationally as they might do when surveyed. I support going ahead with wider consultation, but we also need to have a reality check and ensure that we understand what is happening on the ground.

**Angela Constance:** Does the panel think that older boys and girls should be treated equally with regard to the criminal law in this area? Does the panel approve of the extension of the criminal law to older girls who engage in consensual sexual relations with older boys, given that under the present law under-16s are protected by criminal law but are not subject to prosecution?

**Jan McClory:** We are in favour of gender equalisation in legislation. It is unacceptable that young men and young women are treated differently. However, there are questions around identifying someone as a sex offender in the first
place—doing that to women is no more appropriate than doing it to young men.

The Convener: That is in line with your earlier point.

Martin Crewe: Our position is that we support gender equality, with the decriminalisation of the activity for both sexes.

The Convener: We will now turn to defences in relation to offences against older children.

Stuart McMillan: Children 1st expressed concerned about confusion in the bill, especially in relation to the age difference defence in section 29(3). In what regard is the defence confusing? Do other aspects of the bill present a confused picture? I have done some research on the matter and I gather that Austria, Italy and Latvia have similar provisions in their legislation.

Jan McClory: You know something that I do not know; I am afraid that my research was not as full as yours was.

As we said in our submission, we are concerned that the criminalisation of non-exploitative relationships between 16 or 17-year-olds and 14 or 15-year-olds would be confusing and unworkable in law. The arbitrary notion of a two-year rule—and the boundary between a two-year age difference and an age difference of one year and 11 months—would be hard for young people to absorb and understand and would lead to confusion.

Martin Crewe: Section 29(3) is a difficult provision, but we considered the matter and concluded that it would be difficult to come up with anything better. The problem relates to Dr Sher's point about how children reach maturity at very different ages. Whatever approach is put in place, it must be acknowledged that we might be talking about a 15-year-old girl who is as sexually and emotionally mature as the 17-year-old boy or about two young people between whom there is a big difference.

We deal with quite a few cases that involve children who have learning disabilities. In such cases age is much more of a proxy than it is in other cases. Section 29(3) is not ideal, but we want such a provision in the bill and we have not been able to come up with better wording.

Robert Brown: The underlying issue is whether a sexual relationship between older children is exploitative. A general point that has been made in favour of the approach that is taken in the bill is that the existence of offences that do not rely on proof of consent would give the prosecution more scope when a child had been sexually exploited by another child but there was not enough evidence to secure a conviction under sections 1 and 2. That sounds like a difficult argument in criminal law terms; is it a good reason for supporting the criminalisation of certain sexual activity without requiring proof of consent?

The Convener: Do you want to answer that, Ms McClory?

Jan McClory: Me again. I am not sure that I can add anything without repeating what I have said.

The Convener: Do the other witnesses want to augment their previous answers?

Dr Sher: Another way of considering the two-year rule is to regard it not merely as a defence against a criminal charge, which will be used at the back end of a case, but as a presumption—at the front end—that there will be no prosecution when the age difference between two consenting older children is less than two years, unless there are extraordinary circumstances. Instead of the provision being regarded as relevant only as a defence when a charge has been laid, it could be regarded as a presumption that no charge will be laid in the first place, unless there are extraordinary circumstances.

Bill Butler (Glasgow Anniesland) (Lab): In response to a question from Cathie Craigie, Ms McClory mentioned the need for support for young people whose sexual behaviour gives rise to concern. Will the witnesses comment on the type, effectiveness and availability of services, including sexual health services, in Scotland? Why not start with Mr Crewe and give Ms McClory a break?

Jan McClory: Thank you.

Bill Butler: No problem.

Martin Crewe: Throughout Scotland, there is a wide variety of services giving some sort of generic sexual advice to young people. Our concern is that specialist services for children with harmful sexual behaviour are few and far between. We provide services in three locations in Scotland. What is particularly interesting about those services is that if the children come to us young—usually under 12 or 13—there is little difference between those children who have exhibited harmful sexual behaviour and those who have been abused. There is a willingness among children to address their harmful sexual behaviour, especially at a young age, and the success rates are good. As an investment for addressing those behaviours, specialist harmful sexual behaviour services are invaluable.

Jan McClory: I agree. Specialist services that support changes in the behaviour of young people can produce startling results. However, such services are few and far between, and many are under constant threat because of the funding situation. That does not help us to build a sustainable model of support for young people who present us with challenging behaviour.
Services throughout Scotland are inadequate and are not necessarily located in the right places.

We consulted young people on the availability of sexual health services. We asked them whether the Government could spend more money on sexual health and, if there could be an increase in investment in their locality, what they would want. What was interesting was that they did not say that they would make more contraception available—that they wanted more condoms or anything like that. What they said was that they wanted to have more people to talk to about sexual relationships, and indeed about relationships in general.

It is important for us to understand that young people see sexual health as related to relationships and social development. They want to be able to talk about that, as part of their life and their future, in a safe environment. Sex education and sexual health issues are still closeted, and young people feel that there is still a risk to them, even within education and mainstream school activities, in engaging in discussions on those issues. If they disclose things to teachers, they worry about what is done with that information. They are concerned about becoming the subject of staffroom gossip, or about the impact on their relationships with teachers.

Interestingly, some of the young people whom we consulted said that they would like to have more school nurses, and that they would like to have school counsellors. They would like sexual health to be integrated into the curriculum, rather than just being part of the personal and social education programme. In terms of investment and return, what they were really asking for was not more sexual health equipment but more support and more understanding about where they are coming from and what their dilemmas are.

Bill Butler: So, in general, young people exhibited more common sense than some adults.

Jan McClory: My experience, from working directly with young people in the field of sexual health for many years, and from my role in Children 1st, is that young people show sensitivity and an insight into their behaviour that contrasts slightly with the behaviour of the adults around them. Without fail, they try to wrestle honestly with issues and talk about the pressure that they are under. They find it confusing that, although the adults in their world have high expectations of them to behave responsibly, to know the score about everything and to be open about sexuality, those adults do not exhibit that behaviour in return.

We have a population of young people who are prepared to accept support when it is offered and who value guidance. They value being taken seriously and being respected for who they are and the position that they find themselves in. Many young people will talk about the fact that their first sexual encounter might have taken place when they were under the influence of alcohol. They are able to open up and discuss that, and to say that that is not the way that they wanted it to be. However, it is difficult for them to find a location for that dialogue that values and respects them.

11:30

Dr Sher: I have two quick points. There seems good reason to increase the investment in helping not only the young people who have been victims of sexual exploitation or abuse but the young perpetrators. For example, one of our member organisations—the Kibble education and care centre in Paisley—receives a number of referrals, primarily from local authorities, of boys who have been victims and then become perpetrators of sexual abuse. It is not easy, quick or inexpensive, but the centre has had good results in its work with those boys. That suggests that it is not a waste of time, energy or money to invest in helping to turn their lives round.

Bill Butler: Is there enough such investment?

Dr Sher: Across Scotland, no there is not.

Bill Butler: Is investment in those services minimal?

Dr Sher: It is less than adequate. I do not have all the figures at hand, but I know that the demand for such services cannot be met through current resource allocations.

The other relevant point is that there is a precedent for a public health information campaign and increased education in this arena. That is what the Government has done, rightly in our view, in dealing with the rape-related part of the legislation. It accurately noted the need for, and its responsibility to provide the resources for, a significant public awareness campaign to spread the right message about rape. It was concerned that the public in general and potential jurors in particular would not understand the new law and that it therefore needed to make an active, positive effort. Such an active, positive effort to spread the right messages and provide the right support and assistance to young people needs to happen in addition to the passage of the best bill possible.

Bill Butler: Thank you.

Nigel Don: I want to pick up on Dr Sher’s comment on the inadequacy of the resources. I want to get a feel for the order of magnitude of the issue from the three folk who are here to give evidence. Everybody would like more resources, but are the services that we are talking about underresourced by 10 per cent, or do resources need to be increased by a factor of two or 10?
Roughly, what is the resourcing position for guidance and remedial work with youngsters who have such problems?

Martin Crewe: My guess is that, if they were available, about five times as many facilities could be used to good effect.

Dr Sher: I cannot make an estimate, but I can say that Kibble is an example of there being some resources at the deepest end. It is clear that similar resources are not available for the earlier interventions that might help to keep people out of places such as Kibble in the first place. Additional help is most needed in early interventions.

Jan McClory: I would hesitate to put a number to the question, but it is clear that there is a disparity in sexual health support services for young people between urban areas and rural environments, where access to such services is extremely limited. In rural areas, there are many issues of confidentiality, which particularly affect young people's access to services. The distribution and provision of services in different areas have to be considered.

Investment is an issue, but so is looking at current resources and how sexual health issues are dealt with in the curriculum and by school nurses at the moment. It is not a question of simply increasing investment; we must understand how young people engage with adults and how we can use existing resources to better effect to produce better results. Investments in time and in hearing from young people about what works are required. Massive additional investment may not be needed; rather, better organisation of what we have may be required.

The Convener: Those matters will no doubt be followed up in another place under the aegis of the committee.

I thank the witnesses for coming to the meeting and for giving evidence so clearly. I thank Ms McClory in particular for being so cheerfully behind the 8-ball for much of the proceedings. Your evidence is extremely useful.

There will be a brief suspension so that the panels can change.

11:36

Meeting suspended.

11:37

On resuming—

The Convener: I welcome Scotland’s Commissioner for Children and Young People, Professor Kathleen Marshall. I thank her for her attendance. We shall move straight to questions.
legislation, they should be consulted. Certainly, those aged 13 and upwards should be consulted because the bill has particular resonances for them.

Paul Martin: That was almost a ministerial answer until the end.

Kathleen Marshall: Certainly 13, 14 and 15-year-olds must be consulted.

Paul Martin: That would be the minimum that you would recommend.

Kathleen Marshall: That is an absolute minimum. We have to consult them because it is their lives that we are talking about.

Paul Martin: Have you carried out any work in that respect?

Kathleen Marshall: No. As I said, I would not do that directly. My office has a health group and a care group, with which we work closely on those issues, and we also have another general group. However, proper consultation must acknowledge the relationships that need to be built up to get a proper response.

Years ago, before I had this job, I used to do quite a lot of work on HIV and sexual health education for young people. I remember an initiative in Lothian to help to inform young people by using teachers who were no longer working as teachers but who were trained in sexual health education to lay the groundwork in a school. They got the class to divide itself into friendship groups and then talked in those groups, because they found that the young people often had similar issues. I remember one of the workers telling me that, in one class, one of the groups had only two young women. Her initial reaction was to integrate them into a bigger group but, when she talked to them, she found that they were involved in behaviour that was off the scale as far as other young people were concerned and that it was therefore appropriate to work with just the two of them.

I have always remembered that as a good example of making sure that we create a situation in which young people can talk freely because we have shown that we trust them and take them seriously, and they do not have to expose themselves to their peers. It is not about bravado or the converse—the young people who might feel that they are under peer pressure to consent to things, say things or exhibit behaviour that they do not feel comfortable with. The consultation will have to be carefully designed.

Paul Martin: As the children’s minister, are you—

The Convener: Not minister.

Kathleen Marshall: I thought that something had happened there.

Paul Martin: I am sorry. As the children’s commissioner, are you disappointed that the Government has not carried out such a consultation to date? The bill is significant and it will affect children.

Kathleen Marshall: It is disappointing that the bill has come this far without young people having been consulted. However, it is not too late.

It would take a lot of groundwork for the kind of consultation that I am talking about to be effective, well planned and sensitive, and the question is whether that will be possible within the bill’s timescale. It would not be helpful to rush something through to get a piece of legislation, because that would mean that everyone would think that the issue has been dealt with—people will say that the issue has been the subject of recent legislation and that we should not revisit it.

The current situation is not ideal or principled. I am thinking specifically of the gender inequalities that young people face. The question is about whether we try to patch that up and then believe that we have done it, or whether we say that there is still a lot of unfinished business.

People are not polarised about this issue. Everyone here wants the same thing. I have not come across anyone in the debate who says that they are happy about underage sex. Everyone wants to support young people to make the right choices. If we are serious about doing that, perhaps we should look more widely at the issue. A legal provision is only one part of this; it is simply a tool. We need to find out about the realities of young people’s lives and where the law can support them in making the right choices. We must not do something that has unintended consequences.

11:45

Paul Martin: You said that the minimum age for consultation should be 13. However, the statistics tell us that those under 13 are involved in underage sex. If the minimum age for consultation is 13, how do we consult those under 13?

Kathleen Marshall: I did not say that; I said that it should be at least 13. Thank you for raising the matter. It gives me the opportunity to clarify what I said, which is that, at minimum, we should consult 13 to 15-year-olds. There is a case for also consulting those who are under 13, but we would need to think carefully about how we do that. Also, there should be segmentation of the questions and issues that we put to those young people who have been involved in that kind of behaviour and those who have not. I said that, at minimum, we
should consult those who are 13 and up, but there is a case for consulting those under that age, too.

**The Convener:** That was my recollection of your evidence.

**Robert Brown:** In your submission, you said that the bill should be amended “to exclude younger children from criminal consequences in relation to the ‘strict liability’ offences”.

For the avoidance of doubt, to which offences are you referring in the context of the bill?

**Kathleen Marshall:** Any offence that involves sexual activity. An associated issue is the age of criminal responsibility—we can get on to that if you want to do so.

**The Convener:** No. I would prefer not to do that today.

**Kathleen Marshall:** In my submission, I said that I find it strange that we are prepared to criminalise younger children for engaging in behaviour that they are legally deemed to be incapable of consenting to. There should be no possibility of criminal liability in sexual offences that involve children under 13. I could expand on that, but I will not; I have taken to heart the convener’s message.

**Robert Brown:** That said, will you expand a little on the kind of extreme cases that previous witnesses have raised. For example, we heard of a 12-year-old having some sort of sexual activity with a two-year-old. Is there not scope for having a different approach in those extreme cases?

**Kathleen Marshall:** No, not at all. If a 12-year-old is engaged in that sort of behaviour with a two-year-old, the matter is one of extreme concern. We need to take significant measures to address the situation, but the criminal law is not the appropriate way to address the matter. A 12-year-old is still a developmental being. Of all our population, we have to regard our children as redeemable. We have to try to help and encourage them towards a better way of life. The example raises serious issues about the life and experience of that young person that led them to do that.

Without getting into the debate on criminal responsibility, I think that there is something about the phrase that is unhelpful. For example, when we talk about raising the age of criminal responsibility, people tend to think that, because we are talking about responsibility, we are talking about moral responsibility—whether someone knows the difference between right and wrong. That is not what it is about. When the Scottish Law Commission produced a report on the subject a few years ago, it talked about how unhelpful the language is. What we are really talking about is how we respond to such behaviour. It is about the age of criminal liability and the age of criminal prosecution. It is not about saying that there is no moral responsibility or differentiation between right and wrong; it is about asking what we do about the young person involved and how we try to get them back on the right track so that they become a confident, positive and contributing member of society.

**Robert Brown:** However, in addition to the welfare of the perpetrator child—if that is the right way to put it—the issue of public safety is involved. I want to explore two aspects of that, the first of which relates to whether a different approach needs to be taken in such cases, including different procedures. The second aspect relates to disclosure certificates and the issue of the rehabilitation of offenders, which we touched on earlier. Should a distinction be made between public safety-type cases where a child under 13 is involved and consensual sexual activity by young people who are equal in age when determining whether a record should be made that may materialise later on and have an evil effect on the progress of someone’s career or whatever?

**Kathleen Marshall:** The public safety issue must be of concern. If we go down the criminal route and do not get to the nub of what has happened to a young person and find out why they are behaving in the way that they are and whether they are dangerous in the short term or long term, we are doing the public a disservice as well. I fully accept the public safety argument, which is about trying to create a safe and secure society for everyone, including young people.

Unfortunately, if we extend the criminal record part—as we know, even a referral on an offence ground to the children’s hearings system would count as a conviction for the purposes of the Rehabilitation of Offenders Act 1974, although not for other purposes, and such things could show up in disclosures later—we are devaluing the disclosures system. If people can rubbish it by saying, “Well, you can get a sexual offence record for having sex with your girlfriend or boyfriend when you’re 15, so that doesn’t mean anything,” that will devalue something that is a useful tool for identifying people who are a danger to children or other adults. There is a genuine issue, not only for the young people in relation to whose actions there would be a completely disproportionate response, but for the perception of the disclosure system.

**Robert Brown:** Can you tell the committee what situations you are thinking of when you talk about public safety issues? Do you accept that, in the interests of public safety, certain exceptional cases ought to show up in disclosure checks? That number might be small, of course. How might
could those provisions be improved? What mechanisms might we put in place in order to ensure that that happens in a way that is rational and fits in with other legal concepts?

Kathleen Marshall: I have no problem at all with the principle of safeguarding the public. Very few young people will genuinely be a threat to public safety. It is not in the interests of those who will be a threat to the public that that should go unnoticed or unremarked and that they should not be catered for. However, the question of how we can fit that into the welfare-based system is not an easy one to answer today. You have to watch what route you take. There is a question about what comes through the doors that you open when you follow such a course.

The public safety issue is one thing, but consensual sex between two young people does not sound to me like a public safety issue. We have to disentangle those issues.

Robert Brown: Accepting that the bill is not going to deal with the age of criminal responsibility, are you concerned that the definitions in section 15 might criminalise kissing, touching or similar consensual activities between children who are under 13?

Kathleen Marshall: Yes, that is a serious concern. All sorts of innocent behaviour could be caught up in that, and we could end up cornering children into a no-touching approach, which is an issue that we have talked about previously in relation to the unhealthy, clinical environment that we are creating between adults and children, wherein adults are afraid to talk to a child or comfort them when they fall and teachers are afraid to put sun cream on a nursery child. We are going to end up giving children the same message and telling them that touching and any display of affection or intimacy is dangerous. That is not helpful. We have to get the balance right.

The Convener: We will now turn to the issue of consensual sex involving older children.

Cathie Craigie: I get the impression that you think that the bill’s provisions on sexual activity between older children are not ideal. In what ways could those provisions be improved?

Kathleen Marshall: My problem with the bill is that we are proceeding on the basis of insufficient information. The act that set up my post says that I must take account of the United Nations Convention on the Rights of the Child and involve children and young people in my work. It also says that I must encourage others to take account of the views of children and young people in their work, so I am putting it to the Parliament that there is a hole in the information in that regard.

When I responded to the Government’s consultation, although one would not know it from the media reports, I gave a cautious welcome to the decriminalisation proposal. I recognised that there could be a downside if it were received in a way that made it look as if the age of consent would be lowered, with the result that young people might feel under pressure. I said that any such measure would have to be accompanied by an extremely high-profile public health education campaign to counter that effect. I also said that we could not progress the idea until we had spoken to children and young people, whose lives, experiences and motivations are at the centre of the issue.

The recent survey that showed that 34 per cent of 15-year-old boys and 30 per cent of 15-year-old girls were sexually active demonstrates that, whatever message the law is giving out, it is certainly not being universally accepted. The people who have been concerned about decriminalisation are worried that sexual activity among the young will increase further and that being sexually active will become normal among young people. The convener does not want me to talk about the age of criminal responsibility and is probably even less keen on me talking about the physical punishment of children, but what is fascinating about the debate—

The Convener: I am in no way trying to inhibit you. I just do not want such issues to be discussed here and now. I am more than happy to have that debate elsewhere, but I ask you to confine your remarks to the bill’s provisions.

Kathleen Marshall: Yes, but one of the phrases that was used constantly in the debate on physical punishment was, “We do not wish to criminalise ordinary loving parents.” I find it strange that the same people who said that seem to be quite keen to criminalise ordinary loving teenagers. There is a strange link between the two subjects, both in that sense and from the point of view of what we describe as the symbolic use of the law, which is about whether it sends out a strong message. The fact that people who argue one thing in one debate argue the opposite in the other shows that we have a great deal of thinking to do about the purpose of the law, which, to an extent, is a highly academic issue.

Neither I nor, with the greatest respect—I say that sincerely, rather than as lawyers use the phrase—the committee has the information to proceed on the issue at the moment.

Cathie Craigie: Thank you for that response. I accept what you are saying. You are batting the
ball back into our court, which the act that set up your post entitles you to do.

In your submission, you explored the issues of “principle”, “effectiveness” and “unintended consequences”, but you did not come to a final conclusion. Have you had further thoughts on those issues? Will you expand on the principles that you think should govern the law in relation to consensual sexual activity between older children?

Kathleen Marshall: I did not come to a conclusion because I do not think that we have the information that allows us to do so. We must start with the reality of young people’s lives; it is not just about subsections in an act. We must start from there and ask how the law can help young people. I want a resolution that respects the international standards to which we are committed. The Convention on the Rights of the Child seeks to protect young people, to ensure that they are listened to and to divert them from criminal responsibility, where that is possible.

12:00

There is also a new Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse. We have not ratified it yet, but it addresses the issue. Article 18 states:

“Each Party shall take the necessary legislative or other measures to ensure that the following intentional conduct is criminalised:

a engaging in sexual activities with a child who, according to the relevant provisions of national law, has not reached the legal age for sexual activities”.

However, the convention goes on to say:

“The provisions of paragraph 1.a are not intended to govern consensual sexual activities between minors.”

So there has been debate about the issue at international level, too.

We have heard that young people are interested in relationships, not just the mechanics. We want to promote something that encourages them to behave in a way that is respectful of themselves and of other people, and we want to ensure that they are supported in doing that. We risk unintended consequences by bringing in the weight of the criminal law and the fear of prosecution when a young person has done something that, in retrospect, they regret—and a lot of the research shows that they do regret it. So we need to think further about that.

Those are my thoughts. I do not pretend to be able to get into the head of a 14 or 15-year-old—they live in a different world. We really need to set up a context in which we can hear from them and start from their lives.

Nigel Don: Good afternoon, Professor Marshall. How unhappy are you about the idea of having a law that is routinely not enforced?

Kathleen Marshall: That is an interesting question. I noticed that you posed it at last week’s evidence session. At the heart of this is the argument about the symbolic use of the law. People seem to be in agreement that we do not want to apply the criminal law to cases in which the activity is consensual, but the argument is that the law sends out a strong message. The possible unintended consequence of not enforcing the law is that young people will get the impression that there are laws that do not need to be obeyed. There is a parallel with physical punishment, as I mentioned in a footnote to my written evidence.

The Convener: We have read it.

Kathleen Marshall: Relying on the basis of existing principles—not on the de minimis rule that the law does not concern itself with trivialities—we argued that minor assaults between adults, such as taps, are not prosecuted and neither should they be when they occur between children. I have some sympathy with the symbolic use of the law. We do not catch all muggers, murderers or rapists, and the conviction rate is not a guide to whether the law should make a clear statement.

One of the problems is that already, when the activity is known to be consensual, there are no convictions. The phrase, “If it ain’t broke, don’t fix it” springs to mind. There is a sense in which we have let the genie out of the bottle. We have had big debates about the issue and now have it in the act along with binding instructions for the police. What are they going to say? Are we going to come out and say, “Right. This is what the law says, but we’re not going to prosecute”?

There are some precedents. The Crown Office has a prosecution code on its website, which shows the principles that it applies in deciding whether to prosecute. I seem to recall—although I have not checked this—that in one case, concerning Travellers sites, there was a presumption against prosecution. That is not unknown in our law.

There is a symbolic use of the law, but we must be prepared to prosecute in appropriate circumstances. That then leads to the question of how those circumstances can be decided unless there is an investigation. How can it be known that the activity was consensual? That takes us into the unintended consequences to which I referred, which apply across every part of the population. We are talking about our children, not some group of people out there. Is a police investigation helpful to someone whose 15-year-old daughter is standing before them pregnant by her 15-year-old boyfriend? Unless we say that there will be no
investigation, there will always be a criminal dimension because there will always be an associated question about an investigation. Even that is quite scary for people.

I have not answered the question cleanly, because there is a symbolic side to the law. At present, and in the debate about the bill’s provisions on consensual underage sex, we talk about sending out a strong message to young people, but 30 per cent of them are not taking the message on board now. Will a strong message combined with a direction not to prosecute actually make any difference?

Nigel Don: That is helpful and I am glad that it is on the record. I would like to explore a further point that needs to be on the record.

I understand what you mean when you say that you cannot get your mind around being a teenager. My increasingly grey beard tells you that it is some time since I was a teenager, but at one level I well remember being a teenager and I know perfectly well that as a 15-year-old I would have wanted to know what the law actually said. I am wondering what to tell my 15-year-old son that the law really says. Should I tell him not just that the law is not routinely enforced but that, when it is enforced, it will be at the Lord Advocate’s discretion?

I have nothing against the Lord Advocate either personally or in principle, but if we do not know how her discretion will be exercised, we do not know what the law is. The first rule of law is that it applies to everybody and the second is that we know what it means. How unhappy are you with the idea that children do not know and cannot find out what the law actually is?

Kathleen Marshall: I listened to your discussion about that with the previous panel. The Lord Advocate’s discretion is written throughout the criminal justice system and not just into particular laws. What matters is not just the sufficiency of evidence but that prosecution is in the public interest, and there are other principles that apply. It would be difficult to have a system with no such discretion about whether to prosecute. As I recall, the policy memorandum does not mention the policy thinking behind leaving the decision to the Lord Advocate’s discretion, but it has been suggested in discussions that, in general, we will not prosecute, which seems to counteract the strong message that the law is meant to send out.

There is another issue. Is the criminal law the only or the most appropriate way in which to set standards for young people? Do we always need a command with the threat of punishment, be it empty or not? Are there other ways in which we can encourage young people to understand what is best for them and other people and to have standards that are based on something other than the threat of punishment? How can we encourage them to have standards that come from within and are about dignity and respect?

People respond to different things. Some people will never park on a double yellow line, for example, but others will do it just to show that they can. People have different views of the law and they respond to it differently. Some people like to challenge it and some people like to undermine it. Some people are law abiding and scrupulous, but other people respond to something quite different that comes from within themselves. When the UN committee scrutinised the United Kingdom’s performance, one thing that came out was that we demonstrate our young people. In particular, other parts of the UK have a hard-punishment ethos, although we are better about that in Scotland.

I like to think that we can proceed in a way that respects our young people and tries to treat them positively, rather than that we have the criminal route as the fallback position.

Nigel Don: So would you support the idea that those who engage in sex before we say that they should are not treated by the criminal law but are referred to the children’s panels or wherever? I am not sure where the idea came from; it might be the original Scottish Law Commission proposal. It would send the signal that underage sex is not right and will have consequences, but not criminal consequences.

Kathleen Marshall: The children’s panel is a more appropriate route for dealing with such behaviour than the criminal law because it also focuses on the welfare of the young person concerned and we are talking about consensual activity. There is also the question whether all such children should be referred to the children’s panel. The panel system would be completely swamped by it, but a consideration of whether referral was appropriate in some cases would be valuable.

To avoid a swamping and to take account of what previous witnesses said, there is a huge need for young people to have access to services to talk about such matters and to get friendly and helpful support and guidance in a way that respects them and helps them to respect other people. We should be looking at the issue from that angle. When issues need to be addressed, cases could be referred to the children’s hearings system, but I do not think that we could deal with all cases in that way.

The Convener: A depressing answer. The final question will come from Cathie Craigie.

Cathie Craigie: Professor Marshall, you said that we are basically talking about 30 per cent of young people; I remind us all that 70 per cent of
young people are taking on the message. It is important that we get that across.

Nigel Don referred to the original proposal from the Scottish Law Commission, which I accept, that all the young people in question should be heard through the children’s hearings system, although I understand that it could be swamped by the level of complaints. Do you have any information on the number of young people who come before the children’s panel in cases involving sex?

Kathleen Marshall: You would be better asking the reporters on the next panel of witnesses. From my previous work in the Scottish Child Law Centre, I know that there has been a debate in which some reporters wanted all underage pregnancies referred to them and social work departments said that that was not appropriate. We would have to be discriminating.

The Convener: The question might more properly be pursued with the reporters in the next panel.

Kathleen Marshall: The Scottish Law Commission was working on the basis that the only available ground of referral was offence and that such an issue could not be fitted into other grounds. I have since heard some reporters say that they have used other grounds of referral. That would be interesting to explore as a matter of fact.

The Convener: We will try to tease that out.

Professor Marshall, we are much obliged to you for coming along this morning and answering in your usual frank style—your honest responses will be of considerable assistance to us in formulating a view on the matter.

12:13

Meeting suspended.

12:14

On resuming—

The Convener: I welcome the final panel of witnesses this morning: Ne tta Maciver is principal reporter and Karen Brady is head of practice at the Scottish Children’s Reporter Administration. We will go straight to questioning, led by Robert Brown.

Robert Brown: Can we go back to square 1 and start with current law and practice? How are allegations of unlawful sexual conduct between children and young people under 16 dealt with? That is the background to questions of prosecution, children’s hearings and the numbers that are involved. Can you give us an insight into that?

Karen Brady (Scottish Children’s Reporter Administration): At the moment, for young persons under 16, anything that falls to be dealt with as a criminal offence is jointly reported to the procurator fiscal and the children’s reporter, who then discuss the most appropriate place for dealing with the matter. If it is decided that the children’s reporter will deal with the referral, the reporter will then decide whether there is a need for compulsion. Therefore, the test for determining the need for intervention in a young person’s life is based on the grounds of the referral and on the need for compulsion. At the moment, I am unable to provide figures for the number of offences that are dealt with in that way.

The Convener: We would appreciate it if you could provide them in writing.

Robert Brown: Are you able to give us a flavour of the kind of things for which, under the current arrangements, a very limited number of cases have gone to court?

Karen Brady: The procurator fiscal tends to deal with cases that have more serious coercive elements. The general assumption is that cases involving young people under 16 will be dealt with by the reporter: the criminal courts deal with only a very limited number of cases involving such behaviour.

If any criminal activity is involved, the reporter is likely to refer the matter as a criminal offence. However, if the behaviour predominantly constitutes a criminal offence, current case law restricts us in referring that kind of behaviour on non-criminal welfare-based grounds. In general, however, the majority of such incidents will be dealt with by the reporter.

Robert Brown: Professor Marshall said that she had heard that some reporters had used welfare-based grounds to take such matters forward. Do you have any knowledge of that?

Karen Brady: That might happen in cases in which a young person has not been referred for such behaviour by the police. As you know, young people can be referred by any source, and it might well be that concerns have been referred through some other route and that, as a result, the fiscal and the reporter have not been able to discuss the matter.

If behaviour has begun to form a pattern or has given rise to a series of concerns about the child being outwith parental control or exposed to moral danger, and if those concerns are not solely to do with criminal behaviour, the reporter will be able to use those separate concerns and that pattern of behaviour, which can very often reflect, but is not exclusively linked to, sexual behaviour that is cause for concern. However, reporters tend to use such grounds in cases that give rise to wider
concerns and which reflect a pattern of behaviour that goes wider than the particular issue.

Robert Brown: Are you able to give us a flavour of the situations that would be referred under the criminal grounds that, as you say, are more normally used? I assume that they are not used in, for example, consensual arrangements between children of 14, 15 or whatever.

Karen Brady: Are you talking about the cases that are prosecuted?

Robert Brown: No. I am talking about cases that are referred to the children’s hearings system.

Karen Brady: Those cases are likely to be referred to the reporter, but very few will end up at a children’s hearing. The reporter will base his or her decision on the behaviour that has been presented and all the other matters related to that young person, including their parents, their living environment and their development.

The reporter must also consider the need for compulsion. Only when there is a need for compulsion will the young person be referred to a children’s hearing. If a young person is not referred to a children’s hearing, it does not mean that there will be no response or action to address concerns. Measures are often put in place to engage the young person and their family voluntarily. However, the decision to require a children’s hearing will be based on two factors—the young person’s behaviour and whether there is a need for compulsion.

Robert Brown: Am I right in assuming that a case that would be rape for an adult will be dealt with by the procurator fiscal, through the criminal courts, or is the position not quite that straightforward?

Karen Brady: No—it depends on the circumstances of the child. The more serious the offence, the more likely it is that the Crown will be interested in prosecuting the case. The presumption with all under-16s, irrespective of their offence, is in favour of the matter being dealt with through the children’s hearings system. However, the fiscal may decide to prosecute. The cases in which very young children are dealt with by the criminal courts are likely to relate to serious offences.

Robert Brown: If the bill is passed in something like its present form, will the Scottish Children’s Reporter Administration have to make significant changes to the approach, philosophy and practice that it adopts when dealing with such matters?

Karen Brady: We will want to look at the matter in the context of our decision-making framework, which involves consideration of various aspects of a child’s life. I am not sure that I can go beyond that at this point.

Robert Brown: I refer you to the arrangements for 13 to 16-year-olds. Although there are differences of legal principle, there is also a recognisable echo of previous law. Do you envisage there being significant changes to the way in which you approach the question of what cases are prosecuted, which are referred to the children’s hearings system or in any other regard?

Karen Brady: I do not think so—the presumption will remain that young people under 16 should be dealt with through the children’s hearings system. The same process will be followed and the same presumptions will apply in respect of offences that are committed by that group.

Robert Brown: Originally, the Scottish Law Commission debated the possibility of having, as an alternative to criminal prosecution, a non-offence ground for referral to the children’s hearings system for 13 to 16-year-olds. Would having such a ground be of assistance to you in your work, or would it be a negative factor?

Karen Brady: We think that that would be the most appropriate way of dealing with the issue. From a child-centred perspective, it would provide an opportunity to address the behaviour and needs of a young person in the round and in a welfare-based way. It is difficult to know whether it would change the number of cases that the children’s hearings system would receive; to a large extent, that would depend on referral practice. However, the appropriate way of responding to young people’s behaviour in the children’s hearings system is on a ground for referral that enables hearings to consider the wider welfare needs of young people, as well as their behaviour.

Angela Constance: What principles should govern the criminal law in relation to sexual activity involving, first, those whom the bill describes as “young children”, and secondly, those whom it describes as “older children”?

Netta Maciver (Scottish Children’s Reporter Administration): I see that I am not being allowed to escape that question. The bill currently distinguishes between young children under 13, who are considered to have no capacity to consent, and those between 13 and 15, who are considered to have limited capacity to consent. Our belief is that, as Karen Brady said, these concerns are addressed most effectively and appropriately as an issue of welfare, care and protection. The mechanism for that would be the new ground of referral, which has already been covered.

Angela Constance: So the underlying principle is the welfare of children.
Netta Maciver: Absolutely. We heard from earlier witnesses about the difficulty of legislating for individual cases. The hearings system allows for individual assessment.

Nigel Don: The bill treats older boys and girls equally when they engage in consensual sexual relations—it criminalises both of them. Do you think that that is the way forward or—assuming that we are sticking with the idea of criminalisation—do you think that it would be better to stick to the current position of being able to prosecute only the boy?

Netta Maciver: We do not think that it is acceptable that there is a different way of treating young men and young women. However, as the bill stands, there is the potential to criminalise both of them equally. We think that there are potential difficulties with that, which you might want to explore further.

Nigel Don: I would be happy to explore them further because, as the bill is drafted, we are talking about criminal responsibility. If you would highlight the potential difficulties, that would be of great assistance.

Karen Brady: As Netta Maciver said, we think that the behaviour should be dealt with as a matter of welfare within the children's hearings system. There are potential practical consequences of the bill in relation to the Rehabilitation of Offenders Act 1974 and in relation to any conviction or charge that will follow a young person throughout their life as a result of the disclosure provisions that we heard about earlier. Dealing with the behaviour in the way that the bill proposes has clear implications.

An issue that was highlighted earlier is how young people are dealt with and the response of professionals in relation to disclosures of underage sexual activity. If the bill remains as drafted, there will be issues around whether a young female who is pregnant is a victim of a serious offence or whether she has committed an offence herself. That will create challenges for some of the agencies that have to respond. The category that the young person falls into—whether they are treated as a victim or as someone who is accused of committing an offence—will affect how they are dealt with thereafter by the police in interviews and so on. There will be practical consequences of the bill as drafted. Our wider view is that the matter is better dealt with in the hearings system as a welfare issue.

Nigel Don: If we accept your point and given the possibility that the bill will go through as drafted—I have no idea what we will finish up with, because the issue is clearly difficult—do you think that the problems that you have just articulated could be dealt with by appropriate paragraphs that would allow freedom of work for those who deal with youngsters after the event? Should we be able to draft things in such a way that the appropriate professional services can be given without liability? Is that likely to be a problem? Should we be able to solve that problem if we put our thinking caps on and draft things correctly?

12:30

Netta Maciver: It is important that we make clear where we stand. We fully appreciate that the Government wants the law to continue to make clear that society does not encourage underage sex. However, we want to be able to respond to concerns about the sexual behaviour of children, whatever their age, and we want our response to be based on the principle of affording protection to children. You ask whether we can manage to do that; we think that if there is an appropriate ground of referral, we will be able to bring to a case the individual scrutiny that, allied with consideration of whether compulsory measures of care are needed, will enable us to make the decision that is best for the child.

Nigel Don: That takes us to the question that was asked earlier—possibly by me. From your perspective, what is the point of maintaining a law that we routinely do not apply, and which we apply only rarely, I presume in cases in which another aspect of the law could be applied?

The Convener: I note a degree of hesitation on the part of the witnesses.

Karen Brady: Our position is that a new ground for referral would be the more appropriate approach and would give us the opportunity to deal with the behaviour in the context of consideration of the young person’s wider welfare needs.

Nigel Don: Does that mean that you see no purpose in having the criminal law on your side at that stage?

Netta Maciver: It is fair to reflect some of your previous witnesses’ concerns about the messages that might be sent out. We are saying that, although we do not regard sex among the under-16s as particularly healthy for young people, we accept that the people on whom we are most likely to focus will generate a range of other concerns.

Stuart McMillan: The SCRA agreed with the abolition of the offence of lewd, indecent and libidinous practice but expressed concern that the bill might not cover conduct that is currently criminal. Will you explain your concerns?

Karen Brady: In our written evidence, we said that, in relation to that particular aspect of the bill, there would be a need to prove a purpose in the offences. Our concern is that by removing the
common-law offence of lewd and libidinous practices and moving to the offences that are created in the bill, some areas might not be covered and difficulties might be created if it were not possible to prove a purpose. The bill might therefore give less wide protection for young people than exists under the common-law provisions. We flagged up our concern because we do not want children to be less protected than they currently are.

The Convener: If there are no more questions, I thank Ms Maciver and Ms Brady for their extremely helpful evidence.

We move into private session. I thank the public for their attendance.

12:33

Meeting continued in private until 13:24.
Sexual Offences (Scotland) Bill:
Stage 1

10:18

The Convener: I intimate to our witnesses and to others present that, today being 11 November, business in the Parliament—and indeed in all public buildings and courts in Scotland—will be suspended briefly at 11 o’clock for the appropriate commemoration. I will attempt to bring proceedings to a halt at a suitable moment just prior to 11 o’clock. I apologise for the necessary interruption but I am sure that everyone appreciates it.

I welcome Euan Page, senior parliamentary affairs officer at the Equality and Human Rights Commission; Mhairi Logan, manager of Scotland’s lesbian, gay, bisexual and transgender domestic abuse project; and Tim Hopkins, policy and legislation officer at the Equality Network. I thank you for attending to give evidence; it is greatly appreciated. The committee is slightly behind the 8-ball, time-wise, so I ask members to ask questions as succinctly as possible.

Bill Butler (Glasgow Anniesland) (Lab): Good morning, colleagues. As you know, the Sexual Offences (Scotland) Bill seeks to move the law in the direction of making rape gender neutral. Could each witness comment on that policy from the perspective of equalities and human rights?

Tim Hopkins (Equality Network): We have been pursuing that end for many years. In England, the law of rape was extended in 1994 to include male rape. If a man is raped, it is important that the right language—the language of rape—is used in prosecuting that. I thank you for attending to give evidence; it is greatly appreciated. The committee is slightly behind the 8-ball, time-wise, so I ask members to ask questions as succinctly as possible.

Bill Butler (Glasgow Anniesland) (Lab): Good morning, colleagues. As you know, the Sexual Offences (Scotland) Bill seeks to move the law in the direction of making rape gender neutral. Could each witness comment on that policy from the perspective of equalities and human rights?

Mhairi Logan (LGBT Domestic Abuse Project): We support what Tim Hopkins has said. The domestic abuse project believes that it is great that men will be able to name the experience of rape as such. We are really pleased with the changes to the first offence of rape.

Euan Page (Equality and Human Rights Commission): I agree with my colleagues. This is a long-overdue rewriting of the law to ensure that offensive, outmoded terminology is removed and that the offence of rape can apply equally to male and female victims. We welcome that.

Our submission picked up on one or two outlying issues. Although the bill strives, rightly, to make rape and sexual offences gender neutral in statute, the policy environment in which we work is that—without for a second downplaying the equal trauma and pain that are caused by rape regardless of the gender, gender identity or sexuality of the victim—rape is still predominantly a crime committed by men against women.

Bill Butler: How do the witnesses respond to the comment that rape is still overwhelmingly a crime committed by men against women, and that the policy of gender neutrality might obscure that fact?

Euan Page: I disagree that there is any—

Bill Butler: I am playing devil’s advocate.

Euan Page: Of course. It is a very good point. The Equality and Human Rights Commission disagrees that there is any contradiction between striving for gender neutrality in statute while recognising that the policy environment in which the new law will be introduced is one in which we are dealing with rape as a gendered crime. There is no contradiction as far as the commission can see.

Bill Butler: Does Ms Logan have a comment on that view, which is sometimes expressed by some people?

Mhairi Logan: The project definitely accepts that we are talking about disproportionate gender-
based violence, but as it stands, the bill does not diminish that. It is about the policy context within which we work. Lesbian, gay, bisexual and transgender people who experience domestic abuse and rape should also be considered in terms of gender-based violence; that sits quite comfortably alongside what is proposed in the bill.

**Bill Butler:** I understand that.

**Tim Hopkins:** The number of cases in which the new crime of rape as set out in the bill would be committed by someone who is legally a woman would be very small. The Scottish Law Commission was right to identify penetration with the penis as a specifically bad crime. The penis is a sexual organ, it is in the nature of rape, and it is what people understand rape to be. We are therefore in favour of rape being a separate crime, which means that it can be committed only by someone who has a penis; the majority of those who commit rape are men. The crime is gender based and the law should recognise that.

**Bill Butler:** All three organisations refer to rape of a woman by a woman. Is that a significantly prevalent issue?

**Mhairi Logan:** Our written submission refers to Stonewall Scotland’s recent research, in which approximately one in 15 lesbian or bisexual women disclosed that they have been raped by a partner. Other research that was done in 2006 into same-sex domestic abuse showed that approximately one third of respondents disclosed that they had experienced sexual violence by a partner. We are therefore talking about significant numbers and a massive issue.

That is why we said that it is important that the bill includes an offence that sits alongside rape and which is clearly distinct and not subsumed within general sexual assault. It is important that the rape with an object offence is included to cover lesbian and bisexual women’s experience in the context of domestic abuse. Without that, we cannot say that the legislation is sexual-orientation neutral because it will not cover the experience of a sizeable proportion of women.

I support what Scottish Women’s Aid and Rape Crisis Scotland said on the issue. It is important that the term “rape with an object” is used. As Tim Hopkins pointed out with regard to gay and bisexual men being able to use the word “rape”, an important part of experiencing sexual violence and being able to recover from it is for the victim to reach a point at which they can say not that they were forced to have sex, but that they were raped. Giving lesbian and bisexual women that language is important to the recovery process, and rape by an object or another body part can still be a separate offence. We should think about that.

**Tim Hopkins:** Our position is the same as that of my colleagues. There should be a separate offence. The English offence is called “sexual assault by penetration”, but the term “rape with an object” would be better because it captures the victim’s rape-like experience while distinguishing the crime from the central rape offence of penile penetration. The offence should cover vaginal and anal penetration, but not oral penetration; that is what the English law does. The Scottish Law Commission originally suggested that in its 2006 discussion paper.

**Euan Page:** I agree with what has been said. The EHRC pointed to stakeholder concerns that there is a gap in prevention, protection and understanding in the area of same-sex female rape, both in the criminal justice arena and in the wider interventions for support after such an event. We need to be alive to that.

**The Convener:** I turn to Cathie Craigie, although I think that the witnesses have anticipated her questions to some extent.

**Cathie Craigie (Cumbernauld and Kilsyth) (Lab):** The witnesses are very good and are covering everything while taking account of the convener’s introductory remarks.

I hear everything that you have said this morning, what is in your submissions, and the clear arguments that have been made. The Lesbian and Gay Christian Movement’s written evidence raised concerns about the same matters. It suggests that, if the Government is not willing to take the route that we have just discussed, we should consider creating a separate offence of assault by penetration. What are your views on that?

10:30

**Tim Hopkins:** The principal difference between what the LGCM suggests and what we suggest is just the name of the offence. It suggests the creation of an offence that is similar to the English offence of assault by penetration with an object or another part of the body. We believe it is important that the offence is called something like rape with an object; as Mhairi Logan said, such an assault is experienced by the victims as a form of rape, so it is important that the word “rape” is included.

**Cathie Craigie:** Would you confine the definition of rape to vaginal and anal penetration?

**Tim Hopkins:** Yes. Other witnesses have discussed the matter with you already and the Scottish Law Commission discussed it in its final report. There is an issue about, for example, a forced kiss during which there is penetration with the tongue. If the crime of rape with an object was defined to include oral penetration, such a forced
kiss would become an example of rape with an object. It is not clear that it makes sense for the word "rape" to be applied to such things, whereas it is much clearer in the case of coerced and forced vaginal or anal penetration. That is why we believe that it is not appropriate to include oral penetration in the offence. Oral penetration would be covered by the sexual assault offence.

Mhairi Logan: The word "rape" depicts the seriousness of the offence. I agree with Tim Hopkins that the definition of rape with an object should be confined to vaginal and anal penetration.

Cathie Craigie: Would you include penetration by other parts of the body?

Mhairi Logan: Yes, definitely. People experience violent rape with the hand, fingers or other parts of the body. It is important to include that.

The Convener: We turn to questions on consent and reasonable belief, on which Robert Brown will lead.

Robert Brown: I want to ask about two aspects. The first relates to the question of the victim being asleep or unconscious. The same point has been made in different ways by many organisations, but the Equality and Human Rights Commission, in particular, states:

“It is very difficult to see under what circumstances an individual would wish to consent to sexual activity at some point in the future when s/he is asleep or unconscious.”

To an extent, the issue is theoretical. Will you elaborate on your thinking on it? There is a genuine question about when consent takes place. How do we deal with the problem of situations in which alcohol has been taken or issues of greater uncertainty arise?

Euan Page: The committee is right to try to bottom out that area, because it is not clear cut. We must ensure that we do not sweep up in the law people who behave inappropriately but not in a way that should leave them open to a serious criminal charge. As we state in our submission, we need to get a handle on the situation that is envisaged. The dangers in going down the route of prior consent are manifold. By its nature, consent, or free agreement as it is defined in the bill, implies the ability freely to withhold consent at any time, but that ability is removed if one of the sexual partners is unconscious.

I know from reviewing the previous evidence that has been given to the committee that there have been discussions about situations in which people have had too much to drink and somebody gets caught up in the moment. To take the model to its logical conclusion, however, is it really conceivable that an individual would be caught up in the moment and have sex with somebody who was unconscious? Part of a sexual relationship between two adults is the important principle of reciprocity, and that would be missing from such an arrangement.

The dangers of proceeding with the provision on prior consent outweigh the dangers of removing it. We need to ensure that the criminal law does not inadvertently reinforce the public misconception, which is unfortunately still widely held, that somebody can be responsible for being raped because they had too much to drink or acted stupidly with drink, drugs or whatever. The responsibility for being raped does not exist; the rapist is the only person who is responsible for a rape.

Robert Brown: Your submission states that section 10(2)(b) of the bill, which deals with the matter, should be removed. Is that what it boils down to?

Euan Page: Yes. Unless a compelling reason is given for recrafting the provision in such a way that it clearly protects a group of people who would otherwise be caught up in criminal law inappropriately, the provision should be removed from the bill. The Equality and Human Rights Commission is not aware that any compelling reason has been provided thus far.

Robert Brown: Do you have a clear view about how consent should be indicated in the perhaps more ambiguous circumstances that we are discussing? We should bear it in mind that the matter has given the courts difficulty for 150 years, when cases of clandestine sexual assault were first decided by the High Court.

Euan Page: I do not pretend that this is an easy area. Doubtless, we will move on to talk about the bill's provisions on due regard being given to the defendant's indications of what steps were taken to establish consent, which perhaps ties in with the issue that we are discussing. We need to get to the bottom of what consent looks like, be it verbal or otherwise.

To take the matter out of the realm of statute and into the realm of policy, we should consider Rape Crisis Scotland's excellent this is not an invitation to rape me campaign, for which there are posters and have been adverts in magazines and papers in the past few weeks. Consent is not affected by whether somebody has had too much to drink, is flirting with somebody, has kissed them or is wearing a particular outfit. Consent can be given or withdrawn at any point. It is important to get to the bottom of the fluid nature of consent. One does not enter into a contract to have sex with somebody. We need to get away from the onus being on the victim, who is grilled about why he or she gave out mixed messages or whatever.
The onus should be on the accused to explain what indications they believe they were given that the person consented to have sex with them.

Robert Brown: I think that we all accept those points, but the difficulty is that we are talking about criminal statute. In court, ultimately, there will have to be proof beyond reasonable doubt of all the issues, including that there was no consent. That is what gives us problems, is it not? Does anyone else have any different comments on that?

Tim Hopkins: The results for LGBT people on the issue are no different, so it is not an LGBT equality issue, but I will comment briefly. What is required is not the removal of section 10(2)(b) altogether but the removal of the second half of it, which states that prior consent is possible. We would still want a rule that stated that there is no consent if the person is unconscious.

I have the impression that the prior consent provision was included in the bill to deal with specific circumstances that, it was suggested, might arise between people in long-term relationships, but I agree with Euan Page that the dangers of including the provision outweigh the possible benefits. Regardless of what it strictly means in law, it sends out the message that prior consent is an excuse for rape. Situations that arise in long-term relationships could perhaps be dealt with in prosecution policy.

Mhairi Logan: Prior consent does not sit sensibly alongside free agreement. They contradict each other, and a question arises about how long ago the person gave their consent. I worry that the argument would be used in the context of domestic abuse and rape cases. We support the point that Rape Crisis Scotland and Scottish Women’s Aid made on the matter.

Robert Brown: The other issue is reasonable belief, which section 12 covers. It is arguable that there is an element of academicness about that provision, too.

Mr Page, the Equality and Human Rights Commission has criticised the reasonable belief provision in section 12 and suggested that it runs the risk of being meaningless because of the difficulty of saying what steps the accused took if they will not give evidence. Will you elaborate a little on that? Do you have any other thoughts on how that challenge might be dealt with? Perhaps the bill has not got things altogether right, but the issue is important.

Euan Page: Before I answer those questions, it is worth putting on the record that I endorse Tim Hopkins’s comments. We are not looking for the excision of the whole of section 10(2)(b); rather, we are talking about excising the offending second part of it.

The reasonable belief provision is enormously encouraging, but there is a question about its practical application. How can we introduce the provision into court procedures in a way that does not jeopardise a defendant’s right to silence? Would it be possible, whether through judicial guidance or otherwise, to make it clear that an inference can be drawn from a person’s refusal to provide evidence on the steps that were taken to ascertain consent? That is a practical suggestion.

Robert Brown: Are there any other thoughts or suggestions?

Tim Hopkins: I do not have anything to add to what has been said.

Robert Brown: There is concern about the provision and practical laws of evidence. Would there be any advantage in widening the provision and using the phraseology in the English Sexual Offences Act 2003? That act states that the reasonableness issue is to be determined “having regard to all the circumstances”.

It should be borne in mind that an objective element to reasonable belief is introduced in part 1 of the bill.

Euan Page: The answer to your question is, “Possibly.” When the Equality and Human Rights Commission met members of the bill team, we acknowledged in our discussion that section 12 strays into wider questions to do with the law of evidence in Scotland. Perhaps that question needs to be considered in the round with wider questions to do with the law of evidence. That is one possibility. Perhaps we could get back to you in writing on the matter once we have further discussed it internally.

Robert Brown: That would be helpful.

The Convener: It would be useful if you could reply to us in writing, Mr Page.

We turn to the definition of rape. Stuart McMillan’s question appears to have been anticipated.

Stuart McMillan (West of Scotland) (SNP): I am content with the responses that have been given.

The Convener: Right. Angela Constance will therefore lead on questions about children and young people.

Angela Constance (Livingston) (SNP): As the witnesses know, the bill will continue to criminalise many forms of consensual sexual behaviour between older children. Is that consistent with the human rights of older children? Is it, for example, consistent with their privacy rights under article 8(1) of the European convention on human rights? I direct that question at Mr Page first.
Euan Page: The committee wrestled with that issue in its first two evidence sessions, and I do not know whether the Equality and Human Rights Commission has a great deal to add to the useful responses that you received then. We endorse the pragmatic approach that a number of witnesses have advocated. Provisions exist to deal with the very rare circumstances in which a criminal justice response would be the first and most appropriate response, but it is hard to envisage a situation in which such a response would come before a sexual health and child welfare response. In addition, the Lord Advocate has discretion to intervene when that is necessary. We would expect criminal justice interventions as opposed to other responses to be rare, as they are already.

You are right. Several potential rights are involved, particularly if we are to consider any moves towards an automatic appearance before a children’s panel. There are all sorts of issues to do with rights to privacy and the most appropriate way of dealing with individual children. We wholeheartedly agree with what has been said, and endorse the pragmatic, case-by-case approach that many witnesses have taken.

Angela Constance: Are you saying that, provided that there is discretion and people are not automatically referred to the children’s hearings system, for example, no conflict exists with the right of older children to privacy? Have I understood you correctly?

Euan Page: I think that that is right. If we are pragmatic, the law will stay in place. We think that the Lord Advocate would use her powers of discretion sparingly, and we want the best interests of both children to be paramount. It is hard to square such an approach with an approach involving an appearance before the children’s panel or any other criminal justice intervention.

Mhairi Logan: I do not have anything to add to that.

Tim Hopkins: I do not have much to add. The Equality Network does not work with children and young people, so we do not have a view on where the boundaries that separate what is and is not criminal should be. However, it is important to us that there is no sexual orientation discrimination in the law. It is clear that, at the moment, the law discriminates on grounds of gender—members have discussed that with other witnesses. If a 15-year-old boy and a 15-year-old girl engage in sexual activity, the boy—but not the girl—will have committed an offence. The law also discriminates on grounds of sexual orientation at the moment, because if a 15-year-old girl engages in sexual activity with her 15-year-old girlfriend, they will both have committed an offence, whereas if a 15-year-old girl engages in sexual activity with her 15-year-old boyfriend, she will not have committed an offence. We are pleased that that sexual orientation discrimination will be removed from the law.

It is also important that the law is implemented in a way that is free from discrimination. For example, if the question whether to prosecute an offence under section 27 is left to the discretion of prosecutors, it is important that that discretion is exercised in a non-discriminatory way. Equally, referrals to the children’s panel need to be made in a non-discriminatory, sensitive way, because a privacy issue for young lesbian, gay and bisexual people is that they may not have come out to, for example, their parents.

The Convener: Nigel Don has a question for Mr Page.

Nigel Don (North East Scotland) (SNP): I want to return to the point that Mr Page made about taking a pragmatic approach and the Lord Advocate’s discretion. In previous evidence sessions, I have been concerned that we could, for understandable reasons, finish up with a law that is routinely not enforced. It also seems to me that we are talking about a law that the average older child could not describe. The perpetrator of the offence would not be able to tell me or you what the offence was, because they would not know the circumstances under which it would be prosecuted or the circumstances under which it would not be prosecuted, which would apparently happen in the majority of cases. As someone who can discuss human rights, does the fact that people would not know the law offend you?

Euan Page: There is a general issue to do with the extent to which sexually active 15-year-olds refer to criminal statute before they decide what to do. That problem will doubtless remain.

I was struck by the comments that were made by, I think, Children in Scotland. It is a case of weighing up the pros and cons of changing the law and decriminalising such offences, or proceeding on the basis that has been advocated by several witnesses, who believe that, on balance, it is better to ensure that we continue to have a criminal law response in our armoury while recognising that that response is unlikely to be used frequently. I realise that such an approach is unsatisfactory to some members, who will think that laws that will not be enforced should not be passed. However, organisations in the children’s sector have stated that we must be mindful of the complexities of the law in this area and of the unintended consequences of sending out messages that the law has been relaxed or the penalties lowered.
The issue is not clear cut or easy, but a number of witnesses have advocated the best balance, which involves moving forward on the basis that the law exists with the understanding that when and how to proceed will be up to the wisdom and judgment of the Lord Advocate.

The Convener: We appear to have dealt with the bulk of the issues. Does Ms Constance have any further questions?

Angela Constance: Mr Hopkins has anticipated my final question, but I wonder whether Ms Logan or Mr Page wants to give a view on the equalisation of the law on consensual sexual activity between young men and young women over 13 but under 16. Both groups are potentially criminalised.

Mhairi Logan: I agree with what Tim Hopkins said. There used to be a problem, in that there was a difference in law between two young women in a relationship and a young woman and a young man in a relationship, but the bill will rectify that.

Euan Page: I am happy to go along with Tim Hopkins’s and Mhairi Logan’s comments.

The Convener: We will have a final question from Bill Butler.

Bill Butler: Are there other issues in the bill on which panel members wish to comment? Are there equalities and human rights issues that we have not yet touched on?

Tim Hopkins: I have one further point to make, and I hope that I will not take too long to explain it.

The Convener: So do I.

Tim Hopkins: The issue is discussed in our written evidence. Section 13 of the Criminal Law (Consolidation) (Scotland) Act 1995, which is entitled “Homosexual offences”, deals with most of the sexual offences commitable between men. Most of the section will be repealed by the bill, with the offences being replaced by gender-neutral and sexual orientation-neutral offences, which is great. However, part of section 13 of the 1995 act deals with offences that connect to prostitution. The Scottish Law Commission proposed two years ago to repeal all those offences and to consolidate the necessary provisions with general prostitution offences that are also in the 1995 act. However, when the Law Commission published its draft proposals, it pulled back from its original position, because, it said, the Scottish Executive had excluded prostitution from the remit of the review—

The Convener: I will interrupt you there, Mr Hopkins. You appreciate that we have to deal with the bill that is before us.

Tim Hopkins: Yes.

The Convener: I would prefer not to have extraneous matters introduced at this stage.

Tim Hopkins: I am sorry. In that case, I will not talk about material related to prostitution, which is arguably outwith the scope of the bill.

The Convener: Those discussions are for another place and time, of course.

Tim Hopkins: Fair enough. However, the parts of section 13 of the 1995 act that the bill, as it stands, will leave in legislation include material that will require consequential updates, because of other measures in the bill. In particular, section 13(4) of the 1995 act defines “a homosexual act” as an act of “sodomy or an act of gross indecency or shameless indecency”.

There are two problems with that. The first is that “shameless indecency” no longer exists as an offence, and the terms “sodomy” and “gross indecency” are, in effect, repealed by the bill. The second is that the language is very offensive. It is discriminatory to define any homosexual act between men as sodomy, gross indecency or shameless indecency. Section 13(4) of the 1995 act must be amended, by a simple consequential amendment to the bill, to define “a homosexual act” in straightforward terms as a sexual act between men.

Another problem is that section 13(9) of the 1995 act goes beyond prostitution. It criminalises any soliciting or importuning by “any male person for the purpose of procuring the commission of a homosexual act”.

We think that that criminalises a man asking another man to have sex with him, because doing so is regarded as soliciting the procuring of a homosexual act by the other man. The words “for the purposes of prostitution” are missing from section 13(9) of the 1995 act. That is the key point. In all other legislation on prostitution, the words “for the purposes of prostitution” are there to qualify the words “soliciting” or “importuning”. We therefore recommend that the phrase be inserted into what remains of section 13 of the 1995 act, to ensure that the scope of what remains catches only prostitution—as the Scottish Law Commission suggested—and does not accidentally catch things that should be legal for gay men, just as they are legal for everybody else.

The Convener: That is a useful clarification to add to what is in your submission.
Bill Butler: I am obliged to Mr Hopkins as well, convener. We now have something to think about for sections 13(4) and 13(9) of the 1995 act.

Does Ms Logan or Mr Page have anything to add?

Mhairi Logan: I would like to make one final point on the question of rape with an object. As the bill stands, it is proposed that rape would only ever be dealt with as a solemn matter in the High Court. We would like that also to be the case for rape with an object.

Euan Page: The committee has already highlighted this issue during previous evidence sessions. In questions of coercion or threats of violence, we need to be sure that we do not have in our minds the scenario of the knife against the throat. The dynamics of coercion and violence in an abusive relationship can be much more subtle and insidious than that. An individual’s ability to consent freely to sexual activity can be hampered in ways that might not be immediately obvious, and we must be aware of that.

Enable Scotland will be next to give evidence this morning. The Equality and Human Rights Commission got sight of Enable’s submission only after we had produced our own. Enable raises a very important point about how we can address the difficult area of ensuring that we extend all the protection that we should to people with learning disabilities while not using the criminal law as a means of regulating how consenting adults have sexual relationships.

I completely understand that two opposing principles are at play. The overriding and unacknowledged principle at the moment is that people with learning disabilities should not have the same autonomy and opportunities to make decisions about how they live their lives as other people. We need to address that head on, and Enable makes some practical suggestions on how to ensure that the greatest possible protection and the greatest possible autonomy and dignity are extended to adults with learning disabilities when they are deciding when and with whom they will have a sexual relationship. The Equality and Human Rights Commission will be contacting Enable to try to think through some of those issues.

Robert Brown: Violence is sometimes described as violence such as would overcome the fortitude of a reasonable person. Is some sort of qualification to that required, to distinguish significant threats of violence from more minor incidents?

Euan Page: The issue is perhaps more complex than has been suggested. Sometimes things are easy to say but difficult to get right in law. Circumstances have to be taken into account.

Enable’s written evidence makes the point that threats that might appear minor or inconsequential to one person might, to another person, be extremely distressing and have a major impact on their future decisions. Legislation must therefore capture not so much the nature of the threat but the circumstances in which it is made.

The Convener: I congratulate the panel of witnesses on evidence that was the acme of brevity and clarity. I am very much obliged to you all for that. Thank you for your evidence. The committee will consider carefully what has been said.

I now suspend the meeting in order that we can commemorate the war dead when the two minutes’ silence is announced at 11 o’clock.

10:59

Meeting suspended.

11:03

On resuming—

The Convener: I welcome to the meeting Norman Dunning, chief executive of Enable Scotland. We will proceed directly to questions, which will be led by Nigel Don.

Nigel Don: Good morning, Mr Dunning. Fortuitously, I want to ask about section 10, which is where we left off. Will you expand on the suggestion in your written submission that the notion that someone might submit to sexual contact as a result of threats be reconsidered?

Norman Dunning (Enable Scotland): I agree with the previous panel that the issue must be seen in context. After all, what one person sees as a credible threat might not seem so to another. In that respect, people with learning disabilities might be much more suggestible to threats than others. As we say in our written evidence, a person’s pet might be threatened or they might be told that they will never be allowed to go home again, and they will find such threats credible in a way that others might not. As a result, we suggest that if section 10 is to be amended, it should cover not only threats of violence but credible coercion or something like that.

Nigel Don: I get the impression that, given those examples, we will not be able to list in the bill all the relevant threats.

Norman Dunning: Not at all.

Nigel Don: Are you therefore suggesting that we should use phrases such as “credible threat”, “threats that are relevant in all circumstances” or something like that?
Norman Dunning: Yes—threats that are relevant to the particular person in the particular situation. The issue obviously extends beyond people with learning disabilities, but we considered it in the context of how those people would react in the situation.

Nigel Don: So you would be happy with a general proposition, along the lines that we have just discussed.

Norman Dunning: Yes.

Paul Martin (Glasgow Springburn) (Lab): You will be aware that the bill will repeal some sections of the Mental Health (Care and Treatment) (Scotland) Act 2003, relating to offences involving abuse of trust. Is the bill’s approach to such offences an improvement on the 2003 act?

Norman Dunning: No. I must make it clear that Enable Scotland has changed its view. We gave evidence to the Millan committee in which we supported what became section 313 of the 2003 act. There were similar provisions in the Mental Health Act 1983, although they applied only to women with learning disabilities.

We in no way wish to give the impression that we condone any breach of trust by people who are there to care for and support people with learning disabilities, but the criminal law is not helpful in trying to resolve that situation. We note in our submission that there have been only four referrals under the 2003 act, none of which has resulted in prosecution. There were only a handful of referrals under the previous provisions in the 1983 act. Criminalising such a breach of trust does not seem to work, which is why we have revisited the issue.

We have had a considerable debate within our organisation, and with people with learning disabilities and their parents. One way that we led that discussion was by presenting different scenarios that might occur and asking how they might best be resolved. One issue that arose was that scenarios involving breaches of trust between a care worker or a support worker and a vulnerable person, such as someone with a learning disability, usually take place in private. One finds out about them usually because somebody who is closely involved—either the vulnerable person or somebody from their wider family who hears about it—comes forward and tells someone.

We feel that people are not coming forward with that information, probably because of the criminal law. The issue is quite subtle. It is important to remember that we are talking about people with learning disabilities who have the capacity to consent, rather than people who do not have the capacity and who are already covered by legislation. If a person enters into a consensual relationship with their care worker, we have to be subtle in dealing with the situation.

To cut to the chase, we find out about such relationships when someone tells us, and therefore we have to make it easier for people to tell us. If a support worker finds themselves getting into an improper relationship, we want them to come forward, but they are less likely to do so if they think that it is a criminal offence. We want the person with the learning disability who is engaged in a consensual relationship to feel that they can come forward without getting the person they got involved with caught up in the law. Other people connected with the scenario are also more likely to come forward and point out a wrongdoing if they do not think that it will result in a criminal conviction.

We should not underestimate people’s reluctance to come forward—first, to be a witness in a criminal case, and secondly, to be a witness in a case that involves a delicate sexual matter. We are taking a pragmatic approach: we think that the best way to protect people is not to use the criminal law.

There are, of course, other sanctions that can be applied. If the support worker was employed, their behaviour would be inappropriate in their employment situation, and if they were a registered worker, their registration might need to be terminated. However, we do not think that the criminal law is the best way to deal with the situation.

Paul Martin: Do you envisage any scenario in which using the judicial system would be of benefit? I appreciate that your point is that regulation can help, but there must be scenarios—for example, involving predatory behaviour or someone abusing the trust of a number of individuals they are caring for—in which it would be more effective to pursue a criminal offence. You have set out specific scenarios, but the situation is complex. Surely the opportunity for criminal interventions should remain while understanding that regulation plays a role.

Norman Dunning: You make a valid point about predatory behaviour, although I refer again to the fact that the current law does not help—there are no prosecutions. There are also other ways of dealing with predatory behaviour, particularly by registered care or social workers, whose registration can be terminated.

There is currently a gap. As members may know, the Scottish Social Services Council is in the process of registering care workers. It started with social workers and then service managers, but the logistics mean that it is taking a long time to register everybody. So regulation exists, but its implementation is taking time, and it will probably...
be another three or four years before all care workers are registered. We know that there is a gap, but we still feel that the criminal law is not the best way to deal with the situation.

Ultimately, regulation will cover all support workers, but, as we acknowledge in our evidence, it will not cover people who are not recognised as care workers—people who help somebody to get a job, for example. However, there will always be such issues.

I return to the fact that we are talking about consensual behaviour. If someone’s learning disability is such that they cannot consent to a sexual act, there is no problem of interpretation—that is clearly a criminal offence.

**Paul Martin:** Do you accept that there will be circumstances in which people might be preyed upon? I appreciate the consensual element that you referred to, and I recognise that there are adults with capacity, but do you acknowledge that those adults face complex issues? Do you accept that some individuals could take advantage of those circumstances, despite the capacity issue that you referred to? Surely there should be the opportunity to pursue criminal law. I acknowledge the issue that you raised about enforcement, but it does not take away from the fact that there are complex issues concerning the detection of such activities.

**Norman Dunning:** Again, it is a question of how best to help people with learning disabilities. Rather than “protecting” them—as I said, there is no evidence that the current law does that, and the new measures are very similar—we need to educate them and give them the confidence to be ordinary citizens. A lot of the information that we receive from people with learning disabilities with capacity is that they want to be treated like other citizens—like everybody else.

The issue goes right back to education. At the moment, a lot of people with learning disabilities are vulnerable in sexual matters because they do not receive the same sex education as other people when they are children. They do not have the same opportunities to form the ordinary peer relationships that other people have, because people are too protective of them.

We hear from people with learning disabilities that they want to be less protected, better educated and better supported. Giving those people the right support to deal with complex matters in their lives is much more important than having a criminal sanction. Criminal sanctions tend to work the other way round—they mark them out as being different and encourage overprotective attitudes.

**The Convener:** There are no other questions for you, Mr Dunning, so I thank you for your attendance. The issues that Enable Scotland is particularly involved in are difficult and sensitive, and we appreciate the fact that you have come to answer our questions.

**Norman Dunning:** Thank you.

11:15

Meeting suspended.

11:16

On resuming—

**The Convener:** I reconvene the meeting and welcome the third panel of witnesses. The Rev Graham Blount requires only a limited introduction, as he is well known to members of the Parliament in connection with his work as the parliamentary officer for the Scottish Churches Parliamentary Office. He is joined by Alistair Stevenson, the public policy officer of the Evangelical Alliance. Good morning to you both and thank you for your attendance. The purpose of this type of evidence-gathering session—I direct this information to Mr Stevenson in particular—is for members to question witnesses about the content of the bill. We are not interested in any extraneous matters this morning; we are dealing with the bill as it is before us.

I will ask the first question. What is the proper role of criminal law in regulating sexual conduct?

**The Rev Graham Blount (Scottish Churches Parliamentary Office):** When we talk about sexual conduct among those who are in some sense children—whether younger or older children, they are our focus in relation to the bill—we see the regulation of sexual conduct fundamentally as a welfare issue. The Church of Scotland is still persuaded that, in that context, the criminal law is not the most effective way to protect older young people from themselves. Increasingly, the present legal situation is not working if the criterion is to deter people. We do not want to exaggerate the figures—about which the committee has heard—but it appears that the law is not successfully discouraging young people from engaging in sexual activities.
The Convener: May I interrupt you for a second? This is an important issue that we intend to examine in greater depth later on, if you will bear with us. I am interested in hearing what you feel is the role of the law in dealing with sexual conduct generally.

The Rev Graham Blount: The law exists to protect vulnerable people. Obviously, in a given situation certain judgments will be relevant in determining which people are vulnerable and require to be protected in the context of consensual sex between young people. In most situations, we believe that it is appropriate to treat all those involved as equally vulnerable.

Alistair Stevenson (Evangelical Alliance): We agree that the law should provide protection. A lack of legal involvement in a case would send a clear message that the law does not give direct expression to the principle that vulnerable persons should be protected and seen to be protected. The law exists to provide protection for vulnerable people. We agree with Graham Blount on that point.

The Convener: We will come to the issue of children presently.

In the written evidence that we have received, there is general appreciation and acceptance of the terms of the bill. Do you find any of its provisions difficult to accept or agree with? I invite Mr Stevenson to lead on that question.

Alistair Stevenson: I am happy to do so. We did not submit written evidence to the Justice Committee because we thought that our views were successfully taken on board by the Scottish Government when the bill was produced. We have no further problems with the bill.

The Convener: That will no doubt come as great encouragement to the Government.

The Rev Graham Blount: The Church of Scotland welcomes the broad intent of the bill. In certain areas of detail—other than those on which we have commented—we do not have adequate knowledge to comment further. We want the principle of protecting vulnerable people to be reflected in legislation, and we are persuaded that the bill as a whole seeks to do that.

The Convener: That is perfectly straightforward. We turn to the definition of rape.

Stuart McMillan: The committee has received a considerable amount of evidence suggesting that the crime of rape should be extended to include penetration with an object, instead of such conduct being covered by a more general sexual assault offence. Do you have a view on that?

The Rev Graham Blount: The church has not taken a view on the issue. We recognise that difficulties arise wherever one draws the line in these matters. One would not want to broaden the definition of rape in a way that progressively made the offence seem less serious. That is not to say that there are not very serious forms of sexual assault that do not come within the definition of rape.

Alistair Stevenson: We have no evidence to submit on the matter.

The Convener: Again, you have been quite clear. We move to the issue of children and young people.

Paul Martin: The bill draws a distinction between younger children and older children, and suggests that whereas sexual relations between younger children should be criminal, sexual relations between older children should not necessarily be criminal. What are your views on that issue?

The Rev Graham Blount: Drawing a line at a particular age is problematic, but it seems sensible to recognise that there is a difference between very young children and teenagers.

Paul Martin: You referred to the role of the criminal law. Can you elaborate on that? Has the General Assembly of the Church of Scotland taken a formal position on issues relating to the bill?

The Rev Graham Blount: The General Assembly appoints the church and society council to speak for it between General Assemblies. The council submitted a response to the consultation on the Scottish Law Commission’s proposals, and the contents of that response are reflected in what we have said at this stage. The General Assembly was aware of our response when it met earlier this year. It did not debate the matter formally, but it did not seek to change what had been said in the church’s name.

Paul Martin: Does the church have a specific position on how the criminal law should relate to younger and older children?

The Rev Graham Blount: We made our submission before the General Assembly. I am not sure that I understand your question.

Paul Martin: I am seeking to ascertain whether the church’s position could change. When the General Assembly meets again, could there be developments in its position?

The Rev Graham Blount: That is always possible, as is the case in any organisation. When Enable Scotland gave evidence to the committee, it indicated that its view had changed. Our position was known to the General Assembly earlier this year, but it did not seek to change it.

Alistair Stevenson: I think that the clearest message I can come to you with this morning is to
say that, while the Church of Scotland has a view on this, certainly Christians across denominations are particularly divided on the issue. I suppose that I am here this morning to provide the other side of the argument and to say that although, initially, it is extremely difficult, as has been said, to draw lines in the sand in terms of age, it is important to do so, as the Rev Graham Blount has indicated. We think that, although some children might have the capacity to understand the implications of their consent, many children between the ages of 13 and 16 do not. Children are more likely to be vulnerable to exploitation and are less likely to understand the capacity either to withhold or to give consent. We therefore agree with the Government's position that children between the ages of 13 and 16—older children—should be criminalised in some cases.

As the Rev Graham Blount has said, at the heart of any church and Christian response is our wish to cement our firm foundation in the ideal of ensuring the welfare of the most vulnerable in society, including children. That must be to the fore of any discussion. We think that the law can and should play a role in drawing a line in the sand at the age of 16 and saying that we disagree that children between the ages of 13 and 16 should be having sex with each other. The law can be used to send a clear message. Although it might be a blunt instrument in this case, on the basis of all the evidence that we have heard, we regard it as the only means of addressing the issue.

Paul Martin: So you believe that the law plays a role in regulating sexual behaviour among young people.

Alistair Stevenson: We do, yes.

Paul Martin: The Rev Graham Blount’s view is slightly different. In your written evidence, you suggest that the criminalisation of young people is unacceptable.

The Rev Graham Blount: That is not entirely the same thing as saying that the law does not have a role to play. We do not believe that criminalising young people who engage in consensual sex within the specified age parameters is the most effective way of discouraging them from engaging in that activity or of ensuring that those who engage in that activity are supported.

Paul Martin: I appreciate the point that you are making, but do you believe that the law has a role in regulating that behaviour? You say that the law is not the most effective means of preventing that behaviour, which is one argument, but do you believe that the law plays a role in preventing that behaviour? In other words, is there a role for the law or are there some intervention opportunities to deal with that behaviour in some instances?

The Rev Graham Blount: There are intervention opportunities in law for situations in which the sexual activity is not consensual. We have no reservations at all about the role of the law in such situations. We favour a legal position that makes the situation a matter of a welfare referral to a children's panel. That would be a use of the law but not of the criminal law.

The Convener: Would you be relaxed in the knowledge that all prosecutions in Scotland are at the discretion of the Lord Advocate, whom we hope would ensure that the cases that you have in mind would proceed on a sensitive basis?

The Rev Graham Blount: Yes. Our concern is about the passing of new legislation that would, rightly, extend the crime by making it even-handed for both boys and girls, if—as the implication appears to be—the Lord Advocate issues guidance that the law should not normally be enforced.

The law might be understood to send an important signal to young people, but it is a very confusing signal if we find it necessary to remind people in statute that the Lord Advocate always has discretion, on the basis that much of the discussion seems to assume that the vast majority of cases will not be prosecuted. We would also be worried if people were prosecuted under one heading because the heading under which it was suspected their action actually fell could not be discussed in court. A prosecution might be pursued because it is believed that an activity was not consensual, but because that is irrelevant to the indictment it would not come out fully in court.

11:30

The Convener: I can see the force of that argument.

Cathie Craigie: I refer to sections 27 and 29. The bill seems to want to continue to criminalise penetrative sex, but will apparently legalise oral sex, between young people aged 13 to 16. What are your organisations’ views on that? The Church of Scotland expressed concerns in its written evidence and said that it is “not persuaded” by section 27 and section 29. Perhaps the Evangelical Alliance could comment on whether the Government was able to allay any of its concerns before the bill was introduced.

Alistair Stevenson: That is a really important issue that we have continued to think about since we first saw the Government’s proposals. Unfortunately, it has not been picked up until now. If we were pushed on the point, we would say that in relation to penetrative and non-penetrative sex it is difficult to start drawing lines in the sand. Unfortunately, we do not have any answers on the issue, and I am not entirely sure whether it is
appropriate to start drawing lines in the sand. The current situation seems to be working—there is no evidence to say that it is not. Some ambiguity in this matter might be helpful in providing space for cases to be judged case by case and to be left to the discretion of the prosecutor or the Lord Advocate.

The Rev Graham Blount: I do not disagree with anything that Alistair Stevenson just said. The church did not express unhappiness about sections 27 and 29; it is fair to say that we did not consider the detail.

Cathie Craigie: Are there any risks associated with criminalisation of sexual conduct between older children? I would welcome some detail on that.

The Rev Graham Blount: There is a risk in respect of support. If there was not a threat of an appearance in court, children who had engaged in sexual activity but regretted it might be more likely to look for support both within and beyond their family. That is one reservation that we have about the use of the criminal law. It might be helpful to bring older children who are in such a situation to the children’s panel, not on criminal grounds, but on welfare grounds.

Alistair Stevenson: I might be reiterating the point that I made earlier, but the welfare of the child is of utmost importance for any Christian and, I am sure, for every person at the table. We understand that criminalising sex between older children has implications, but we feel that they do not outweigh the message that the law sends, and would continue to send, to children in that situation, which is that the people who make the decisions for them feel that it is not appropriate for them to have sex. The children might not understand that at that moment in time. Putting on my teenage hat, if I was a 15-year-old, I suppose that I would like to rest assured that the people who have made the decisions—who are more intelligent than me and who have been around a lot longer—have seen the evidence and understand the implications more than I do and therefore have the authority to speak on the matter. If that was in my mind as a 15-year-old teenager, it would be fundamental to the next step that I would take in such a situation.

Nigel Don: I cannot help but point out that the Rev Graham Blount has been the first person who has actually supported the position behind my line of questioning, which is that a law that is not routinely enforced may not deserve the title of law and might be counterproductive. However, although it has been suggested that we should simply decriminalise such sexual activity, doing so would send the wrong message. Generally speaking, that does not have much support. Have any of the people to whom Graham Blount has spoken made suggestions about how we might find some middle ground? Is there a legal turn of phrase or another way of doing things that would achieve the objective that we both have of making an understandable and enforceable law that nonetheless sends the right messages?

The Rev Graham Blount: I wish that I had a bright answer to that, but none has been found. The committee has previously heard a witness—it may have been the witness from Barnardo’s—speak about the need for robust public health campaigning and the provision of support services for young people. That must be part of the argument. The churches’ welfare concern would be reflected by introducing in the bill a statutory welfare-based referral to the children’s panel in such circumstances. However, none of those measures is the magic bullet that will sort out the issue. We need to consider working with families to support parents and teenage children in dealing with the pressures that they face. I am pleased that, in some places, churches are involved in that. Personal support that is provided in an on-going way, and not as a result of a case being reported, is crucial to changing things.

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Nigel Don: Do you accept that, if we put that in the bill as a first line of attack, with the offence as a subsequent line, as it were, the Lord Advocate would not have discretion because she would not have the locus in the first place to investigate the case? As far as I understand it, we must retain the offence throughout, even if we then say that it will in practice be dealt with through the children’s panel.

The Rev Graham Blount: I am open to correction, but I understand that if there appeared to be a lack of consensual activity, the Lord Advocate would want to investigate using other provisions in the bill.

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Nigel Don: I think sections 1 and 2 apply to anybody of any age when there is a clear lack of consensual activity. The problem arises when it is not entirely clear. My understanding of the justification for the bill as drafted is that the Lord Advocate can exercise discretion from the very beginning and that therefore, in effect, the police can from the beginning exercise their discretion to investigate a matter so that it is dealt with through the criminal system, to the point at which a decision is made not to prosecute rather than the matter having to be revisited once the health issues have been dealt with. I think that is the basis on which the bill is drafted and that we are stuck with it. Do you accept that?

The Rev Graham Blount: I tried earlier to express my concern that the bill might lead to young people finding themselves in court under sections 1 and 2 when the basis of the Lord Advocate’s discretion to proceed with the matter is
something that is not, on the face of it, what they have been charged with.

**Bill Butler:** The bill will extend criminal responsibility for consensual sexual acts to girls aged 13 to 16, whereas at present such criminal responsibility extends only to the boy. Do the witnesses agree with that extension of the criminal law or, as has been suggested strongly by responses to previous questions, do they believe that the criminal law should not be involved when there are consensual sexual acts between older children and that, as the Rev Graham Blount said, there should be a statutory welfare-based referral to the children’s panel?

**The Rev Graham Blount:** Our belief is that whatever legal provision is made should be even-handed between boys and girls. As you say, we have already made the point about what we believe it is appropriate to deal with in legislation.

**Bill Butler:** Is it the Church of Scotland’s position that such acts should not be dealt with under criminal law?

**The Rev Graham Blount:** Yes. That is the position to which the church has come.

**Alistair Stevenson:** We agree that there should be a general principle of gender neutrality.

**Bill Butler:** Should the criminal law be involved?

**Alistair Stevenson:** Yes. I think it should.

**The Convener:** There are no further questions for the panel. I thank the Rev Graham Blount and Mr Stevenson for giving their evidence so clearly.

**The Rev Graham Blount:** I would like to say one thing that I have not said in response to any of the questions.

The church regrets that it did not raise the point, which some of your witnesses raised last week, about consulting children. We believe that it would be useful to do that before the bill is passed. As Paul Martin hinted, there may be the possibility of the church’s view being changed. If what Children 1st found in their conversation with a relatively small number of children proved to be widespread, that would, at the very least, give us pause for thought.

**The Convener:** Thank you for putting that on the record. That is helpful. I again thank you both very much.

11:44

*Meeting suspended.*

11:45

*On resuming—*
with an object. Does the panel have a view on that matter?

**David Greatorex:** We have not considered that issue particularly. We approve of the fact that oral sex is to be included within the definition of rape. I do not want to bang on about the same point, but we consider the fact that that is defined as rape under part 1 means that there is a disparity and that it is not treated as seriously with regard to older children in part 4.

**Dr Macdonald:** It is not an issue that CARE has considered.

**The Convener:** Fine. We turn to the sensitive issue of sexual activity between children and young people. Paul Martin will lead the questioning.

**Paul Martin:** Gentlemen, what are your views on the role that the criminal law plays in regulation of sexual behaviour between young people?

**Dr Macdonald:** I return to our answer to the first question. The law has primarily a protective role to prevent harm and to act as a deterrent. Specifically, where there is harm or predatory behaviour, the law acts as a mechanism for intervention so that that behaviour can be addressed by the appropriate authorities—the police, social services or whoever.

**David Greatorex:** Paragraph 113 of the policy memorandum acknowledges the importance of the criminal law in guiding young people’s behaviour. That is true of full sexual activity and, we believe, of oral sex. The message-sending role of the law is important: if any hint of a watering-down of the law is given, it will be taken as a weakening of the law. We do not want to encourage any form of under-age sexual activity by weakening the law or giving the impression that the law has been weakened. The criminal law is an important indicator of society’s views.

We believe that the law should provide the capacity to intervene in the most serious cases, although we acknowledge that discretion will be exercised in many cases. To have the law in this area totally disapplied, leaving the authorities unable to intervene, is not a step that we would condone. The law should include scope for intervention in the most serious cases.

**Paul Martin:** Are you suggesting that young people think about the current law and decide that they should not engage in sexual behaviour because of the possibility of their being brought before the courts?

**David Greatorex:** The law will have a deterrent effect on some young people, although not on all. The fact that 30 per cent engage in sexual activity indicates that the law is not a deterrent to all, but some of the remaining 70 per cent will be deterred by the law. The Children 1st study found that children are using the age of consent as a buffer—an excuse or prop—to enable them not to consent to sexual activity. That is an important sign that young people do think about the law in this area.

**Paul Martin:** The bill draws a distinction between younger and older children. What are your views on that?

**Dr Macdonald:** We would not draw such a distinction. Essentially, we argue that 16 is the appropriate age of consent for sexual intercourse.

**David Greatorex:** I agree that 16 is the correct age of consent. We would not like the law to be watered down, because we believe that under-16s are still children. Nevertheless, we acknowledge the reasoning behind the drawing of that line. We say that children under 13 have no capacity for consent, and that children over 13 but under 16 have limited capacity. We still consider that children under 16 are vulnerable and require protection, and that they do not have the necessary capacity to consent to the types of sexual activity that we are talking about.

**Dr Macdonald:** I am aware that this is not the Health and Sport Committee, but from a purely health-focused point of view, the earlier people engage in sexual activity, the greater the health risk. That is certainly the case for cervical cancer. The age range 13 to 16 is crucial. We should seek to use not only the criminal law but other mechanisms to encourage young people in that age group not to engage in sexual activity. At the end of the day, the criminal law will not, on its own, solve the problem.

**Cathie Craigie:** In its submission, the Christian Institute says that

"the law should prohibit any sexual activity below 16."

Are there any risks in criminalisation of sexual conduct between older children?

**David Greatorex:** Obviously one concern is that if a broad definition is used, children will be criminalised for kissing. That concern is often raised, but the area is exactly one where discretion is important and there is room for common sense. That is why we said “any sexual activity”. Discretion is required. By having the provision drafted in that way, someone can intervene, even in circumstances in which full sexual activity is not involved.

**Cathie Craigie:** In its submission and its oral evidence this morning, the Church of Scotland made it clear that it views the matter as a welfare issue. I may be putting words into the church’s mouth, but I understand that it thinks that the bill should be written appropriately so that it does not end up as law that is never enforced.
Do you think that the law will be brought into disrepute if legislation is passed which is not intended to be enforced? 

David Greatorex: I do not, no. There are many roles for the law. If not every case is prosecuted, the message-sending role of the law is not undermined—society’s standard is still clearly set out. Some people will benefit by being deterred and others will be enabled to say no. We learned that in evidence from Children 1st and similar evidence was heard in England and Wales when sexual offences legislation was considered in 2003. It was heard that children used the age of consent as a prop not to engage in sexual activity in which they were unwilling to engage.

Peer pressure is also important. Any assistance that we can give children to resist pressure that media coverage and peer pressure puts them under is important assistance. The criminal law can do that by expressing the seriousness of the activity.

Cathie Craigie: The Christian Institute’s submission raises a great number of concerns about part 4 of the bill—indeed, part 4 is the focus of your submission. How would you change part 4 to meet the concerns that you have set out?

David Greatorex: That is quite a question, and one that is probably beyond my pay grade. As I said, we would like to see the line on sexual activity drawn much further down than it is at the moment. Oral sex should not be exempted but be brought within the provisions of the bill. One concern is the proximity of age defence—the 16 to 14 issue. From conversations with criminal law practitioners, I understand that under the current law prosecutions may result when the age gap between parties is 23 months. We believe that the introduction of the proximity of age defence in the bill will therefore weaken the law.

12:00

Cathie Craigie: Last week we heard from many organisations that work with and represent young people. The Commissioner for Children and Young People in Scotland made the point that, under the bill as drafted, if my next-door neighbour’s 15-year-old daughter becomes pregnant, she will be a criminal. In terms of the opportunity that the bill provides to look at legislation in this area, is that the right way forward?

David Greatorex: There is important room for discretion. We are looking at the wider picture—the message that is sent when we legislate in this area. We are concerned that focusing on difficult cases such as the one that you have described could dilute the message that is sent. We would like to maintain a firm position in the law, while allowing for discretion. Legislating for more difficult cases could allow cases in which the criminal law needs to intervene to slip through the net.

Dr Macdonald: Presumably the 15-year-old would be recorded as a criminal only if she were prosecuted and convicted in a court. As we have heard, that is unlikely to happen unless there is evidence of abusive behaviour.

The Convener: If the case were referred to the children’s hearings system, the offence would be recorded, although that is not a criminal conviction.

Cathie Craigie: You say that there should be flexibility and discretion to enable us to deal with particularly difficult cases. As we see in other areas with which we have to deal, young women below the age of 16 get pregnant all too often. Should discretion be exercised so that such cases are never prosecuted or, as other witnesses have suggested, should the individuals concerned receive welfare, education and training? Are we making legislation that we intend never to enforce? What is the point of having such legislation? One piece of written evidence—it may have been from the Christian Institute—stated that that would send out the wrong message; it would be saying that it is okay to break the law, because there is a way to get off.

Dr Macdonald: People need to remember that we are starting not with a blank sheet of paper but with the current law. The argument has been made that we should not pass laws that will not be routinely enforced or prosecuted. However, I do not imagine that the law is likely to be enforced routinely in cases where two 12-year-olds have had sex, even though that will remain an offence under the bill. No one is proposing that it should not be an offence just because there may not be a prosecution. There has been a tendency to see the issue in purely theoretical terms.

Margaret Smith asked about referrals to children’s panels. There have been about eight such referrals—I cannot remember over what period they were made. I would be concerned if it were suggested that every teenager who is having sex should be referred to the children’s hearings system. It would be really interesting to hear what those involved in the system would have to say about that suggestion. I do not imagine for one minute that children’s panels would welcome that, because it would snow them under with all sorts of cases. They have enough difficulty in dealing with the number of cases that are already referred to them.

Whether in relation to older or younger children, the law is aimed at targeting the most serious abuse and predatory behaviour. We all accept that
most children will not end up in court or even go to the children’s panel but, in some cases, it is important to have that mechanism. Otherwise, no intervention will be made to prevent behaviour that might lead to more serious offending behaviour later. That is why the law is important. The issue is not that the law will not be enforced; it will be enforced, but the key point is that enforcement will be appropriate.

David Greatorex: Cathie Craigie said that children are becoming pregnant routinely. I am sure that we all want to reduce the number of such pregnancies and we should use every tool that is at our disposal to do so. The criminal law is one tool that we have. The law’s deterrent role is real and significant and it can be applied through the bill.

The policy memorandum says that we should not take risks with young people’s health. By weakening the law, we would take the risk that the deterrent effect—which currently functions—was reduced or removed, which would mean that more children engaged in sexual activity, which could be dangerous for them. I would maintain a strong role for the relevant criminal law.

Robert Brown: You talk about the criminal law’s deterrent effect, on which one can have varying views. Do you have evidence, such as research, that the criminal law has a deterrent effect on sexual conduct?

David Greatorex: I have nothing to hand. We have the evidence from Children 1st that the law is in some children’s minds, because they use it as an excuse not to consent. However, I have no research to offer the committee.

The Convener: That is fair enough.

Bill Butler: As you know, the bill will extend criminal responsibility for consensual sexual acts to girls who are aged 13 to 16, whereas at present only the boy has criminal responsibility. Do you agree with that extension of the criminal law?

Dr Macdonald: Yes.

David Greatorex: Yes.

Cathie Craigie: At the end of the previous panel’s evidence, the Rev Graham Blount said that the Church of Scotland supports the call that we heard in evidence last week for further consultation with children and young people. Do you support that?

David Greatorex: The findings of Children 1st were interesting. The role of the law as a prop to allow children not to consent should be further considered. However, we return to Alistair Stevenson’s comment that older and wiser heads should legislate, rather than children themselves. We would consult children and be interested in their views, but we would hesitate to give those views too much weight. The criminal law has an advisory role in regulating children’s conduct, so we would hesitate to allow them total freedom to dictate that regulation.

Dr Macdonald: I am not sure whether the committee should undertake such consultation. The danger is that the sample will be skewed, particularly if specific organisations arrange the consultation. I am not sure what age of children the committee would consult. I do not particularly want you all to turn up to interview my four-year-old, thank you very much—not that I would not welcome you for a cup of coffee any time you liked. The question is what is appropriate. Obviously, the committee will exercise discretion in deciding what it wants to do; however, if you go down that road you must ensure that you get a balanced sample of opinion rather than the views of a selected number of people. That is where I would consider there to be some difficulty with that course of action.

Cathie Craigie: Convener, the suggestion was made last week that there should be age-appropriate consultation.

The Convener: That is not to say that Dr Macdonald’s four-year-old might not have some sensible contributions to this or any other discussion.

There are no further questions for the panel. Thank you for your attendance. I also thank the witnesses who gave evidence earlier. We have dealt with some difficult and sensitive matters this morning, and the way in which the evidence has been given has been particularly helpful.

Nigel Don: I would like to put on record, for the avoidance of doubt, the fact that I am a member of the Church of Scotland and the sponsor of Alistair Stevenson’s regular visitor pass.

The Convener: That is noted, Mr Don. Do any other members have interests to declare in that respect?

Cathie Craigie: I, too, declare that I am a member of the Church of Scotland. I did not realise that I had to say that.

The Convener: The interest is peripheral; nevertheless, your declaration will be recorded.
Scottish Parliament  
Justice Committee  
Tuesday 18 November 2008

[THE CONVENER opened the meeting at 10:20]

Sexual Offences (Scotland) Bill: Stage 1

The Convener (Bill Aitken): Good morning, ladies and gentlemen, and welcome to the meeting. I make my usual intimation that all mobile phones should be switched off.

We have received no apologies so far, although Angela Constance has indicated that she has been detained. James Kelly MSP will attend for agenda item 2.

Under agenda item 1, the committee will take evidence on the Sexual Offences (Scotland) Bill. I welcome the first panel: Detective Chief Inspector Louise Raphael of the Association of Chief Police Officers in Scotland; and Temporary Deputy Chief Constable Bill Skelly of ACPOS’s family protection portfolio. I welcome Mr Skelly in particular, as this is the first time that he has appeared before us.

I ask our first panel members—and all the other witnesses who are present—to give short and succinct answers. That would be greatly appreciated, as we have a heavy agenda.

We will go straight to questions.

Robert Brown (Glasgow) (LD): Good morning.

I want to ask about consent and free agreement, which section 9 covers. The ACPOS submission states that although the use of the term “free agreement” is okay as far as it goes, it is a bit “simplistic” and that it would be helpful if the expression were expanded “to include the terms ‘voluntarily’ and ‘with knowledge of the nature of the act’”.

Bearing in mind the need for juries to be able to reach views on such matters, will you give examples of situations that you have concerns about and explain how the concept of free agreement would benefit from the addition of the idea of voluntariness to the bill?

Temporary Deputy Chief Constable Skelly (Association of Chief Police Officers in Scotland): Good morning. ACPOS does not underestimate the complexity of that question. The definition of the word “consent” is key to later provisions in the bill.

We do not think by any means that there should be an absolutely definite definition of the term “free agreement”, but we would like there to be an extra little bit of guidance on how the public—juries in particular—and the police should interpret the meaning of the word “consent”. As the bill stands, the combination of section 9, which defines consent as free agreement, and section 12, which deals with reasonable belief, go some distance towards giving an understanding of what is meant, but they do not go quite far enough.

For us, the definition of the word “consent” goes beyond merely the absence of denial. Section 10 deals with situations in which consent could not be seen to have been given, but it deals with negative attributes. We think that the bill should include positive examples, such as positive verbal affirmations of consent or behaviour that indicates that understanding and knowledge were present in the person who gave consent. It is a matter of going beyond saying that consent is merely silent or that consent/free agreement is an absence of negative indicators, and saying that consent can be the presence of positive indicators such as verbal or behavioural actions.

Robert Brown: I do not think that anybody would disagree with such an objective, but do the words “free agreement” not already imply an element of positiveness? I cannot read that term as meaning just the absence of denial.

Temporary Deputy Chief Constable Skelly: We are saying that the guidance on free agreement—or on the indications that there has been free agreement—should be expanded. I understand the complexities of the issue. The bill states that “consent” means free agreement; it then gives circumstances in which conduct takes place without free agreement—negative examples are given. We have suggested that it would be useful if the bill indicated positive things that showed that free agreement was present, such as indications of knowledge or of the person voluntarily taking part in whatever the act was.

Robert Brown: I want to return to the initial point, which you did not entirely deal with. Do you have any examples of types of situations that you or your colleagues have come across that would illustrate the point you are trying to make or the difficulties with the current arrangements?

Temporary Deputy Chief Constable Skelly: Often, agreement or consent is inferred by silence, or by nothing being given. With reference to section 12, the person who is accused of the crime is in some ways required to provide information as to their reasonable understanding or belief that free consent or agreement was present. As far as examples are concerned, we would look for positive consent or positive indications to have been given. That might be verbal agreement or behavioural indications that show agreement. That requirement is not intended just to benefit the
Robert Brown: Section 10(2) sets out some of the circumstances in which conduct takes place without free agreement. Does it not deal, in significant measure, with your point? That subsection illustrates a series of situations, whether raised by way of defence or otherwise, that have been the subject of legal cases over the past century and a half or more.

Temporary Deputy Chief Constable Skelly: Absolutely. As I said earlier, the bill as drafted goes some considerable distance towards tackling the issue of defining consent, using the interpretation of free agreement. The instances given in section 10 indeed go some distance towards dealing with our point, but ACPOS feels that the bill could go slightly further. That is not to suggest that the bill does not address the issue, however; it certainly does.

Robert Brown: Do you have any fears that making the definitions more complex will give rise to greater problems in what is already a difficult area for establishing and proving various facts, and that it will make it even more difficult to prove rape and similar offences?

Temporary Deputy Chief Constable Skelly: I understand those concerns, which I am sure the Crown can articulate far better than I can. It is thought that, the more that we put into a piece of legislation, the more proof might be demanded—therefore, the higher the level of evidence required. It comes down to the art of drafting and to the question whether provisions should be in the bill or in guidance to follow, which might expand on the points that we have been making. I accept those concerns around the idea that, the more we include, the more we have to prove and the more complex things become. We feel that the issue is worth bringing to the committee. Beyond that, it is for you to decide where that issue sits.

Robert Brown: I want to test the quality of what you are saying, and its evidence base. I will return to the initial point. From your experience, do you have in mind particular situations in which current definitions, or directions to juries, have given rise to problems following a police investigation and a case being brought to court?

Temporary Deputy Chief Constable Skelly: Discussions around consent are central to almost every case that goes through the court system. When it comes to drafting new legislation to redefine, or to define better, what is meant by "consent" in the judicial process, we have borne in mind the fact that that question comes up on every occasion, and that is why it is so hugely important. You ask whether we have any examples of the problem; I reiterate that, in practically every case that goes through the court system, the issue of consent comes under significant scrutiny. At this stage, when we are discussing new legislation and the definition of consent as free agreement, it is vital to get the provision right, as the matter will come under intense scrutiny in the courts.

We are not trying to address the specifics of one or two cases that have gone through court. We are not arguing that, if we had been able to show positive consent and positive affirmation in certain cases, the provisions before us would have been of assistance; we are saying that, if we are not firm and clear about what we mean by "consent", that will cause confusion and difficulty across the whole spectrum of cases that go through the system in future.

Although as drafted the bill goes a great way towards assisting us and the courts in understanding what is meant by "consent", amendments that further define what is meant by free agreement might need to be considered to provide the courts with a bit more help.

10:30

Robert Brown: As lay people, we need to get some flavour of the issue. I realise that highlighting such matters is going to be somewhat difficult, but I wonder whether you can come back to the committee with any practical examples—obviously anonymised—in which the police service found it difficult to prepare a case for prosecution.

Temporary Deputy Chief Constable Skelly: Absolutely.

Robert Brown: That would be helpful.

The Convener: Cathie Craigie will ask some questions on aspects of the bill that relate to children and young persons.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): In what circumstances are the police called to investigate the possibility that a child has committed a sexual offence? In answering, could you distinguish between younger and older children, cover consensual and non-consensual aspects and tell us about the number and outcomes of such investigations?

Temporary Deputy Chief Constable Skelly: Could you break that down a bit?

Cathie Craigie: Okay. First, could you distinguish between younger and older children in such circumstances?

Temporary Deputy Chief Constable Skelly: ACPOS has already provided written evidence on sex between or involving children, so I will try to keep my replies as succinct as possible.
Given the incidence throughout Scotland of older persons well beyond 18 or 21 having sex with people aged between 13 and 16 and of 13 to 16-year-olds having sex, we felt strongly that there was a need to maintain current age levels to allow the police to carry out appropriate investigations into cases of such sexual intercourse or activity. As a result, we welcome and concur with the provision set out in section 27(7), which gives the Lord Advocate the ability to issue us with guidelines and a discretionary power with regard to the way we report such investigations.

I am not able to present the committee with a huge amount of statistics, but if you can be specific about which statistics you want we will do our best to gather them from individual forces or from across Scotland.

The Convener: That would be helpful. We will intimate to you the statistics that we might find useful.

Cathie Craigie: It would be helpful if you could give us as much of a breakdown as possible on the numbers and ages of those involved in consensual and non-consensual sexual activity.

How will passing the bill in its current form impact on your ability to investigate allegations that a child has committed a sexual offence?

Temporary Deputy Chief Constable Skelly: It will allow the police to continue to make an appropriate and proportionate response to incidents involving sexual behaviour among older children. Earlier in the bill's development, we were concerned by suggestions that such a provision might not be included.

Cathie Craigie: So, as things stand, if the bill allows you to continue doing your job, there will be no change.

Temporary Deputy Chief Constable Skelly: Yes. We will support it if the amendments stand.

Cathie Craigie: No. I mean that if, as you say, the bill as it stands will allow you to continue to investigate as you do at the moment, there will be no change to what you do.

Temporary Deputy Chief Constable Skelly: The change is in balancing the issues around gender. The current legislation criminalises only one gender, and the bill will address that anomaly. The investigative process will be able to continue as at present. The bill will assist us in relation to the manner in which we will be able to treat gender in matters of sexual behaviour between older children, which will be a great help. It will allow us to approach investigations on a legislative footing; without it, we would not have such an opportunity.

Nigel Don (North East Scotland) (SNP): Good morning. Can you clarify for me the current process of investigation? Because sexual relations between youngsters are, by definition, illegal at the moment—albeit that only one party is criminalised—you have a duty to investigate. I presume that, if something came to your attention, you would do that as a matter of routine. Am I right in thinking that, once you have conducted whatever investigation you feel is appropriate—that is clearly for your discretion—it is up to you to decide whether to refer the matter to the procurator fiscal or to close the book on it? I am not sure how the process works. Can you please clarify that for me?

Temporary Deputy Chief Constable Skelly: I ask Louise Raphael to expand on that.

Detective Chief Inspector Louise Raphael (Association of Chief Police Officers in Scotland): As it stands, there is limited discussion following the police investigation. Ordinarily, we would report the circumstances to the procurator fiscal if that were appropriate; the decision regarding what happens after that rests with the procurator fiscal. Welfare services are engaged at that point as well.

Nigel Don: Sorry, but I am still not quite sure about this. I presume that you have discretion to decide that there is nothing in the case to worry about and that, therefore, you will not refer the matter to the procurator fiscal, or do you refer every case to the procurator fiscal, once it has been investigated, for the fiscal to make the decision?

Detective Chief Inspector Raphael: Yes.

Nigel Don: You mean the latter.

Detective Chief Inspector Raphael: Yes.

Nigel Don: Thank you.

The Convener: Louise Raphael used the caveat "if that were appropriate". Can you define that in wider terms?

Detective Chief Inspector Raphael: By that I mean when there is evidence to substantiate that an offence has been committed.

The Convener: I call Bill Butler.

Bill Butler (Glasgow Anniesland) (Lab): Nigel Don has covered the point that I wanted to raise, convener.

Cathie Craigie: The committee has been taking evidence on the bill for several weeks and has heard concerns from some quarters about our having unnecessary law that is not enforced. It is clearly a criminal offence for a person under the age of 16 to engage in sexual activity, although sometimes the whole force of the law is not
applied. There have been suggestions that it is wrong to have something in legislation but not to enforce it. We have been told that it would be better for such matters to be dealt with as a welfare case, rather than as a criminal case. Do you have any comments on that? I am sure that you have read that evidence.

Detective Chief Inspector Raphael: Our concerns revolve around the fact that the absence of the provisions would deny us the opportunity to investigate a case fully in order to establish whether there had been coercion or whether there had been informed consent. If the powers were not contained in legislation, we would not have the opportunity to investigate a case fully to establish such issues. Peer pressure is an extremely powerful aspect of older children’s lives, and what may appear, on the surface, to be free agreement or consent might be revealed not to be that when we probe further. Our concerns revolve around our lack of ability to conduct a proper investigation.

The Convener: I ask Nigel Don to come in on that issue. He can pursue a separate matter later.

Nigel Don: I am confused. Surely, if there were any suspicion or evidence of coercion, we would be dealing with a section 1 or 2 offence, would we not? The fact that the person was under 16 would not be relevant. Why, therefore, do we need to create an offence relating to older children?

Detective Chief Inspector Raphael: Sorry, could you repeat that? I did not quite understand your point.

Nigel Don: My point is that, if there is any evidence or suggestion of coercion, we would be dealing with a section 1 or 2 offence, would we not? The fact that the person was under 16 would not be relevant. Why, therefore, do we need to create an offence relating to older children?

Detective Chief Inspector Raphael: Yes.

Nigel Don: So you could investigate the matter on that basis. Why, therefore, do we need to create an offence relating to older children to enable you to investigate?

Detective Chief Inspector Raphael: I will give an example from our experience of dealing with girls aged between 13 and 16 who have engaged in sexual activity and become pregnant as a result. In one particular example, on initial inquiry, the girl offered the information that the pregnancy was as a result of sexual intercourse with a 15-year-old boyfriend. In the absence of legislation, we would have taken the matter no further. However, on further probing, it transpired that the girl had had sexual intercourse with a much older person. Our concerns revolve around our ability to ensure that we are conducting a proper investigation and establishing what offences, if any, have been committed.

Temporary Deputy Chief Constable Skelly: Our primary concern is over the safety and wellbeing of the child. We are not here to say that the police should be responsible for reporting all cases to the procurator fiscal because it is the procurator fiscal’s role to protect children; it is everyone’s role to protect children, which is our central aim.

In relation to legislation on sex between older children, we would not want the age of consent to move to 13; it should be kept at the current limit. We want to be able to investigate on a lawful footing, as opposed to one in which the law is absent, with the police acting ultra vires or in some other capacity to protect the child. That is not to say that the final outcome should be a prosecution or a conviction, but some other arrangements should be put in place to protect the child.

As I said, we will provide as much information as we can to give you a breakdown. For example, last year in the east end of Glasgow, there were 19 incidents of sexual behaviour in which one of the partners was aged between 13 and 16, including six incidents in which both partners were aged between 13 and 16. Therefore, six incidents involving sexual behaviour between older children were investigated by the police in the east end of Glasgow. Some of the remaining 13 incidents involved adults who were much older than 21. We are concerned about the issue, and we want to retain the ability to investigate.

Nigel Don: I will distinguish between the provisions that relate to sex between older children—the 13 to 16-year-olds—and those that relate to an older person having sexual relations with an older child. If we accept that the latter provisions should exist—that was the premise of my question to Ms Raphael, although I am not sure that she realised it and I apologise for not making that explicit—I am concerned about whether the police need the former, which relate solely to sex between older children, in order to investigate coercion. I am still not happy in my own mind if you are saying that you believe that, if there is any element of criminality in such cases, you cannot proceed under sections 1 or 2.

Temporary Deputy Chief Constable Skelly: Perhaps we have not been clear in our response to your questions. You are right; if a case shows elements of criminality, we have the power to investigate. That is not the basis on which we are saying the provisions that you are concerned about should be retained.

We want the legislation to give the police the ability to intervene in cases involving young people in which one or both parties are putting themselves at risk of significant harm. The bill would allow us to intervene at that point.

Nigel Don: Okay. Having now set out the ground rules of what is law and what is not, why
do you still think that there needs to be an offence of strict liability, although we will never enforce it, if older children have penetrative sexual relations with each other? Why do the police need that provision if you have sections 1 and 2 and the section that refers to older persons?

Temporary Deputy Chief Constable Skelly: Its absence would significantly restrict our lawful ability to carry out our duty to protect young people. It is not about criminalising individuals; it is about giving us the lawful ability to investigate, to ensure that we are protecting young people.

There might be other ways of doing that, and other agencies and bodies might require a different route and a different level of support, but for as long as the police are vested with a duty to protect young people and we have that role in society, we will need the tool to allow us to discharge that duty.

Nigel Don: Forgive me, convener, but this is a crucial point.

I do not want to disagree with you—I hesitate to disagree with a police officer about anything, and certainly ones with the experience that you folk clearly have—but it is still not clear to me why, if you have sections 1 and 2 as writ, you need the bill to provide another offence in order for you to investigate.

10:45  


Nigel Don: Sorry—is it section 21? Let me check, to be absolutely clear.

No, it is not section 21. It is not about the older person. It is about children having—[Interrupt.] Or is it section 21?

The Convener: It could be section 27.

Nigel Don: Right. Let us make sure that we are absolutely clear, for the sake of the Official Report. Yes—it is section 27, “Older children engaging in penetrative sexual conduct with each other”.

Forgive me, but it is still not clear to me what section 27 adds to your investigative armoury. If you have prima facie evidence of sex and you want to investigate that, you can investigate it for evidence of coercion, or at least lack of consent. Can you not do that with sections 1 and 2 in your back pocket? Why do you need section 27 as well?

Temporary Deputy Chief Constable Skelly: In Scotland, we consider 16 to be the age at which consent can be given to sexual intercourse, or to the sexual behaviour that is described in the bill. When such behaviour takes place below that age, society is concerned, even when consent or free agreement appears to have been given. Society believes that such behaviour is inappropriate and should be investigated, and that the people who should investigate it in the first instance are the police. While society in Scotland takes that view, we need the powers to be able to investigate.

If you believe differently, and you believe that consensual sex between older children is something that should take place, you would argue for the removal of section 27 from the bill, but we do not believe that that would be appropriate. There are a number of professional reasons why we say that. For example, we find predatory sexual behaviour occurring from a very young age. Some instances that we investigate lead us to people whose journey into adulthood is such that they become predatory sexual offenders. There are reasons why we would want to intervene at an early age, because doing that helps us to protect people throughout their lives.

That is one reason—but by no means the only one—why we want to retain the power. However, it is for the Parliament and the public to decide whether they want us to protect people in that way.

Nigel Don: I am sorry, Mr Skelly—I am with you, and I still not got what I understand as an answer that tells me why you need section 27. I think that you can do all the things that you mentioned under sections 1 and 2. I wonder whether Ms Raphael can help.

Detective Chief Inspector Raphael: Often, circumstances do not come to our attention in the first instance but are reported through schools or social services or by other means. In the absence of the provision, if a young person explained that they had engaged in sexual intercourse with a peer of similar age, there would be no requirement for those organisations to alert us, and we would therefore be denied the opportunity to investigate. The provision means that there is a legislative requirement on the bodies to report the matter to us, which allows us to investigate.

Basically, if a set of circumstances was highlighted anywhere other than within the police service, the absence of the provision would mean that we would not hear anything about it and would therefore be unable to investigate.

Nigel Don: Thank you. I am with you.

The Convener: Cathie Craigie has a question on this important point.

Cathie Craigie: The change in legislation would mean that the 15-year-old girl that you gave as an example earlier would be a criminal. Under the existing law, and given the way in which you operate, is every 14 or 15-year-old girl who
becomes pregnant in Scotland reported to the police?

Detective Chief Inspector Raphael: Sorry, is every—

Cathie Craigie: Is every young girl under 16 who becomes pregnant reported to the police?

Detective Chief Inspector Raphael: They should be.

Cathie Craigie: Are they?

Detective Chief Inspector Raphael: As far as I am aware, they are.

Cathie Craigie: Perhaps we can get some more statistics or information on that.

The Convener: I think that there is some difference between the theory and the practicality. I very much doubt whether every girl aged under 16 who becomes pregnant comes to the attention of the police.

Detective Chief Inspector Raphael: As I said, they should come to the attention of the police, because underage sexual activity has taken place.

Temporary Deputy Chief Constable Skelly: It would not be different from any other crime. It is up to people to report incidents to us.

Cathie Craigie: You said in response to Nigel Don's questions that there was a concern that some organisations and agencies, such as schools and the health service, would not bring such issues to your attention if there was a change in the law. I am trying to get at whether incidents of underage pregnancy are being brought to your attention at the moment. I know that, at the moment, a young girl in that situation is not committing an offence, but, if a girl aged under 16 has become pregnant, somebody has committed an offence. I am aware of the way that the law stands. I hear the evidence that you are giving, but I cannot quite understand where your concerns come from if incidents are not being reported at the moment.

Detective Chief Inspector Raphael: I have no idea of the numbers that are not reported to us, but whatever that figure is, it would be significantly greater in the absence of the proposed provision in the bill.

Paul Martin (Glasgow Springburn) (Lab): I want to follow up Cathie Craigie's point about the criminalisation of the girl. What is the police's approach? Do they consider the welfare of the girl? You mentioned predatory behaviour. Would the identification of the girl, who might not have come to your attention before, assist in identifying and dealing with the male, whose behaviour might have been predatory?

Temporary Deputy Chief Constable Skelly: Yes. The fact that the police are involved means that an investigation is carried out and both parties come to the attention of the care authorities, for example through social workers or the children's reporter. The police approach the case from the point of view of the wellbeing of the victim. Given that both parties may very well have consented—section 27 deals with situations in which both parties consent—we would approach the case from the point of view that both parties are potential victims. We can investigate the circumstances and then treat the parties appropriately, depending on what the investigation tells us. That means that both parties are on our systems, which means that we should be able to care for them better in future, whether they come to our attention because of their continued predatory behaviour or because they become a repeat victim. Vulnerable people who put themselves into positions of vulnerability often do so more than once. The point is to be able to prevent that from happening in the future through some kind of appropriate intervention, although not necessarily a policing one.

The Convener: I invite Robert Brown to make a brief final point under this heading.

Robert Brown: The nub of this is which cases get taken forward for prosecution. You referred to 19 cases in the east of Glasgow. Why do some cases get prosecuted and others do not? Is it to do with the presence of predatory behaviour or some other element?

Detective Chief Inspector Raphael: That is a very difficult question to answer. It relates not just to the conduct itself but to social background or other factors that influence the circumstances. I apologise for not being able to answer your question with any great clarity, but it is an extremely difficult question to answer.

Robert Brown: But you are saying that there are wider issues than just the behaviour.

Detective Chief Inspector Raphael: Yes.

Temporary Deputy Chief Constable Skelly: When we report cases to the procurator fiscal, the ones that go forward for prosecution are those in which there is concern that there has been significant criminality, beyond what we would see in most other instances, when the matter might be better dealt with in another way.

The Convener: We will leave that point. It is a complex issue and we accept that you were put in a position of some difficulty.

Nigel Don: Does ACPOS support the distinction that the bill draws between sexual intercourse between older children and other forms of sexual contact between older children?
Temporary Deputy Chief Constable Skelly: We support section 27, which is the section to which you refer. The only part of it that we would put forward for further discussion is section 27(3), which refers to sexual activity other than using the mouth. The inclusion of activity using the mouth would require careful drafting because we would not want to criminalise kissing between older children, but by explicitly excluding it from the section we are allowing some types of sexual behaviour, such as oral sex, that we feel should be included. Although, broadly speaking, ACPOS supports the section—we have discussed the issue at some length—we think that that anomaly is a matter on which there should be further discussion.

The Convener: That seems a fair enough answer.

Nigel Don: I presume that you would prefer section 27(3) to be removed and an exception to be made for kissing, as you and I would understand it.

Temporary Deputy Chief Constable Skelly: Careful drafting is required. We are happy to engage with those in the Scottish Government who are drafting the bill to establish what form of words might be better, but the solution would be something like the one that you suggest.

Bill Butler: Under what circumstances should consensual sexual intercourse between older children be the subject of criminal proceedings? Do you have a view on that, or, as you stated earlier, is it your view that it is up to the procurator fiscal—in other words, you present the evidence and the procurator fiscal takes the view?

Temporary Deputy Chief Constable Skelly: You have answered your own question.

Bill Butler: I want you to answer my question, as I have a small element of doubt in my mind. Can you allay it?

Temporary Deputy Chief Constable Skelly: It is for the procurator fiscal and the Crown to decide on prosecutions and how they go forward. We report the evidence as it is presented to us. I could foresee that when there is repeat offending we would be strong in our view that the matter should be dealt with by the criminal justice system but, ultimately, it is for the Crown to decide.

Bill Butler: Do you think that only in exceptional circumstances will consensual sexual intercourse between older children be the subject of criminal proceedings? You said earlier that you need the ability in legislation to intervene or investigate on the basis that, as a result of your investigation, although you will pass the case on to the procurator fiscal, other arrangements can be made to protect the child in question.

Temporary Deputy Chief Constable Skelly: Absolutely. There needs to be the ability to intervene and I foresee that, in sexual circumstances, it would result in conviction.

Stuart McMillan (West of Scotland) (SNP): Some of the issues were touched on earlier, but I am keen to clarify a couple of points. I come back to the extension of the criminal law to girls under the age of 16. Do you see any practical difficulties being associated with the extension of the criminal law?

Temporary Deputy Chief Constable Skelly: I do not, but perhaps my colleague might.

Detective Chief Inspector Raphael: No, I do not. It is probably only right and proper that the law is gender neutral in that respect and that there is equity between boys and girls. I do not anticipate any practical difficulties in the investigation process.

Stuart McMillan: Do you see any argument for treating young men and young women differently?

Temporary Deputy Chief Constable Skelly: I do not. ACPOS welcomes the fact that the bill broadly addresses gender issues and we support the move to address the apparent and real gender imbalance in current law.

Stuart McMillan: Your submission highlights section 29(3), on age proximity. You say that the section sets out “straightforward, unambiguous parameters that are easily understood”.

Temporary Deputy Chief Constable Skelly: As far as anything is straightforward and unambiguous, yes.

Stuart McMillan: Indeed. Surely making 16 the age of consent would be unambiguous and more straightforward than what is suggested in section 29.

Temporary Deputy Chief Constable Skelly: I am not entirely sure that I understand what you mean because the legislation attempts in a coherent way to set out various age limits and types of offence that are committed and the reasons behind that. Section 29, “Defences in relation to offences against older children”, attempts to be very clear about the position when there is a two-year age difference between the parties involved and so on. I am not sure whether I understand what you are saying.

Stuart McMillan: It could be suggested that section 29 would allow sexual activity to take place even though one of those involved is under 16, although they will be in the older child category. If the section were not included in the bill, the bill
might say that the age of consent is 16 and there should be no exceptions, so if anyone has sex with someone under 16, they should face the full force of the law. It could be suggested that section 29 dilutes the law and reduces the age of consent.

Temporary Deputy Chief Constable Skelly: Thank you for helping me to understand. The bill attempts to introduce checks and balances in how the legislation should be implemented. It provides an opportunity for balance in that society would take the view that someone who is significantly over the age of 16 should be in a position of greater responsibility and understand that the person with whom they are going to have sexual activity should be 16 years of age, but when someone is close to the age of 16, it is reasonable for them to make the defence that they believed that the other person was their age. Section 29 is proposing that the age at which such a defence is reasonable should be within a two-year window. Our view is that that offers an appropriate balance to criminalising the behaviour. If there is a sea change of view that says, "Well, no, there should be no balance; there should be a cut-off at 16 and that's it," that is for a group beyond the police to decide. However, it seems to meet the test of reasonableness to allow the defence to be put forward if the people involved are within a certain age range. As with all statutory defences, the one in section 29 is intended to introduce a balance to the legislation.

The Convener: The final question will be on abuse of the position of trust.

Paul Martin: I note from ACPOS’s submission that you welcome

"the provision in the Bill to extend the offences relating to abuse of trust from under 16 year olds to those under 18 year olds."

However, you state that there are persons

"who have attained the age of 18 but who are nevertheless extremely vulnerable".

Which vulnerable groups do you refer to?

Temporary Deputy Chief Constable Skelly: Our point is that a number of people who have reached the age of 18 remain in the care system and are still highly vulnerable. It is necessary to set an age limit at some point; we are not suggesting that the age limit should be set at 19, 20 or 21, for example. Rather than proposing that the age limit in the bill be changed, we are simply making a general observation that, as I have said, a significant number of 18-year-olds remain in the care system. It might well be that the Protection of Vulnerable Groups (Scotland) Act 2007 provides an opportunity to deal with the issue in a different arena in a different way. We merely comment on the position rather than put forward any hard-and-fast change.

Paul Martin: I want to clarify which vulnerable groups you refer to. Section 35 mentions specifically the abuse of trust of persons who are mentally disordered. Do you have in mind other vulnerable groups that you did not mention in your submission?

Temporary Deputy Chief Constable Skelly: I have no more detail. We would welcome the opportunity to clarify the detail that lies behind what we said in our submission.

The Convener: There are three outstanding matters to be dealt with in correspondence—you have a note of them. The clerk will give you precise notification of the statistics that we would like to be provided with.

I thank Mr Skelly and DCI Raphael very much for their attendance, which has been extremely useful. We will have a brief suspension to allow for a changeover of witnesses.

11:07

Meeting suspended.

11:08

On resuming—

The Convener: I welcome the second panel, which comprises Professor Pamela Ferguson from the University of Dundee, James Chalmers from the University of Edinburgh and Professor Michele Burman from the University of Glasgow. We have received submissions from some members of the panel. We will move straight to questions. I repeat my request to the previous panel: answers should be as succinct as possible.

Stuart McMillan: Good morning. Mr Chalmers and Professor Burman suggest that further changes to the law beyond what is proposed in the bill will be necessary if conviction rates in cases of rape or sexual assault are to improve. In general, will the bill have any positive effects?

James Chalmers (University of Edinburgh): It is reasonable to say that simply clarifying the definitions of the relevant offence should ensure that there is less possibility of a jury being misdirected, for example, which might be helpful. I do not envisage any detrimental effects coming out of the bill. All told, I simply do not envisage there being much effect one way or the other.

Professor Michele Burman (University of Glasgow): I think that the bill will have a positive impact. In particular, it marks an attempt to place existing common-law and statutory sexual offences in a single act, and represents an important attempt to bring clarity into this area of law. The provision of a statutory definition of consent is important, because it brings much-
needed clarity, and will be a positive impact of the bill. One of the previous witnesses referred to the centrality of consent in rape cases and other cases of sexual assault. Consent is, indeed, a central part; it is at the heart of sexual offence cases. Having a clear understanding of what consent means will be especially helpful to juries, as well as to complainers and, dare I say it, to the accused.

**Professor Pamela Ferguson (University of Dundee):** I agree. The bill is to be welcomed because it provides clarification. However, more needs to be done on the law of evidence, such as sexual history evidence. That needs to be looked into next. In addition, there is a greater role for education, particularly in schools, about what we mean by rape and sexual offences. We must try to get across to young people that it is never acceptable to have sexual intercourse with someone who does not welcome it.

**The Convener:** That leads us to the second question that we would like to pursue, via Cathie Craigie, on the definition of rape.

**Cathie Craigie:** Good morning to all the panel members. The bill makes it clear that only a man can be guilty of rape, although the victim can be a man or a woman. Do the witnesses support that limited gender neutrality?

**Professor Burman:** Yes. I support the view that penile penetration is a crucial element of rape. I think that I said in my written submission that rape is a powerful and weighty word that taps into complex symbolic meanings. It conveys in specific terms the nature of the offence and denotes a specific type of wrong, with characteristics that are quite distinct.

**Cathie Craigie:** That is clear.

**James Chalmers:** It is fair to say that penile penetration is a crucial element of rape. I think that I said in my written submission that rape is a powerful and weighty word that taps into complex symbolic meanings. It conveys in specific terms the nature of the offence and denotes a specific type of wrong, with characteristics that are quite distinct.

**Cathie Craigie:** That is clear.

**Professor Ferguson:** I agree. Women could be liable art and part if they became involved in rape. However, for the principal offender, it is appropriate that rape is defined as penile penetration.

**Cathie Craigie:** Over the past few weeks, the committee has taken evidence from a number of different interested parties who have suggested that it should be considered rape if a perpetrator abuses someone with an object. Can you comment on that? I do not know whether you have read any of the evidence that we have taken over the past few weeks, but it has been powerful.

**Professor Ferguson:** There might be merit in having a separate offence of penetration with an object. Currently, that offence is included in section 2 as part of sexual assault. However, it is a serious form of sexual assault and, for the point of fair labelling and having previous convictions reflect the gravity of the offence, having a separate offence has merit.

**Professor Burman:** I agree. The insertion of an object into the anus, vagina or other part of the body is extremely brutal sexual exploitation and a violation that can be as devastating as penile penetration and should be treated as no less serious a crime than rape. I support the proposal to have a separate offence that is distinct from sexual assault and equivalent in seriousness and maximum sentence to rape.

**James Chalmers:** I have nothing to add, save to say that any offence involving an object would obviously have to be gender neutral in a way that the offence of rape is not.

**Professor Burman:** I agree.

**The Convener:** We turn now to consent and reasonable belief.
understanding, rather than any statutory test that is given to them. I am not sure that that situation would be altered terribly much by leaving out "consent", as I think that such offences are still understood as non-consensual offences, and that understanding would permeate any discussion among jurors.

**Professor Burman:** I largely agree. In Victoria, in Australia, where "free agreement" is used, the fact that someone did not do anything to indicate their free agreement is enough to show that intercourse took place without it. That is the kind of direction that is given by the judge to the jury as a way of clearly explaining the idea of free agreement. There might be scope for the bill to incorporate something like that. The directions to the jury need to be clear about what is meant by "free agreement".

**Bill Butler:** Are you otherwise content with those words being used?

**Professor Burman:** Yes. The term has lots of advantages, especially when compared with the situation in England and Wales. The term is simple and succinct.

**Bill Butler:** Do you agree with Professor Ferguson's concerns about the use of "consent"?

**Professor Burman:** Yes. I had not thought about the issues that Professor Ferguson raised, but, having listened to her, I feel that there is something to be said for her view.

**Bill Butler:** Do you agree with Professor Ferguson that "consent" should be excluded entirely and that it should be replaced by "free agreement"?

**Professor Burman:** Yes. I can see that "consent" could lead to confusion.

**Robert Brown:** I would like to pursue the question of prior consent in sections 10(2)(a) and 10(2)(b), which has been the subject of some criticism, particularly from Professor Burman and other witnesses. I would like to be clear about the principles behind this matter. Is the objection that people should not be allowed to make a choice in advance in that respect? Is it that the idea of prior consent might allow spurious defences to be raised? Is there some other reason? It would be useful to clarify this matter in relation to the point about sexual autonomy.

**Professor Burman:** If the notion of prior consent is introduced, it will make rape very hard to prove. Rape is already extremely hard to prove, but the Crown would need to disprove the existence of prior consent in any trial. That goes against the philosophical underpinnings of the bill, which are based on sexual autonomy and the idea that a person can withdraw their consent at any time. The notion of prior consent is problematic if, at the same time, there is a recognition in respect of sexual autonomy.

**Robert Brown:** What happens under the current law when there is some suggestion that people gave consent at an earlier stage? I assume that that must arise from time to time.

**Professor Burman:** It arises a lot. Consent is at the heart of all sexual offence trials.

**Robert Brown:** Are you suggesting that the provision relating to prior consent be removed as a complicating factor or that it be amended?

**Professor Burman:** I would remove it.

**Robert Brown:** Would that cause any problems? What would be the effect of removing the provision?

**Professor Burman:** I do not think that it would cause any problems, but I defer to my criminal law colleagues on the matter.

**The Convener:** The issue of prior consent would arise in only a small minority of cases, when a person was insensible through either drink or drugs. It would not arise in every case.

**Professor Burman:** You are quite right.

**Robert Brown:** The bill provides no guidance on when a person is too drunk to consent to sexual activity, which is a complex issue. How should we deal with that? If prior consent is removed, will we criminalise something that is probably a common activity between adults who have had too much to drink, and one that is, arguably, not criminal?

**Professor Burman:** I can base my answer only on my empirical research in the area. At the moment, many rape cases are characterised by one or other party having had drink. There are endless debates in court about the amount that has been drunk and the extent to which someone is intoxicated. Often, such evidence is introduced to suggest that a woman is of a particular character, has a particular disposition and leads a particular kind of lifestyle, and opens the door to attacks on her credibility and character. There is a danger of opening the floodgates to discussions about character in relation to drink.

**Robert Brown:** I see that, but the central issue is that people have sexual relations after one, other or both parties have had too much to drink. That is a practical human situation with which we and the courts must deal. You say that character issues come into the picture. If we set aside such procedural matters, what guidance can you give us on how we should deal with the question whether people are too drunk to give consent and the issues that surround that?
Professor Burman: I am unable to answer the question just now. If you give me a moment, I will think about how to do so.

Robert Brown: Do your colleagues have any thoughts on this common and complex issue? If we set aside the procedural implications and character issues, there is still a central point with which we are often required to deal. We need clarity on when conduct is and is not criminal.

The Convener: Professor Burman, we have all found ourselves in your position from time to time. Feel free to respond to the question later, when you are able to answer it.

Robert Brown: Do Professor Burman’s colleagues have thoughts on the matter?

James Chalmers: There may be little that we can do. It is difficult to lay down a precise test of when someone is too drunk to consent. In cases involving alcohol, it is inherently difficult to establish the precise circumstances and just how drunk someone was. I suspect that we can only reinforce the general test—that for sexual activity to be lawful there must be free agreement in all cases. That requirement is in no way diminished by the fact that someone has taken drink—drink is not a licence to exploit someone.

Robert Brown: That is a helpful comment. Do the definitions in the bill need to be changed to bring about the position that you describe?

James Chalmers: It is purely a matter of public education. I am not sure what can be done in the bill in that regard.

Robert Brown: Professor Ferguson, do you have any thoughts on the issue?

Professor Ferguson: Section 12 refers to the accused’s belief as to whether a person consented and states:

“regard is to be had to whether the person took any steps to ascertain whether there was consent”.

Presumably, if a woman is extremely drunk, it behoves the man to take at least some steps to find out whether she is past the point of being able to consent.

Robert Brown: That is helpful. Professor Burman, do you have any further thoughts? I will not press you if you have nothing to add.

Professor Burman: I agree with what has been said on the accused being requested to state the steps that he took to determine free agreement.

Robert Brown: I will move on to section 12. The bill tries to make the approach to consent objective rather than subjective, which most people accept is a satisfactory approach in principle. However, Mr Chalmers and Professor Burman have both questioned whether the bill will achieve that aim. Will you elaborate on your concerns and how we might deal with the question of reasonable belief against the background of trying to make the approach as objective as possible?

Professor Burman: Currently, consent requires an honest belief by the accused, regardless of how reasonable or otherwise that belief is. As you say, that enables a subjective interpretation to be applied, and it has allowed the accused in trials to maintain that the victim’s behaviour amounted to what he believed to be consent.

The Crown currently has to prove that the accused knew that the woman did not consent, but there is no onus on the accused to set out what steps he took to ascertain whether the complainer consented. The current position means that trial proceedings are far likelier to focus on the actions of the complainer than on those of the accused, who is under no obligation to give evidence, while the complainer may be forced to undergo an intrusive secondary ordeal in the court room.

I support the move away from the subjective approach that is currently taken to establish mens rea. The introduction of a reasonable belief provision, whereby the accused must have reasonable belief that the victim consented to the act, is welcome. In a sense, the bill provides for a greater focus on the responsibility of the accused to demonstrate the steps that they took, but for me it is difficult to conceive how the accused could demonstrate that without taking the witness stand to describe those steps.

Robert Brown: Do you suggest, therefore, that there should be the right to draw an inference from the accused’s failure to explain his position in suitable instances? I know that you touched on that in your submission.

Professor Burman: Yes, I would support the bill making it more explicit that some inference may be drawn from the accused’s refusal to outline the steps that he took to ascertain free agreement.

Robert Brown: Mr Chalmers, do you agree with that approach? If so, do you have any fears about it moving the burden too far?

James Chalmers: At present, where the circumstances are crying out for an explanation, the jury can be directed to take into account the accused’s failure to give evidence. However, it would be inappropriate simply to direct a jury that it could draw certain inferences from the fact that the accused had not given evidence, when the accused is entitled to do so.

As far as I can tell, the current law on the inferences that may be drawn from silence is not often invoked by judges in charges to the jury. If there were a desire to use it more often in such cases, it would be helpful to include something
specific in the statute. I am not entirely sure what form that provision would take, although I could consider it.

The Convener: Are you saying that there might be compliance problems with article 6 of the European convention on human rights?

James Chalmers: I doubt that there would be compliance problems if the rule were carefully drafted. At present, judges have discretion in appropriate cases to direct the jury that it may draw inferences from the fact that the accused has not given evidence when there are circumstances that cry out for an explanation. That is compatible with article 6.

The Convener: But are we not talking about going a bit further?

James Chalmers: If we went as far as saying that simply not giving evidence would count against the accused, it would cause problems with article 6.

Robert Brown: I have one final question. Is it possible or desirable to deal with that issue in the bill and in the context of the particular offences rather than consider it as part of a more general review of the laws of evidence and procedure?

James Chalmers: It would be far preferable to deal with the issue as part of a general review of evidence and procedure, although it might be some time before that opportunity presents itself.

Robert Brown: I accept that.

11:30

Nigel Don: I would like to pursue that point to its logical conclusion. Is there scope within the bill to say that the accused is duty bound to provide evidence in the particular circumstances of a rape or serious sexual assault accusation, or are we not able to say that in the context of human rights law?

James Chalmers: We could not say that. We can have regard to the failure of the accused to put forward an explanation, but we cannot drag them on to the stand to give evidence.

Nigel Don: Not no way.

James Chalmers: Not no way is the broad answer.

The Convener: We move to the question of those who are euphemistically described as older children.

Paul Martin: Professor Temkin, in her written submission, objects to the use of the term "older children" on the basis that

"A child is a child" and that the use of the term

"undermines the general message that sex with all children under 16 is against the law."

Professor Ferguson: I think that Professor Temkin is right, but it would be better to talk about children aged 12 and under on one hand, and children aged 13 and older on the other. It would be preferable for the bill sections to have those headings.

James Chalmers: I do not share that concern. Professor Temkin has made a similar point in the past about the use of terms such as “consent” in relation to children. The concerns that she expresses fail to give sufficient weight to the distinction between consensual sexual activity and non-consensual sexual activity by children under the age of 16. That is a serious distinction, and to say that the matter is as simple as recognising that children under 16 cannot consent does not acknowledge the complexity of the situation, nor does it recognise the law as it currently stands, in which there is a very sharp distinction between those two areas.

Professor Burman: I support what James Chalmers says. The area is very complex.

Cathie Craigie: I will ask James Chalmers a couple of questions based on his submission, but I welcome comments from the other two panel members. Section 4 deals specifically with children. James Chalmers states in his submission:

“it seems to me that it is inappropriate to pass criminal laws unless we are prepared to enforce them. The criminal law is too serious a tool to be used simply to 'send a message'."

He also states:

“It seems to me strange that any Parliament would pass criminal laws which it wished prosecutors to refrain from enforcing.”

A number of witnesses who have written and given oral evidence to the committee agree that sexual intercourse and sexual activities among children under 16 are not generally good for those children. How should the Government and the Parliament reconcile that belief with the issue that James Chalmers rightly raises about passing laws that will never be enforced?

James Chalmers: Government has other tools at its disposal to put across the message that certain things are not a good idea. A lot of things that we all might do are not good ideas, but the Parliament has not yet proposed legislation to outlaw them. It is a matter of public education as much as anything else—I am not sure that there is an easy way to achieve that.
Criminal law is perhaps viewed as an easy educational tool, but we must be wary of patronising young children and assuming that they are not well aware that particular offences are not prosecuted. If children see that people regularly engage in certain activities and are not regularly prosecuted, they are not likely to take the legal message seriously. The danger is that they then might start to take other legal messages less seriously than they ought to.

Cathie Craigie: Do you have any thoughts on how the bill could be amended to address those concerns?

James Chalmers: The concerns could largely be addressed by taking the approach that the Scottish Law Commission proposed. I would not propose anything significantly different from what the commission had in mind. The possibility of referral to a children's hearing is a serious prospect, and I am sure that it would be viewed as such.

Professor Ferguson: I agree. The arguments are difficult, but I am persuaded by the evidence from people such as Kathleen Marshall. My worry is that, under section 27, in cases involving a pregnant 15-year-old, the police will have to treat her as a potential accused rather than as a victim. There will always be an allegation by the accused that the activities were consensual. The defence will be able to put it to that pregnant teenager that because she was worried about being prosecuted, she said that it was rape. Section 27 would open up all sorts of horrendous possibilities for girls to be accused of engaging in consensual activities that they did not agree to.

Professor Burman: I very much agree with that. As James Chalmers said, rather than make sex criminal, there are other opportunities for Governments to persuade young people not to indulge in sex. The issue is about providing easier access to appropriate advice and information. I support what Kathleen Marshall said the week before last about the need for a robust public health campaign that conveys a clear message that we do not condone sex for under-16s. That is a more appropriate route than criminalisation.

Cathie Craigie: My final question is for James Chalmers.

Many people have been waiting with great hope for legislation on how we address accusations of rape, so it is surprising that your submission states:

"It should not be expected that the Bill, if enacted, will do much—if anything—to affect the fact that the conviction rate in rape cases" —

I will not go on, but I think that you state that the bill will not affect the conviction rate, or am I misreading that?

James Chalmers: No, you are not misreading. It is probably just as well that you did not go on, because that sentence is badly worded and does not make much sense. I meant to say that the bill will not affect the conviction rate if we continue to express the rate as a proportion of the number of rapes that are reported to the police, as we often do at present. That is different from expressing the conviction rate as a proportion of the number of rapes that are prosecuted, which is a small fraction of the number of reported rapes.

My impression—it is no more than that—is that most rape cases turn on two different accounts of events being put to the jury. It is a rare case in which the prosecution and defence in essence agree on what happened, but are not sure whether it was rape. The new law will help in clarifying those boundary issues, but in most cases the question is whether the jury believes one story that is well on one side of the boundary or another story that is well on the other side. Tightening up the boundaries, as the bill will do, is not likely to make any cases that would have fallen on one side of the boundary fall on the other side in future.

The Convener: Is that sufficient, Cathie?

Cathie Craigie: Yes—that is food for thought.

The Convener: I thank the witnesses very much for their evidence. It was given with great clarity and very succinctly, which is greatly appreciated.

The committee will suspend briefly while we change the witnesses.

Meeting suspended.

On resuming—

The Convener: I welcome Professor Gerry Maher, professor of criminal law at the University of Edinburgh, who will give evidence in connection with his former duties as a commissioner of the Scottish Law Commission. We have read the commission’s discussion paper and report, which give the principles behind the proposals. We will proceed directly with questioning.

Nigel Don: Good morning, professor. The principles behind the bill were given in those earlier papers. Will you clarify for the committee what the principles of this reform of our law should be?

Professor Gerry Maher QC (Former Commissioner, Scottish Law Commission): There are a variety of interlocking principles, but first and foremost we are concerned about sexual
autonomy as a principle: the bill should both promote and protect sexual autonomy. Of course, the sexual autonomy principle has important implications for the provisions on consent.

Another fundamental principle is protection. There are people out there who are vulnerable to sexual exploitation and there are people for whom sex is not an appropriate activity. The law should be seen to protect such people.

We also had other aims. Clarity in law is an important aim for any law reform, and this is an area in which the law must be clear. We are talking not about a technical legal set of rules but an activity in which everybody has an interest. The law must be clear about what people are allowed to do and what is criminal.

**Nigel Don:** Are those principles present in the bill?

**Professor Maher:** I hope so. As I said, the protection and promotion of sexual autonomy require some sort of conceptual framework. That is what we had in mind when we considered the consent model. The bill contains a number of provisions on the protective offences. My hope is that the law will now be clearer. The present law, which does not define consent, is certainly much less clear than any other attempt—especially our attempt—on that fundamental concept.

**Nigel Don:** I will pursue the last question that I put to the previous panel. Will clarification and rewriting of the law change the number of convictions, or do you agree with the previous witnesses?

**Professor Maher:** I tend to agree with the previous answers. The conviction rate is a fairly complex issue that seems to me, however one interprets the problems, to involve many possible explanations and causes. Concurrently with the commission’s project, the Crown Office conducted a review of the procedures for prosecution and investigation of rape and other sexual offences. It seems to me that the Crown Office’s review will have as much impact—probably more than—as our project will have on the conviction rate.

I also think that there is value in the law stating things clearly; for example, there is value in the law making explicit the proper principles of sexual conduct. The commission took the view that many of our recommendations on the consent model would spell out what is proper and improper in terms of sexual conduct.

**Cathie Craigie:** Why did the commission believe that rape should continue to be defined as a crime that can be committed only by a man?

**Professor Maher:** We took the view that, in trying to separate out the different types of sexual assault offences, of which rape is one, it is important to make it clear that the law should reflect the specific type of wrong that has been done to the victim. It seemed to us that penetration with someone else’s sexual organ is a distinct type of wrong that should have its own offence, which should be a separate offence from other types of sexual assault, including other types of penetration.

11:45

**Cathie Craigie:** According to written and oral evidence that we have received from women’s organisations, the effects of being penetrated with an object can be just as bad—and, if we are talking about physical damage, can be worse, especially for women. What is your view on that?

**Professor Maher:** I totally agree. There is no suggestion that in confining rape to penile penetration we are saying that all instances of penile penetration are worse than other forms of penetration, or that there is some form of hierarchy in that respect. The question is how to find an appropriate label with which criminal law can refer to such conduct. Although all types of unwanted sexual penetration are horrible for the victims, we felt that being penetrated by someone else’s sexual organ seemed to be a distinctive type of wrongdoing.

Again, I emphasise that we are neither suggesting some form of hierarchy nor saying that penile penetration is always worse than other types of penetration, or that other types of penetration are not as bad as penile penetration.

**Cathie Craigie:** What is your view of the suggestion that there should, in this respect, be another offence of similar seriousness to the crime of rape?

**Professor Maher:** The commission originally proposed a set of three sexual assault offences: rape defined as penile penetration; sexual penetration not just with objects but with other parts of the body; and a residual category of sexual assault. For a variety of reasons, we changed our minds. However, section 2 still refers to the offence of sexual assault by penetration, which suggests that the legislation marks out non-penile penetration as a specific type of wrong.

One of our pragmatic reasons for including sexual assault of penetration within the broader category of sexual assault was to do with the point about maximum penalties. It seemed to us that it would be better to keep sentences for all types of sexual assault within the range of the possible maximum of life imprisonment. Technically, it might be more difficult to attach a maximum of life imprisonment to what might be termed bare sexual assault—in other words, non-penetrative assault—but locating sexual assault by penetration within
the broader category of sexual assault might have advantages.

Cathie Craigie: I do not know whether you have followed the evidence that the committee has taken, but a significant number of people feel that the bill will not fully cover their various areas of concern, nor will it protect many men and women out there. I have to say, however, that we do not yet have suggestions for amendments in black and white.

Professor Maher: Are you talking about sexual assault?

Cathie Craigie: Yes.

Professor Maher: As we have argued, there is an offence of rape—in other words, penile penetration. The bill also sets out four types of conduct covering a wide range of sexual assaults. The common law would remain in force for anything that would not be covered by sections 1 and 2 including, for example, assault under circumstances of indecency. If a person is assaulted as a result of being urinated on by someone else, that might not fall four-square within the categories of sexual assault—indeed, it could be argued that it does not fall within those categories at all— but the Crown could prosecute on the grounds of assault under the aggravation of indecency.

The Convener: I want to be quite clear about the potential penalties. The maximum penalty for rape is, of course, life imprisonment, subject to a punishment part. How, under the bill, would a case such as we had a few years ago, in which a baton was forcibly inserted into a woman’s vagina, be classified?

Professor Maher: It would be classified as assault.

The Convener: What is the maximum penalty that that would attract?

Professor Maher: Under schedule 1, the maximum penalty for a prosecution on indictment would be life imprisonment.

The Convener: So, the same maximum penalty will apply under each heading.

Professor Maher: Yes.

The Convener: I was anxious to clarify that.

Professor Maher: Let me make this absolutely clear. Section 1 rapes and section 2 assaults will carry a maximum penalty of life imprisonment. That will apply to all types of sexual assaults that are prosecuted on indictment.

The Convener: That was my understanding, but I was slightly vague about it. I think Nigel Don is similarly vague.

Nigel Don: Can you please clarify your point, Professor Maher? My understanding is that, under those circumstances, prosecution would proceed under section 2(2)(a), which concerns sexual penetration. You are suggesting that if that provision and all the words that are associated with it were removed to another section—which is what a lot of people have asked us to do—there would be a struggle to attach the same penalty to what remains in what is currently section 2. Is that your view?

Professor Maher: That is one consideration. There are conventions about maximum penalties for statutory offences. I am not saying that it would be impossible to argue for life imprisonment as a maximum penalty for the residual category of assault, but it seems to us that it would be easier, instead of making such distinctions, to have a general section 2 type assault that is constituted by four types of behaviour.

Nigel Don: Would it necessarily be a bad thing if that were to be the consequence? If we removed all the offences of penetration with objects or body parts to another section, would it be a bad thing if the residual sexual assault did not carry the same penalty? It is not clear to me that it should.

Professor Maher: That would give rise to the problem that was mentioned earlier of trying to avoid hierarchies—saying that one thing is always worse than another. From the victim’s perspective, a sexual assault that is not penetrative can still have a terrible impact. To be told that it is okay because they have not been raped or sexually penetrated does not bring comfort to the victims in that scenario.

The Convener: Okay. We turn now to the issue of consent.

Robert Brown: Let us return to the general point about free agreement. The clarification in the bill has been broadly welcomed. Is it possible for that definition to stand on its own without reference to the categories in section 10, which have been at issue?

Professor Maher: When you say “stand on its own”, are you asking whether we could do away with section 10?

Robert Brown: Yes.

Professor Maher: That is possible. However, we feel that an important role of the definitions in section 10 is to spell out to people who are contemplating sexual activity that certain forms of such activity in and of themselves count as rape or sexual assault. We feel that the law would not give a strong enough message if we left consent as defined in the general definition of free agreement.

Robert Brown: I am concerned that the whole issue looks very complicated, in terms of
directions to juries and that sort of thing. At the end of the day, we want something that is transferable into judicial language and comprehensible to a jury so that juries can make clear-cut decisions. Do you think that, in broad terms, part 2 allows for that?

Professor Maher: I think it does. The problem that arose in the state of Victoria, which a witness mentioned earlier, was that judges and prosecutors tended to treat the list of definitions as a checklist. They went through the checklist to see whether an offence fitted in with it. However, the definitions are meant to apply simply when the facts bring one of the definitions four-square within a case; they are not a checklist. A judge would not direct a jury by going through each of the definitions. In many cases, no particular definition will be relevant and the direction on what constitutes free agreement will be the important factor.

Robert Brown: You make the interesting point that there has been an example, in another jurisdiction, of a section 10 equivalent being treated as a definitive list, with other situations being difficult to consider.

Professor Maher: The list is not definitive in the sense that it covers the field of what constitutes free agreement; it is a non-exhaustive list of cases of lack of free agreement. In our report, we said that we looked at the experience in the state of Victoria when the new law first came into effect. We found that after some initial problems and misunderstandings there was, among the wide range of legal practitioners and judges, general acceptance that the new law was working. Our concern was that that would not be the case. You say that the provision seems to be complicated, but no problem was found in putting it into practice in Victoria.

Robert Brown: In that context, I assume that the key phrase is:

"without prejudice to the generality of that section".

Professor Maher: Yes—that is right.

Robert Brown: Significant concern has been expressed on the concept of prior consent. We are getting a sense that people view the provision as being somewhat theoretical and therefore difficult to apply to actual cases. In addition, we are hearing that it may, if it is applied, have adverse implications for the sexual autonomy point on which you place such emphasis. Having listened to and read the evidence, do you now consider that the view that is being expressed is reasonable or do you stand by the idea that prior consent continues to be relevant to the bill?

Professor Maher: We have to be careful about what we say in this regard. Most of the focus has been on section 10(2)(b), where I think the phrase "prior consent" is used. My worry is that the notion may get out that the law does not allow prior consent. I take the opposite view: there must always be prior consent. The focus of the commission’s message is that if no consent is given prior to a sexual act, the sexual act is a criminal act.

I am worried about the language of not allowing prior consent. The absence of consent prior to an act is what makes the activity criminal. Unless prior consent is included in the bill, there is no point in talking about withdrawal of consent, because withdrawal of consent presupposes that consent has been given.

What should emerge from the discussion on the bill is that the law requires consent to have been given prior to any sexual act. That said, discussion thus far has focused on the scenario that is embodied in section 10(2)(b). My concern is that the chopping away of prior consent may serve to obscure that focus and lead people to think that prior consent is not something they need—indeed, it may lead them to think that the opposite is the case. As I said, prior consent is an essential part of the definition of sexual offences.

I also worry about what would happen if section 10(2)(b) were to be removed. If parliamentarians want to impose time limits on the giving of consent, you should spell that out in statute. That said, I suggest that that would not be a wise road to take, because it could lead to questions on whether the consent that was given one hour prior to sexual activity had expired or whether that which was given five minutes beforehand remains. It would serve only to miscapture the social dynamics of sexual activity. I see nothing wrong in the concept or principle of people giving consent prior to the sexual act taking place—even some time prior to it.

Robert Brown: From the evidence that we have heard, I sense that people view the provision as an artificial concept. One difficulty is the distinction between consent and prior consent. Also, people are not signing up to a document or saying hours in advance of the act taking place exactly what will happen later on, after they have fallen asleep or whatever. Do you accept the artificiality of the concept?

Professor Maher: I do not see what is artificial about the scenario. By way of illustration, I will set out a scenario and ask the committee to reflect on whether it is so statistically freakish that the law can ignore it. A couple go to bed and one says to the other, "If you are first awake, can you wake me in a nice way?" We could say that their having said so does not matter and we should make that activity illegal, but for me that would be an infringement of sexual autonomy. Removal of
section 10(2)(b) would not solve the problem, but would simply move the focus to section 9. If the bill were to be passed with section 10(2)(b) absent, this question would arise: is it an offence of rape in Scots law for a man to have intercourse with a woman while she is asleep? The answer should depend on whether she has consented to having sex in that state. In my view, the problem will not go away if we remove the provision in section 10(2)(b).

12:00

Robert Brown: Rightly, you say that it goes back to the general definition of consent. Is that not a more flexible and satisfactory way of tackling the issue than the slightly artificial provision in section 10(2)(b), which seems to imply signed documents and so on?

Professor Maher: The implication that signed documents are required is a criticism that can be levelled at the whole consent model, not simply at this definition. My point is that going back to section 9 will not give us an answer. If the question were asked whether it is rape in Scots law for a man to have sexual intercourse with a woman while she is asleep, what would the answer be? In my view, it is better for the definition to be spelled out.

There is another reason why the commission wanted the definition to be included in the bill. Historically, Scots law has had problems dealing with the sleeping person; other legal systems have had the same problem. In some senses, the issue is slightly illogical, but there is a superficial logic. It is true to say that a person who is asleep cannot give consent, but it is a fallacy to say that a person who is asleep cannot not give consent, and that they are therefore either consenting or not consenting. Scots law should spell out that having sex with a person who is unconscious or asleep is rape or sexual assault, except in one defined circumstance—when they have consented to having sex in that state.

Robert Brown: Would spelling out the issue in that way assist juries that are faced by the practical and varied circumstances in which such situations arise?

Professor Maher: For section 10 to be brought into effect, the victim would have had to be asleep or unconscious. The answer is that sex with such a person would be assault or rape unless the exception applied; in most cases, it would not. We are talking primarily about cases in which men find women asleep in the street because they are drunk. In such situations, there has been no previous contact between those persons, so the law should spell out that that is rape.

Robert Brown: You have made your position clear.

My final question relates to section 10(2)(c), which deals with threats of violence. The provision applies to situations in which the issue of historic abuse has been raised. Does the current wording deal adequately with that? Some witnesses have expressed concerns about that point.

Professor Maher: It was the commission’s intention that historic abuse should come into play in such circumstances. The key point about section 10(2)(c) is that it relates to situations in which there is a causal link between violence and consenting or submitting to sexual activity. If the violence took place far back in time, it may be more difficult for the Crown to show that there is such a causal link, but our intention was that the definition would apply to historic violence or abuse.

Robert Brown: We are dealing with a serious criminal offence, so it is important to establish the existence of a causal link between violence and agreeing to sexual activity. We need to do more than establish background circumstances.

Professor Maher: Establishment of a causal link is important because if the Crown proves a case under the definition, that is the end of it—there is no defence in relation to consent, because it has been proved that there was no consent.

The Convener: Are you aware of any cases under the old clandestine injury charge in which the defence was that consent was granted before sleep or intoxication took over?

Professor Maher: That is a peculiar rule. Case law provides no guidance on the scope of clandestine injury. The offence still exists, but it will be removed.

The Convener: It is historical to the extent that it is no longer used by the Crown.

Professor Maher: Yes.

Bill Butler: Section 12 of the bill provides that, in determining whether a person’s belief about consent was reasonable, “regard is to be had to whether the person took any steps to ascertain whether there was consent”. How do you envisage that section working if the accused declines to give evidence?

Professor Maher: I will outline the scenario that we had in mind. If the bill became law and the law spelled out that there would be an inquiry about what steps, if any, the accused took to ascertain consent, we hope that the proper police procedure would always be to ask about that when the accused was being questioned. In interviewing the suspect, the police could say to him that so-and-so had said that the accused had raped her. He may deny the whole thing and say, “Yeah, I had sex, but she agreed.” We would hope that, as part of
their standard questioning, the police would then say, "Okay. What steps did you take to make sure that she consented?" The suspect would either answer that question or he would not answer it, but the interview would be part of the Crown evidence.

**Bill Butler:** I accept that, but what if the suspect still declined to give evidence, despite that? Would it be possible, as was suggested earlier, to draw an inference if he refused to take the stand?

**Professor Maher:** The response could be, "Well, what would you think?"

You are perhaps asking two questions. One is whether a factual inference could be made, having heard all the evidence—including evidence to the effect that the accused refused to answer the police and refused to go into the box—that no reasonable steps were taken to ascertain consent and that no attempt was made to do anything. That is one thing, and I dare say that juries might consider that in appropriate cases. However, if you are asking whether the law should try to spell that out, which is a separate question, I agree with what James Chalmers said earlier about possible difficulties with the right to be silent under the current law in respect of the European convention on human rights.

**Bill Butler:** Do you agree with Mr Chalmers that the ECHR could be contravened?

**Professor Maher:** Yes—I think there are potential problems with the ECHR.

**Bill Butler:** Okay. That is clear.

May I move on to ask about part 4 of the bill, which is on children, convener?

**The Convener:** That is fine. I appreciate that drafting difficulties are involved, but we may have to reconsider that issue.

**Professor Maher:** Yes. It is essentially a drafting issue. The policy was certainly to apply the consent provisions to attempts.

**The Convener:** That is fine. We now turn to children and young persons.

**Bill Butler:** The bill draws a distinction between young children and older children, but it has been suggested that that distinction undermines the law's protective dimension. Children are, after all, children—that is Professor Temkin's contention in her written submission. Does that aspect of the bill undermine what would otherwise be a clear message that it is not right to engage in sexual activity with or towards a person under 16?

**Professor Maher:** There is a danger of making things worse by simply treating all people under 16 as children. The law should make a distinction, between, on the one hand, an older man having sex with a seven-year-old girl and, on the other, an older man having sex with a seemingly consenting 15-and-a-half-year-old girl. Those are not the same scenarios, and the law should draw a distinction to reflect that difference.

We draw such distinctions in other areas of law, including in relation to sexual offences against children. I accept that there has to be a cut-off point, and the message must be that sex with young children is wrong—end of story, full stop. There is an age below which children are not appropriate for sexual activity, and the law must make that clear. However, the scenario is more complicated when children are maturing—not yet fully mature but developing—so the law has to recognise that. That is why, under the current law, we have different rules for under-13s and over-13s. There are important social and moral distinctions that the law should reflect.

**Stuart McMillan:** The Law Commission’s original proposals were to decriminalise all consensual sexual conduct between young persons aged over 13 and under 16. First, why did the commission support decriminalisation? Secondly, what are your views on the bill’s position on sexual relations between older children? Thirdly, would the move proposed by the commission not have reduced the legal age of consent by the back door?

**Professor Maher:** I will try to take those questions in the right order; you can prompt me if I forget one.

I was asked earlier about our guiding principles. One that I failed to mention was that the criminal law is not the only or always the most appropriate means for social intervention. As other witnesses
have said, criminal law sends out a particular message to society, but the law provides for other ways of dealing with social problems.

When we consulted on the question of what to do with teenagers in the 13-to-16 category who have consenting sex with each other—teenagers is not the correct technical term, but I will call them that—it struck us that there was a social problem, which other witnesses have explained to the committee. We asked ourselves whether the criminal law was the most appropriate method for social intervention. That problem has plagued legal system after legal system, but we think that we have the answer in Scotland—the children’s hearings system.

To us, there does not seem to be a problem on which we need to send the legal message that such behaviour should attract the stigma of the criminal law. Rather, it is a problem of the social and moral development of children, and the appropriate intervention for that is through the hearings system.

Your other question was about lowering the age of consent. We must make it absolutely clear that the decriminalisation provisions would apply only when both parties were under 16. The age of 16 would still be the age of consent for having sex with someone over the age of 16. The age of consent would not be abolished or lowered.

Stuart McMillan: Some of the evidence that we have received has suggested that such a move could be construed as lowering the age of consent.

Professor Maher: It would lower the age of consent only for sex between teenagers. The message would have to be put out that it was still an offence for somebody over 16 to have sex with somebody under 16. The age of 16 as the age of consent would still exist in general law. The question is how to deal with sex between children under 16, who are by definition the parties to be protected—the age of consent is a protective provision. How do we deal with a scenario in which the two parties fall within the category of those who must be protected because they are both under the age of 16?

12:15

Stuart McMillan: What are your views on the bill’s position? Are you happy with it?

Professor Maher: In relation to sex between teenagers?

Stuart McMillan: Yes.

Professor Maher: I adhere to what the commission said in its report, which is that such matters are best dealt with through a welfare intervention by the children’s hearings system. I think that the bill represents the worst of all worlds, because it will extend decriminalisation by listing a wide variety of what would otherwise be offences, but will keep criminal liability for certain acts, which I will not say have been randomly picked, but it is difficult to see where the line has been drawn. Moreover, it does nothing to establish a new ground of referral to the hearings system—that children are engaging in sexual behaviour. To me, that is the worst of all worlds, from the perspective of the position that we in the commission arrived at.

The Convener: Does Cathie Craigie want to pursue that? We have been given a fairly clear answer.

Cathie Craigie: That is fine. I would love it if we had more time to debate the issue with Professor Maher, who has made his position pretty clear, but there is one point that I would like to ask about. We have heard evidence that it is not good legislative policy to enact criminal law provisions that it is broadly agreed will be enforced only in exceptional cases. Another consideration is that the European Court of Human Rights has held that a state cannot claim that the retention of criminal sanctions is necessary while indicating that, ordinarily, there is no intention that the criminal law will be applied. How can we square that with what the bill proposes?

Professor Maher: As a law reform body, it seemed to us that we would not be fulfilling our role if we recommended that the law should change but asked for it not to be enforced. That did not seem to be a good way of making new law.

We should think through the impact of the bill, especially on children, if it goes through in its present form. We will have to explain to teenagers what the law is, which will be complicated. We will have to tell them not to worry, because the bit of the bill that criminalises their activity with their boyfriend or girlfriend will not be applied to them—although it might in some cases. What message will children take from that? There is a serious danger that children will think that there is no point in listening to the law because although they are told that it is the law, they can ignore it. It would be unwelcome for anyone, especially children, to gather that they can ignore the law because somehow it will not be applied to them.

It would be far better if the law said that children who engage in sexual behaviour could find themselves subject to consideration by a reporter to the children’s hearings system. That would send a message to children that they should stop and think, because the hearings system, rather than the criminal law system, could intervene in what they were doing.
The Convener: Let us continue to examine the issue of responsibility through a question from Stuart McMillan.

Stuart McMillan: In the context of the criminal responsibility of older children, will the extension of the criminal law to girls who are under 16 present any practical difficulties as regards enforcement? Are there any circumstances in which the law should treat young men and young women differently in that regard?

Professor Maher: I want to ensure that I understand your question. Are you asking whether the bill's provisions on teenage sex would be difficult to enforce?

Stuart McMillan: Yes.

Professor Maher: I think that they would. I have enough problems trying to explain the law to law students. In difficult situations, there comes a time when people just have to make their minds up. The commission made its mind up that the law would be in a very unsatisfactory state if you brought in such phantom quasi-offences, which give the appearance of criminal offences but are not really criminal because they are being decriminalised by another route: Crown Office discretion. That makes things messy. If it is decriminalisation that you want, decriminalise; but if you want to punish children through the criminal justice system and give them convictions for rape and sexual assault, put the law in place and give the Crown Office the understanding that those cases must be prosecuted: the police must investigate all such cases and the criminal courts must listen to them all. Decriminalisation by the side door is inappropriate. If decriminalisation is what is wanted, the law should state that.

That is not a direct answer, but it would cause practical problems if there were a law on the books in respect of which the police did not quite know what they were to investigate and the Crown Office was not told how it should exercise discretion.

Robert Brown: You indicated that the bill does not allow referral to the children's hearings system. Is that correct? Section 27 creates an offence and a child can be referred on offence grounds. Most offences committed by people under 16 would not go to the courts—they would go to the children's hearings system. Leaving to one side the broader matter, does the bill not continue that pattern?

Professor Maher: I meant to say that the bill does not add a new ground for referral, which would be that children have been engaging in sexual activity. Other witnesses have mentioned that there are problems about the use of the criminal ground of referral anyway, as there is a higher standard of proof and the need for corroboration. If the concern that leads to any teenage child being put before a hearing is that they are engaging in sexual activity, a much more straightforward way of achieving their appearance at a hearing is to have that as a ground rather than relying on the peripheral cases caught by section 27, which must then be processed through another ground of referral. Those are the very children that we want to go through a hearing, but they have to go through a different ground of referral, which might not be as easy to establish on the facts.

The Convener: I will bring us back to an important point, on which we want to be clear. In so far as the law is concerned, rather than in respect of a referral to the reporter or by the reporter, can you see any circumstances in which two people under the age of 16 have sex and one is charged but the other is not? If the provision is retained, would there have to be consistency in that both of them would be charged?

Professor Maher: That highlights one of the practical problems. If both children are in need of protection, but the law says that both are committing an offence, why should we distinguish between them? That is a good example of the practical difficulties to which section 27, in its current form, would give rise.

The Convener: We will now turn to what appears to be a sentencing anomaly.

Paul Martin: Schedule 1 to the bill sets out the penalties for offences introduced by the bill. Can you advise me of any circumstances in which it would be appropriate to impose a fine for rape or for the rape of a child?

Professor Maher: No.

Paul Martin: I understood that such fines were one of the Law Commission's recommendations.

Professor Maher: We were trying to clarify a technical anomaly, which is that there are certain offences for which there is no option of a fine. It is difficult to think of circumstances in which rape would attract a fine as a sole penalty, but we understood the law to be that if there were a very wealthy rapist, the law could put that person in prison for a very long time but could not fine him. We did not envisage that a fine would be the sole disposal for rape or rape of a child. It would be an additional penalty.

Paul Martin: You have more experience in these areas than I have, Professor Maher, but schedule 1 says that, for rape, the “Maximum penalty should be "Life imprisonment or a fine (or both)". Are you advising me that it is not the case that, for the rape of a young child, the penalty could be a fine?
**Professor Maher:** We did not envisage that the rape of a child would lead only to a fine as a form of disposal. We were more concerned about ensuring that, in addition to imposing a period of imprisonment, the court fined the accused, if it was so minded.

**Paul Martin:** So the paragraph that I quoted is wrong.

**Professor Maher:** This may be a drafting point.

**Paul Martin:** The phrase “Life imprisonment or a fine” is repeated throughout schedule 1. You will appreciate that, if there is a drafting error, it is repeated.

**Professor Maher:** It may be a technical drafting error. Our instructions were to ensure that the courts had the power to fine, in addition to the power to imprison. The bill’s draftsman drafted that in the way that members can see. There may be technical drafting reasons for that that I do not know about.

**The Convener:** We will have to pursue that point.

**Nigel Don:** What circumstances was section 3, which has to do with sexual coercion, intended to cover? I do not think that we have heard anything from anybody about that. Does the section refer to something involving a third party or is it intended to cover two people?

**Professor Maher:** It could apply to a range of circumstances. An example was given to us in the consultation. We were asked what offence would be committed under current law if a man forced a woman to have sexual intercourse with an animal for pornographic purposes or even just for purposes of sexual gratification. The law at present is not entirely clear on that. If a man forced a woman to masturbate herself for his pleasure, what offence would be committed? It seemed to us that there is an important gap in the law in that regard, which the bill’s sexual coercion provisions are meant to cover. An accused can get sexual pleasure, for a variety of reasons, from forcing someone else to engage in a sexual act. We thought that the law should make it absolutely clear that that is a crime.

**Nigel Don:** That is my point. You visualise, therefore, section 3 covering a situation in which there is a third party or, in the case of masturbation, possibly not a third party. However, section 3 is not intended to be an addition to sections 1 and 2, which essentially have to do with two parties.

**Professor Maher:** That depends on whether your question is about the drafting, or the intent of the provisions.

**Nigel Don:** It is about the intent.

**Professor Maher:** The intent of the provisions is to cover circumstances to which sections 1 and 2 will not apply. Sections 1 and 2 will apply only where a person is forced to have sex with the accused. However, there can be plenty of scenarios where A, the accused, forces B, the victim, to have sex with somebody else or to engage in sex that does not involve the accused.

**Nigel Don:** I am with you. Thank you.

**The Convener:** Professor Maher, thank you for giving your evidence in what was, if I may say so, a stimulating manner.

**Professor Maher:** Thank you.

**The Convener:** There will be a five-minute suspension.

12:28

*Meeting suspended.*

12:35

*On resuming—*

**The Convener:** I welcome the final panel of witnesses. Bill McVicar is the convener and Alan McCreadie is the secretary of the criminal law committee of the Law Society of Scotland, and Ian Duguid QC and Ronnie Renucci QC are from the Faculty of Advocates. I welcome you all and thank you for your attendance. I am sorry to have kept you waiting but, as you will appreciate, we are under considerable pressure this morning. We will move straight to questions specifically for the Faculty of Advocates.

You do not appear to agree with the extension of the crime of rape to include oral penetration. That form of sexual assault is widely recognised as rape in other jurisdictions, and the proposed extension of the crime has been welcomed by witnesses from whom we have heard previously. What is your objection to the treatment of that activity as a form of rape?

**Ian Duguid QC (Faculty of Advocates):** The point of the legislation is to address the underlying issue that there are very few convictions for rape...
in cases that are brought before the High Court. We do not feel that the provision to which you refer will change that situation in any way. Judging from our experience, we think that juries will be reluctant to consider oral penetration as a form of rape, which is why we are against it. Anal penetration and vaginal penetration are quite understandable to the layperson as forms of intercourse that can be afforded the description of rape, but we think that oral penetration is in a different category.

Our experience so far has been that there have been perfectly proper prosecutions and convictions for indecent assault, which includes the libel of oral penetration and is dealt with appropriately by the courts. Therefore, we see no need to change the law in the way that is suggested.

The Convener: Do you adopt those arguments, Mr Renucci?

Ronnie Renucci (Faculty of Advocates): Juries are reluctant enough to convict defendants of rape; to give them another option, and to call something rape that has not previously been called rape, will mean that there will be fewer convictions, as juries might be more reluctant to convict.

The difficulty with rape—no doubt this has been said in evidence before—is that it is unique in Scottish law. A jury is usually given a circumstance that is clearly a criminal activity, such as an assault, and asked to decide whether the person in the dock is the person who committed the offence. In rape cases, juries are given a set of circumstances that would not in the normal course of events be criminal, and they are asked to decide whether the person who engaged in that activity committed a criminal act. It is difficult for juries—rape cases usually boil down to one person’s word against another, and rape is regarded, in many ways, as one of the most serious offences below murder. I think that juries will be reluctant to convict people of that offence if it is called rape.

The Convener: We did not receive a submission from the Law Society of Scotland. Mr McVicar, do you have anything to say on the issue?

Cathie Craigie: We received a submission.

The Convener: I am corrected.

Bill McVicar (Law Society of Scotland): We replied—we sent in written evidence, but we did not take issue with that point. We agree that there should be a standalone crime that deals with penile penetration, for the reasons that have already been given in evidence today. We disagree with the Faculty of Advocates’ standpoint on that.

The Convener: Thank you. The submission from the Faculty of Advocates states:

“It is not easy to envisage a situation in which the actus reus of the offence could be committed ‘recklessly’.”

Is it not possible to envisage circumstances in which the accused was reckless with regard to whether or not the victim consented?

Ian Duguid: The issue of recklessness is currently a consideration in all rape cases. It arises in the assessment of the mens rea—the intention of the accused—and the law as it presently stands suggests that whether a man is reckless as to whether the party is consenting becomes an issue in a trial, so recklessness has a place in the ordinary consideration of such cases. Our concern, however, was that the extension of an offence that is substantially an offence of assault to include recklessness is a fundamental change in the law.

One of the alternative verdicts that are open to a jury in the event that the members do not hold that a rape has been committed is common-law assault, which requires that there was an evil intention to commit the offence. If a rape could be committed intentionally or recklessly but under an alternative verdict the offence could be committed only intentionally, we envisage that that would raise a huge difficulty for a court.

The situation that is arising is unfortunate, and will make it difficult for the courts to administer the law in that form.

Recklessness features throughout the proposals in the bill, in relation not only to rape but to sexual assault, sexual coercion and so on. However, we do not see any immediate need to change the law in the way that the bill intends to do.

I have been practising law for the best part of 20 years—prosecuting, defending and sitting as a part-time sheriff to decide on indecent assault and lewd and libidinous cases, although not rape—and, although I accept that, if something is broken, it should be fixed, my experience suggests that the law of rape is not broken in such a fundamental way that it requires a change in the way that is proposed. We think that, broadly speaking, the bill will make the process much more complicated for the public, juries and courts. If you are making the process more complicated for juries, you are simply not addressing the issue of why juries tend to acquit more often than they convict.

The Convener: But juries would have to identify whether the conduct of the accused in, for example, a road traffic case was reckless. The word “recklessness” is well defined in Scots law. Is there a fundamental problem in extending that word to define sexual behaviour that could be viewed, in effect, as rape?
Ian Duguid: I am not sure whether you have in mind the criteria that used to apply around the offence of reckless driving, which, of course, was changed to dangerous driving. However, recklessness was a creation of statute in that instance.

You are talking about changing the common law. In theory, you can change the common law to bring in a consideration such as recklessness, as was done in road traffic legislation before amendment. However, the question is, does that make things clearer or does it blur the images around the cases? As Mr Renucci said, many court cases amount to one person’s word against another’s. Would introducing a question of recklessness make the situation clearer for anyone?

The Convener: Mr Renucci, have you anything to add?

Ronnie Renucci: Only that my reading of section 1 led me to think that the bill itself was reckless. That caused me some concern. The bill is meant to clarify matters, but it certainly did not clarify matters for me.

The Convener: But recklessness is a well-established, common-law concept.

Ronnie Renucci: But the bill appears to suggest that there would be recklessness in the physical act. I cannot envisage a situation in which that would apply. Is it suggested that someone is going to say, “I slipped and fell and somehow penetrated the person”? That does not make sense. Section 1 does not make clear to me that the notion of recklessness applies to the intention as opposed to the physical act. It is difficult to see how someone could be so reckless in the physical act that it would cause penetration. The notion seems unnecessary.

Bill McVicar: Our view was that the recklessness that is specified related to mens rea, and we did not have a difficulty with it being placed in the section. I hear what the Faculty of Advocates has said, and I understand its concerns, but if one considers the idea of recklessness as part of mens rea, there is no particular difficulty.

The Convener: Cathie Craigie will ask questions around rape and sexual assault.

Cathie Craigie: First, I would like to continue the current line of questioning. The Law Society’s submission says, more or less, that it is not satisfied with the bill because it is intended to consolidate existing law rather than to address or resolve any problems, perceived or otherwise, with the conviction rates. What could be done differently?

Bill McVicar: As our submission says, further research should be done into what exactly the problems are. We do not know why juries do not convict in rape cases. We can speculate and guess, but we do not know. Our view was that, until some proper research is done into that specific difficulty—if there is, indeed, a difficulty—it is difficult to know how it can be fixed. We welcome the bill in the sense that it consolidates existing law and clarifies various factors and definitions. We just wanted to make it clear to the public that the bill is not the answer to the low conviction rate in rape cases.

Cathie Craigie: Do you know what the answer is?

Bill McVicar: I think that further research needs to be done before anyone comes up with an answer. I have been defending people in the High Court and various other courts for the past 25 years and I could give you all sorts of speculative answers, but I would not know whether they were correct.

Cathie Craigie: Is there any research in any other parts of the world that we could turn to?

Bill McVicar: We understand that research has been done elsewhere, particularly in the United States of America. However, we have not embarked on a review of that research as yet. When, in due course, proposals are introduced to amend procedural law and the law of evidence, as I assume will happen, that might be the time for us to consider those comparisons directly.

The Convener: One of our previous witnesses has produced a paper on that matter that might be of interest to you. We will direct you to that later.

Cathie Craigie: Does the Faculty of Advocates have anything to say about the Law Society’s submission?

Ian Duguid: I wholly subscribe to what Mr McVicar said on behalf of the Law Society.

The low conviction rate can be addressed only by asking jurors about it, although at present that would be precluded by the Contempt of Court Act 1981. I am not sure whether some arrangement could be found to suspend the workings of that act for the purposes of conducting a survey, but that would be the way forward, rather than changing the law in the way that is proposed.

Earlier, someone asked what it was about the word “consent” that the public do not understand and why it was thought necessary to replace that word with the words “free agreement”. I note what Professor Maher said, but nobody has yet given an answer to that question.
The way forward is to conduct some proper research. The problem is not exclusive to Scotland; it affects jurisdictions across the world. People have addressed it in various ways, and the suggestion in Scotland is to do that by codifying the law in some way. However, that does not really address the issue that most people—including us—identify as the unacceptable one.

I have been a prosecutor and I have been a defence counsel, so I have seen the issue from both sides, but I can only speculate on the reasons. There is no obvious reason why the situation should be as it is. I read an article by Helen Mirren in The Sunday Times that suggested a reason for the problem, but it was as speculative as the reasons that anyone could suggest. Proper research is the way forward.

Cathie Craigie: The submission by the Faculty of Advocates suggests that there is an overlap between sections 1 and 2, because conduct that might be charged as rape could be charged as sexual assault. Do you think that such an overlap is acceptable?

Ian Duguid: As you may have seen, neither I nor Mr Renucci was a member of the committee that prepared the faculty’s submission. I am the chairman of the Faculty of Advocates criminal bar association; it is not clear that the bar that I represent subscribes to all the views that are set out in the submission. However, I will try to answer your question.

Section 1 seems to create an offence of rape. It seems to be the view that section 2 may also provide for an offence of rape, under the description of sexual assault, which includes penetration. Section 2(6) suggests that “the reference in the paragraph to penetration by any means is to be construed as including a reference to penetration with A’s penis.”

There is a similar provision in section 2(2). Those who read and examined the provisions thought that it was open to the Crown to prosecute a person under section 1, for rape, and under section 2(2) and 2(6), for rape as we would understand it, but under the description of sexual assault. We were mystified by that piece of drafting. That is the best explanation of how the faculty approached the issue that I can offer to the committee.

Cathie Craigie: You have left me equally mystified. Given that the issue has been raised in writing, the committee will want to take it into account. If you think that further clarity is needed, I am sure that the committee will accept—

Ian Duguid: The concern was that the legislation would make the same situation eligible for prosecution in two different ways and that there was no obvious reason for choosing to prosecute a case under section 1 rather than section 2. We thought that you might try to suggest that section 2 relates to lesser offences—in other words, that you might distinguish such offences from rape, as we all understand it. We were not sure what was the intention or purpose of the provisions in section 2.

Bill McVicar: I understood from earlier evidence that it is not intended that the provisions should be seen as creating a hierarchy of offences—both rape and sexual assault can be punishable by life imprisonment. It occurred to me that section 2(6) might cover the bizarre situation in which the victim did not know what penetration was with. If the accused person were tried under section 2 rather than section 1 and gave evidence that penetration was with his penis, it would be open to the Crown to seek a conviction under section 2(6), even if it libelled something else to begin with. The situation that I describe is bizarre and unusual, but it provides a theoretical justification for the provision. Does that help?

The Convener: Yes, but there seems to be a degree of redundancy in the bill. We may need to look at that.

Cathie Craigie: It has been suggested to the committee in oral and written evidence that the bill should create a further offence of rape with an object. What are your views on that suggestion?

Ronnie Renucci: I thought that the issue was covered in section 2. I agree with Professor Maher, who explained why such a provision is unnecessary. The activity that you describe is an offence under the bill. It may not be the specific offence of rape, but it is clearly a serious offence. If we took up the suggestion that has been made, we would be adding another layer to the offence of rape. That is wholly unnecessary.

Bill McVicar: In my view, it would be redundant under the bill to create an offence of rape with an object. We should get away from the notion that the bill creates a hierarchical structure of offences—offences should be considered in the round, rather than on the basis that one offence is more serious than another. There is no need for a separate offence relating specifically to penetration with an object.

Cathie Craigie: Okay.

Nigel Don: The Faculty of Advocates raised the issue of sexual coercion, and you will have heard my previous conversation with Professor Maher. Would you like to comment further on what section 3 does or does not cover?

Ian Duguid: Yes. You addressed that in your questions to Professor Maher. I have nothing to add to what has been said thus far or to what is contained in the bill.
Nigel Don: Thank you. The faculty made the only reference to that section. I wanted to ensure that we do not miss something.

Ian Duguid: No, not from my point of view. I have nothing to add.

Angela Constance (Livingston) (SNP): Witnesses have broadly welcomed the definition of consent as “free agreement”. Is that an improvement on the current law?

Bill McVicar: Yes. I agree that it is an improvement on the current law. It is difficult to express or draft in an elegant way the concepts that are involved in consent. When taken together, sections 9 to 12 set out clearly what a jury must consider in dealing with the question of consent.

That said, I have two matters to raise on section 10. First, in section 10(2)(b), the bill addresses what used to be described as clandestine injury. Many concerns have been expressed about prior consent. Perhaps a better way of putting it is set out at paragraph 2.59 of the Scottish Law Commission report:

"where the person was unconscious or asleep and had not earlier given consent to sexual activity in these circumstances".

That is a little clearer than the drafting of section 10(2)(b) is.

We addressed the matter in our submission in relation to threats. We suggested that consideration be given to whether a ground might be included under section 10(2)

"where a threat is made that results in consent being given where consent would otherwise not have been given".

It might be useful to list threat as a separate category under section 10(2). Beyond that, we have no adverse comment to make. We broadly welcome anything that makes it easier to understand the concept that is at the root of this.

Angela Constance: I am not sure whether you heard Professor Ferguson’s evidence, but she suggested that use of the word “consent” is unhelpful to jurors’ understanding of and their preconceptions about the concept. What is your view?

Bill McVicar: I do not agree with the proposition. The definition that is advanced in the bill is as clear as any that I could come up with. In the evidence that I heard today, no one made an improvement on the formulation.

Angela Constance: Does Mr Duguid or Mr Renucci have a comment?

Ian Duguid: I probably answered that in response to an earlier question. I said that no one who practises the law understands what it is in the word “consent” that people do not understand. If one word were to be replaced with two, the cause would not be advanced in any substantial way.

We all understand that the seven examples under section 10(2) are the sort of circumstance that would be placed before a jury as indicative of the absence of consent. No example that is given substantially changes the law; they simply codify what those of us who practise the law understand is already the law.

That said, a couple of the examples make things much more uncertain. Under section 10(2)(a), who is to judge whether someone is “incapable, because of … alcohol”? What happens if the victim’s two friends come along and say, “She was drunk” and the accused’s two friends say, “She was not drunk”? The drafting gives no indication of how incapability will be measured.

The issue caused me to look again at the statute. Since 1847, it has been the law that, if a person is intoxicated, they are incapable of giving consent. It is not as if the change that is proposed in the bill will make things better or more certain; it will do nothing in that regard. All the examples that are set out under section 10(2) can be covered perfectly easily by the common law as it stands.

The other concern that is identified in the faculty’s submission is deception. The example that is given in the submission is a promise to marry, but I will bring it down to a more basic promise. Suppose that a man meets a woman and he says that he is 25 when he is, in fact, 35 and the two engage in sexual intercourse. The woman then contends that as he is not that age she has been deceived. Does that mean that it would be rape? I think that the answer to that question is “Yes, it does.” I am not sure what Crown Office policy to date is. In theory, that would be a common-law fraud and the Crown might choose to prosecute it in that way, but it may choose not to do so. The bill gives no discretion to anyone. It would expose to criminal sanction people who might otherwise never have been exposed to it.

13:00

The Convener: May I interrupt? Looking at section 10(2), I am having a wee bit difficulty in ascertaining precisely where you are coming from with that analogy.

Ian Duguid: Section 10(2)(e) states:

“where B agrees or submits to the conduct because B is mistaken, as a result of deception by A, as to the nature or purpose of the conduct”.

The faculty’s submission gave the example of a promise to marry or something of that nature, but I presume that any form of deception would render someone liable to prosecution.
The Convener: At that stage, we enter into a legal debate as to what is a material fact and what is not.

Ian Duguid: You are, of course, right about that, but we are talking about rendering people liable to prosecution. Mr Renucci may have something else to say about it.

Ronnie Renucci: No; I agree with those comments. In addition to the example that Mr Duguid gave, I would include the example of someone saying that they were not married when they were. In theory, at least, a female could say that she would never have had sex with the man had she known that he was married and that that is deception.

I have concerns that a bill that is meant to clarify the situation refers, at section 10(2)(a), to when B is "incapable", but we are given no further help or assistance with the definition of that word. I can see that causing all sorts of problems in the course of a trial.

Angela Constance: Since we are on the subject of section 10(2)(e), I wonder whether anyone can help me. What sort of deception was envisaged when it was drafted?

Bill McVicar: I had the advantage, along with Mr McCreadie, of speaking to the bill team about the draft bill. We raised the same issues as the faculty, because at first blush section 10(2)(e) might cause difficulties with regard, for example, to those who pretend that they are not married. I was told that "the nature or purpose of the conduct,"

was the most important feature of the section and that what the bill team had in mind was the carrying out of a spurious medical examination or something of that sort. If someone pretended that they were examining someone for medical purposes when they were, in fact, doing so for their own gratification, that would be the deception. That is the explanation that was given to me and it appeared to deal with the issue.

Ronnie Renucci: Unfortunately, people who read the bill or members of the public will not have the benefit of the draftsmen telling them exactly what was in their mind in drafting it. That is the problem with quite a lot of sections in the bill.

The Convener: I hear what you say, Mr Renucci.

Angela Constance: Section 10(2)(e) provides that there is no consent when the complainer agrees to or submits to the conduct because he or she is

"mistaken, as a result of deception"

by the accused. Is liability always with the accused? Is there never any scope for it to be turned round and for the issue to be with the complainer? I am not being very clear. I am asking whether the issue of deception should always be restricted to the accused.

Ian Duguid: Presumably, the accused is the person facing prosecution, so it would always be an issue of whether the accused had deceived the individual himself or been a party to deception by another. I am not sure whether the complainer's or victim's state of mind is important. It is important to the extent that she has gone through an act or acted as a result of a deception. The common-law offence of fraud turns on a pretence followed by a practical result. Presumably in this case, there is a pretence followed by a practical result, but we are talking not about fraud but about rape, because the practical result would be intercourse by deception, on which the victim has proceeded by mistake. I am not sure whether that answers your question, but I think that all the deception lies with the accused person, rather than the victim, in any situation.

Angela Constance: Okay. Thank you.

The Convener: To some extent, you might have anticipated Stuart McMillan's question, but he also has another issue to explore.

Stuart McMillan: I just want to explore one other aspect. Previous witnesses have suggested that section 10(2)(c) should be reworded to take account of the historical context of relationships where violence and abuse have been present. Would that be a positive step, or is it not necessary?

Ian Duguid: I would think that that was a positive advance. I am not quite sure what sort of drafting amendment was proposed, but I take it that you are talking about the situation of battered wives or partners or persons who are subjected continually to violence over a long period.

Stuart McMillan: Yes.

Ian Duguid: Well, the answer is undoubtedly yes. It would be advantageous at least to address that matter in the bill in some shape or form. I am not sure what form of amendment has been proposed, but I would not be averse to that matter being addressed.

The Convener: Does the Law Society have a view on that?

Bill McVicar: We agree that there is room for reconsidering the way in which that section is drafted. However, I return to the suggestion in our paper that a reference to threats in general could replace what is in section 10(2)(c). That would be a broader brush with which to address the various issues of violence over time, as well as more immediate violence or threats of violence.
The Convener: Ms Constance is satisfied that the issue of deception has been examined fully.

Bill Butler: The bill provides at various points that conduct that was initially consensual ceases to be so if consent is withdrawn and that if conduct takes place or continues to take place after consent has been withdrawn, it is non-consensual. Do you agree with that general principle, or do you think that it has practical difficulties?

Ian Duguid: Yes, it has huge practical difficulties, as I am sure that everyone in the room can envisage. On the issue of consent, there are plenty of instances—certainly in my experience in the courts—when parties have started off in what, on the face of it, seems to be a consensual situation, but consent has been subsequently withdrawn, for any number of reasons. You can think of any number of instances when the potential victim or complainer in a sense changes her mind. Should that be addressed by the law? Absolutely, because there is no longer consent—or free agreement, if you are going to call it that. However, by putting it in a bill in the suggested form, you are placing entirely in the hands of the complainer or victim the point at which they withdraw their consent. There is no indication whether the state of mind of the accused is going to be addressed. How is the accused going to know that consent is withdrawn? What happens if, after the event, the person comes along and says that they decided that they were not agreeable to the conduct, which would technically render the other individual liable to prosecution for rape?

It is an area that is fraught with difficulty. I am sorry to be negative again but, to come back to the original point, if it were an issue that required to be addressed by being put down in black and white, it would have been identified as such before now. The situation occurs regularly in the courts and is addressed by them in a perfectly straightforward fashion that, I hope, juries can understand. If they do not understand something about it, then, as I said in answer to another question, that should be addressed. Are juries proceeding on a misunderstanding of the law? That would be an important consideration for deciding to change the law.

To answer Bill Butler’s question, the provision is fraught with difficulty through interpretation by the courts. As you will appreciate, if the common law is abolished, there will be no precedent to follow and the appeal court will be inundated with challenges to the interpretation of a statute. Therefore, the whole area of law will have to be revisited and matters will have to be discussed and argued at length. The provision will create a substantial difficulty in a situation in which, as far as I can see, the issue is currently addressed adequately and properly by the courts. I am sorry if that was a longer answer than you expected.

Bill Butler: No. What you said was clear. Do the witnesses from the Law Society agree with what Mr Duguid said, or do they have a different emphasis?

Bill McVicar: The difficulty is that, if we legislate to define what rape is, we must legislate on consent, on the circumstances in which it can be withdrawn and on when a criminal offence occurs in that respect. When we read sections 9 to 12 as a whole, there can be no real doubt as to what the law is intended to be. There is no great innovation in section 11, because that is what the current law is, as Mr Duguid said. I suppose the question is whether we need the legislation at all rather than whether there is anything wrong with section 11.

Bill Butler: Do you think that the intention is correct but that the provision would be fraught with difficulties in practice, as the Faculty of Advocates said?

Bill McVicar: I do not share the faculty’s view or believe that there will as many difficulties as Mr Duguid apprehends. The court, in interpreting the statute, will have access to the various cases that existed beforehand on consent and withdrawal of consent because the provision is simply a codification of the existing law, as I understand it.

Bill Butler: So the Law Society’s view is that the provision is workable.

Bill McVicar: Yes.

Bill Butler: In the panel’s view, are the provisions on reasonable belief in section 12 workable, given that the accused cannot be compelled to give evidence at his trial?

Ian Duguid: I think that you raised the issue with Professor Maher, and it is a well-made point. The accused cannot be forced to give evidence. Professor Maher talked about police interviews, but of course the accused is entitled to say nothing at a police interview and may not do so. We considered how the matter could be addressed in the way that Professor Maher suggested. There is a process of judicial examination. Could the question on belief be put to an accused person before a sheriff in judicial examination? However, outside of murder cases, a judicial examination is currently conducted in only a few cases because of pressure of business in the sheriff courts. If the issue of reasonable belief was to be addressed in the way that Professor Maher identified, there would almost certainly have to be a judicial examination in each rape case and the judge at the trial would have to be allowed to comment on any failure by the accused to respond. That is how the law stands according to, I think, the Criminal Justice (Scotland) Act 1980. A judge is entitled to
comment on an accused’s answer to, or refusal to answer, a question.

Bill Butler asked a good question about how the provisions in section 12 are to be addressed. However, aside from these observations, I am not sure that there is an answer.

Bill Butler: You said that there is a possibility of a judge commenting after judicial examination, but would that not raise the possible ECHR problem that I discussed with Professor Maher? Although it would be a judge’s comment, it would channel juries along the way of inferring something from the accused’s silence.

13:15

Ian Duguid: Professor Maher recognised that there was a problem with compliance with the ECHR, and I agree. I was trying to envisage the situation that he suggested might offer an out.

Bill Butler: But would it offer an out as far as the ECHR is concerned?

Ian Duguid: The provision that allows a judge to comment on the failure of an accused to answer a question during judicial examination is in a statute from 1980. It has not been challenged as not complying with European human rights jurisprudence.

Bill Butler: Would it be open to such a challenge?

Ian Duguid: I suspect that it might not be. Each of the member state signatories to the convention has what is called a margin of appreciation, which allows it to legislate in a way that, on the face of it, might appear to be non-compliant with the ECHR but for which there is justification. One would assume that if the 1980 act has not yet been challenged in that way, it must be compliant.

One must understand that Professor Maher suggested that an accused might answer questions from a police officer—I think that that was the first possibility that he mentioned—but, of course, the accused might never say anything. He is entitled not to say anything. He is entitled not to give evidence or answer any questions from police officers. The only way round the situation that I could think of was the process that I suggested but, as I said, account would have to be taken of the fact that every rape allegation would have to be the subject of judicial examination in the sheriff court. That just does not happen at the moment. One can only assume that that is because of pressure of business in the sheriff court. That would place a huge onus on the sheriff court, but it might be possible.

Bill Butler: Do you want to add anything, Mr Renucci?

Ronnie Renucci: I agree with Mr Duguid, although I think that use of the relevant provision would be challenged. It has not been challenged up until now because it is never used. I have not been involved in a single trial in which the judge has used the 1980 act to comment on the silence of the accused. That might be why the provision has not been challenged. I am fairly confident that the first time that that happens, there will be a challenge.

Bill Butler: I hear what you say; I am obliged to you.

What does the Law Society think?

Bill McVicar: It occurs to me that in the trial process, the jury has to consider the evidence that is led. That evidence might come from an accused person being interviewed by the police or his being judicially examined and saying that his position was that he believed that there was consent because of X, Y and Z. On the other hand, there might be no evidence of that sort at all, in which case the jury would be left with the complainer’s account of events. She would, no doubt, be cross-examined about whether she had given consent, but if the accused does not give evidence, says nothing to the police and there is no judicial examination, what evidence is there from which the jury can infer that there was reasonable belief in consent? It is a point to do with the rules of evidence. We are in danger of crossing over into what happens in the trial process instead of considering a point of principle.

It seems to me that if an accused person were unwise enough not to give evidence in those circumstances, the jury might very well just bring in a verdict of guilty anyway because there would be no basis for holding that there was reasonable belief in consent. The judge must direct the jury on the basis of the evidence that is led during the trial. He or she cannot say that in some cases people give information about consent to the police but, in this case, that has not happened. They must focus on the evidence that has been led in the case.

Bill Butler: In such an example, do you see there being a problem with regard to the ECHR?

Bill McVicar: It would depend on what the judge said. If the judge said to the jury, “You can take it from the absence of evidence that there is no reasonable belief in consent,” that would cause a problem, but if the judge simply said, “This is the evidence. You have to be satisfied that evidence exists from which you can hold that consent was given,” there would be no problem.

Bill Butler: Do you think that judges would be liable to phrase their direction to the jury in the latter rather than the former form?
Bill McVicar: I do not know—that would be a matter for the judges. We would have to wait and see what they did. We are embarking on a new definition of reasonable belief, which is subtly different from the present definition, so it is difficult to know what a court or an individual judge would make of it. I do not see how Parliament can offer any guidance to the judge in that context.

Bill Butler: Would you like to add anything to that, Mr McCreadie?

Alan McCreadie (Law Society of Scotland): I have nothing to add, other than that I think that it is a matter of evidence and for the judge's direction to the jury.

The Convener: Paul Martin will ask questions on the abuse of the position of trust.

Paul Martin: The correspondence that we received from the Law Society highlighted a number of concerns in relation to the detail and practical application of the abuse of trust offence relating to mentally disordered persons, which is dealt with in section 35. Could you expand on that?

Bill McVicar: Since we prepared that submission, we have had an opportunity to consider the submission from Enable Scotland, which raises concerns about whether sections 35 and 36 should be reconsidered. I would defer to that organisation's greater knowledge of the area. If its view is that those matters should be revisited, I would agree.

Paul Martin: So you agree with Enable that we should not criminalise those who abuse trust but, instead, deal with the matter through regulatory means.

Bill McVicar: I am saying that the situation is not as straightforward as that. The matter should perhaps be debated further.

Alan McCreadie: With the committee's indulgence, I could seek further comments from the Law Society's mental health and disability subcommittee.

The Convener: Can that submission be made in writing?

Alan McCreadie: It can.

Paul Martin: Could you confirm that you do not think that criminal action should be pursued against those who abuse trust, and that you consider Enable's alternative course of action to be better?

Bill McVicar: We have not as yet reached a final view on that. The Law Society would want to consider what Enable has submitted before doing so.

I am not trying to avoid the question; I am simply saying that I do not have an answer to that question at this stage. However, we will formulate an answer in writing, with the assistance of those who have more experience of these matters than we personally do.

Paul Martin: I appreciate what you are saying with regard to those who have more experience than you, but there is an issue concerning the opportunities that are given to pursue legal action through criminal proceedings rather than through the regulatory processes, which is what Enable is proposing.

Bill McVicar: I appreciate that, but I do not have an answer to your question at this stage.

The Convener: The committee is actively seeking further information under that heading.

Nigel Don: I would like to pursue a subject that has been raised by members of the panel but which we have not considered at any stage, which is the question whether the statute is codifying the law or changing it to such an extent that it is not just codifying it. I appreciate that those are technical—and, perhaps, jurisprudential—issues, but I think that Mr Duguid suggested that people would be unable to refer to precedent if they had this kind of statute in front of them and that Mr McVicar is suggesting otherwise. Could you explain—in terms that are appropriate to those of us who are not lawyers—what you think the consequences of passing this kind of bill might be?

Ian Duguid: I can answer that quite quickly. We met the committee that was responsible for drafting the bill, and pointed out that, perhaps, changing the law in such a fundamental way—and, as one section would do, abolishing the common-law offences of rape and so on—would be likely to create a new jurisprudence that would have to evolve out of interpreting the provisions of the statute. We suggested that it might be a good idea to include a provision to suggest that the common-law precedent remained insofar as it was compatible with the terms of the bill, which would, presumably, allow the courts to have regard to decisions on particular matters, which could then become subjects of discussion.

I see no reason to depart from that suggestion, as it would be in everyone's interests. However, it was not something that the bill committee picked up on, perhaps because it did not think that it was a good idea.

Nigel Don: I have the impression that there is a very fundamental question—if something can be very fundamental—about whether we are changing the law and starting again or are merely trying to nudge the law into a form of words that we think would put everything in one place.
that most criminal lawyers would approve of the latter. The bill is attempting to codify what has gone before, so precedents will apply so far as they are relevant.

**Ian Duguid:** I hope that I am not being misconstrued. In my view, the bill changes the law in an unnecessary fashion. That is not to say that it does not contain some good provisions on the abuse of positions of trust and the extension of jurisdiction to cover offences that are committed abroad. The bill undoubtedly contains some advantageous provisions that will advance the law in a perfectly proper way. However, you asked whether the bill codifies the law or changes it, and my impression is that it changes it. If it were changing the law for the better, I would be in favour of it, but I am not convinced that a case has been made that it will do so. We will lose a lot if a new body of precedent and jurisprudence is established on the back of the bill. That will be expensive because it will inevitably take up court time, legal aid budgets and goodness knows what else.

**Nigel Don:** If we argued about whether the bill is a good thing or a bad thing, we would be here beyond tea time.

I ask Mr McVicar to comment on the point about codification and precedent. Do you agree with Mr Duguid that it would be a good idea to remove the bit about abolishing the common law, or at least to add a bit about precedent being relevant?

**Bill McVicar:** I am not an academic lawyer, but I do not think that it necessarily follows that we need a provision in the bill stating that the pre-existing law still applies where appropriate. As you might have gathered from an earlier answer, I rather assumed that the existing law would still apply if the circumstances, offences and themes of the bill were the same as the common law. However, as I mentioned in my response to the question about belief, there is likely to be some debate about that because of what I described as a subtle change in the definition of belief.

**Nigel Don:** Am I correct to take it that the panel agrees that holding on to previous decisions and precedents, where they are appropriate, is the right thing to do?

**Bill McVicar:** Absolutely.

**Ronnie Renucci:** Yes.

**Bill Butler:** For the avoidance of doubt, is it not the case that, as Mr McVicar said, it is always permissible to consider legislative history? Mr Duguid, do you agree that we do not need to do what you suggested and write into the bill a statement that common-law precedent is admissible? It is always admissible, is it not?

**Ian Duguid:** It would depend on whether the court decided that there was a sufficient coincidence, not so much in the facts but in the legal argument. If the court was satisfied that there was a coincidental argument, the answer to your question would be yes. However, let us say that you redefine consent with the words “free agreement”. Would any issue that arose about the interpretation of consent in previous cases and what was or was not consent be applicable?

**Bill Butler:** Is it not always permissible and wise to look at legislative history because it informs the situation as it now is, or as it has been amended by a bill that has been enacted?

**Ronnie Renucci:** Yes, but acts are usually silent on the common law. Section 40 of the bill specifically makes it clear that the common law is abolished. That is the difference.

**Bill Butler:** So you could not refer back to the common law at all.

**Ronnie Renucci:** No doubt that will happen in practice in court, but I fear that, if the bill is passed with section 40 in its current form, the appeal court will become even busier than it already is with some of our more litigious colleagues.

**Bill Butler:** I am grateful for that answer.

**The Convener:** Thank you for your helpful contributions, gentlemen.

That brings the committee to the conclusion of today’s consideration of the Sexual Offences (Scotland) Bill. We will finalise our consideration next week, when we will see the Lord Advocate and the Cabinet Secretary for Justice. The contributions from the Law Society of Scotland and the Faculty of Advocates have been helpful in informing what will happen next week.

13:29

*Meeting suspended.*
Sexual Offences (Scotland) Bill: Stage 1

The Convener: Today is the final planned evidence session on the Sexual Offences (Scotland) Bill. I welcome the Lord Advocate, Elish Angiolini QC; Fiona Holligan, principal procurator fiscal depute; and Andrew McIntyre, head of victim policy in the Crown Office and Procurator Fiscal Service. We are grateful to you all for giving evidence. We will go straight to questions.

Bill Butler (Glasgow Anniesland) (Lab): Why do you believe that it is now necessary to put the law relating to rape, sexual assault and other matters that are covered by the bill on a statutory footing? What is wrong with the common law in this area of the criminal law?

The Lord Advocate (Elish Angiolini): You used the word “necessary”; what is proposed is probably not necessary, but the question is whether it is desirable and in the public interest. We could continue to prosecute with the common law as it is.

The Parliament must choose what sexual activity it wishes to criminalise. This is a very difficult area because it goes into the realms of privacy and morality. However, in setting the boundaries for criminality in the 21st century, it is appropriate for us to look to what the 21st century’s law should be. Although much of our common law is useful, it originated in Hume’s time, when the status of woman was different. The progress of the common law was such that it was not until 1989 that marriage stopped being considered to be the unequivocal and irrevocable giving of consent to sexual intercourse in whatever circumstances, irrespective of consent.

The common law has developed incrementally but in a startlingly short time. As you are aware, there was a considerable development when the Lord Advocate’s reference of 2001 removed the need for proof of force. That was a substantial leap for the common law, which has resulted in a significant batch of cases of a new type coming before the courts that would not have been prosecuted hitherto under the common law.

The proposed legislation is not absolutely necessary; the question for the Parliament is whether it wants to have laws that represent the social environment in which we live and which are fit for purpose for the next 20 to 30 years.

I have said publicly that it is a distortion to say that Scotland has the lowest conviction rate worldwide because, under Scotland’s law, rape is a very narrowly defined crime that does not bear comparison with the definitions of this type of crime that are used elsewhere in the world—it is like comparing apples and pears; we are not talking about the same crime. Generally, and almost universally, the crime of rape has a wider definition that would embrace many of our convictions in Scotland that come under the umbrella of sexual assault. The conviction rate for sexual assault in the absence of consent in the cases that we prosecute is approximately 70 to 80 per cent. In relation to the sexual offences that we prosecute, it is a particular type of rape—in America it is called one-on-one rape, date rape or acquaintance rape—that presents a significant challenge, as the committee will be aware from its knowledge of the issue.

Bill Butler: That is very clear—thank you.

In last week’s evidence session, Mr Duguid of the Faculty of Advocates raised the faculty’s worry that,

“If the common law is abolished, there will be no precedent to follow and the appeal court will be inundated with challenges to the interpretation of a statute.”—[Official Report, Justice Committee, 18 November 2008; c 1386.]

Is the faculty right to have that concern, or will the courts be able to adapt and develop the new legislation to address matters that were not foreseen in it and to make use of existing common-law precedent in relation to matters that are covered in the legislation?

The Lord Advocate: I appreciate that section 41 suggests that the common law will be abolished at the time of commencement, in so far as the provisions relate to offences that take place post-commencement. I am not convinced that that is absolutely necessary. It is for the committee to consider whether to remove law, or simply to allow it to fall into desuetude as we begin to use the statutory offences. There are many instances in which codification or statutory alternatives have been developed by Westminster and the Scottish Parliament but in which we have retained the common law. For instance, the crime of vandalism is a statutory offence that goes back to the Criminal Justice (Scotland) Act 1980 but which has a common-law equivalent of malicious mischief. Although prosecutors use vandalism, malicious mischief is available at common law should they wish to use that. The extent to which we want to have that facility is a matter of choice.

The jurisprudence on the common law will not fall into desuetude for a long time, because we will be prosecuting the old law—if we can call it such—for many years to come. Historical sexual abuse is a large part of the menu of cases that we are prosecuting, with some crimes dating back 30 or 40 years. We will use the common law for such offences that predate the commencement of the new legislation. Therefore, the jurisprudence, case law and precedent that have been established will continue to develop through the cases that we will
prosecute under the current common law. There will be no bar to the courts applying the old jurisprudence to the new law in so far as it is relevant and coincides with that jurisprudence. If a distinction arises because of the use of words or if a different interpretation should be placed on the new provisions, the court will do that.

The bill will undoubtedly be a significant and dramatic change in the law, and with that comes an element of risk, because the provisions will have to be interpreted. I suspect that, if we were plagued by fear of the unknown, we would do very little in life. Every aspect of changing the law involves a degree of risk that something may or may not be left out. That is why I am delighted that the committee has had a comprehensive consultation with many interest groups. The Cabinet Secretary for Justice will take into account the comments and ensure that the bill, which in essence was created by the Scottish Law Commission, and which the Government supports, is as workable, practicable and foolproof as possible. However, it would be a brave Lord Advocate indeed who suggested that the development of a statutory law could not miss out a particular aspect of sexual criminality. As members know, sexual predators have an infinite capacity to be innovative in finding ways of committing crimes that even we as prosecutors could not have envisaged 20 to 30 years ago, such as the use of the internet and of fake images and distorted pictures of children.

We hope that the law that is created will be as flexible as possible. The beauty of the common law is its flexibility. There may be wisdom in retaining some of that, at least in the initial stages after the commencement of the new legislation.

Bill Butler: That was clear. Basically, you are not saying that there is no risk that, by placing the law on a statutory basis, we will lose the flexibility that is inherent in the common law; you are saying that there is little risk.

The Lord Advocate: The common law has been set out and we have a significant body of jurisprudence on it. In some respects, we have a fairly restrictive jurisprudence on rape. If the Parliament passes the bill, it will give a much wider definition of rape—in a sense, it will become a different crime. That has risks attached to it because of the other factors and variables. Many of the people who are selected for jury duty when the indictment is one of rape have a narrow notion of what rape amounts to—they have the classic notion of a woman being dragged off the street. However, at least 90 per cent of cases are not like that, as they involve acquaintance. Rape may occur in the context of a marriage, a partnership or an otherwise consensual sexual relationship. If we are widening the crime of rape, we have to hope that there will also be an education campaign to enable the public to understand that rape is no longer the narrow crime that it was prior to the commencement of the provisions.

10:30

Bill Butler: The term “sexual” appears throughout the bill and at various points the bill provides that conduct is sexual

"if a reasonable person would, in all the circumstances of the case, consider the activity to be sexual."

Does that provide sufficient guidance for juries and judges on the meaning of the term?

The Lord Advocate: The alternative would be to have a subjective approach to what is sexual. What might be sexual in one person’s mind might be utterly innocuous in another’s. It is a question of how we draw the boundaries. A reasonable, objective test is a sensible way forward.

In these cases, we rely on 15 members of the jury coming to a consensus on what they consider to be sexual. A definition that was too extreme would not work. We know that certain people may obtain sexual gratification from looking at pairs of shoes in a shop window. Unless there is some overt mechanism that demonstrates their arousal as a result of that, it is difficult to prosecute that. The question is whether we would want to prosecute, in the absence of a manifestation of sexual arousal. There are other somewhat bizarre activities that might cause sexual arousal, which means that something could be sexual for one individual and innocuous for another. We must have a reasoned, objective approach to what is sexual. I am sure that we can rely on the common sense of the courts to interpret the term.

Bill Butler: That is very clear. Thank you.

The Convener: We turn to part 1 of the bill.

Nigel Don (North East Scotland) (SNP): Good morning. In your experience, what are the main obstacles to conviction in rape and sexual offences cases?

The Lord Advocate: Using the current law?

Nigel Don: Yes.

The Lord Advocate: They vary, but there are universal obstacles throughout the world. Part of our problem in Scotland has been that some of the debate has been inward looking. In particular, the media sometimes imply that Scotland is a social backwater in relation to the crime of rape.

As I have said, the conviction rate for sexual offences in general is as good here as it is in any other jurisdiction; it is the restrictive aspect of our definition of rape that creates the difficulty. So far
as that is concerned, the problems arise from a number of complex variables.

First, we operate with a very narrow definition of rape; it is a very specific act of male rape against a woman. I do not need to rehearse that point for the committee, so I shall save you time. Secondly, corroboration is required. That is another feature that is unique to this jurisdiction. At least a third of the cases that are reported by the police cannot get off the starting blocks because of the absence of corroboration from a second source of evidence. In some of those cases, we have credible and reliable witnesses, but we cannot take the matter any further. Corroboration is an important part of our justice system and it is a protection against miscarriages of justice. It is for others, not for the prosecutor, to determine what should take place with regard to corroboration, but it is not a factor with which prosecutors elsewhere have to struggle. Some prosecutors elsewhere may look for corroboration if it is available but, in cases that are prosecuted in Carlisle and elsewhere south of the border, the absence of corroboration does not have to cause the prosecutor anxiety when they are considering whether they have enough evidence.

The other variables relate to the subject matter. The crime is, uniquely, made criminal by the absence of consent. In all other circumstances, we are talking about conduct that is enjoyable, consensual and part of normal life for most people. Unlike any other area of criminality, it becomes criminal only because of one ingredient: the absence of consent. It can be extremely challenging to gain proof of that, particularly in the types of case that I have mentioned, when there may be an on-going sexual relationship; there may be a considerable degree of affection between the partners, which would ordinarily be displayed; and there may have been considerable consumption of alcohol or drugs on the part of both the accused and the victim.

The accused in those cases are often very pleasant-looking young boys for whom the jury may build up a degree of empathy. They do not turn up in dirty raincoats with a belt and with balaclavas hidden in their pockets and so on; they are not strange-looking people. The image of a rapist that people have in their minds is of a creature with no remorse. Instead, they see someone who is very well presented and looks like everybody’s very nice next-door neighbours’ boy.

There are issues that are unique and which present a challenge but, ultimately, such cases often come down to the word of one person against the word of another. That is difficult when there is ambiguity about the circumstances.

Among the other variables is a significant one that has been identified by Amnesty International, Rape Crisis Scotland and Scottish Women’s Aid: the attitude of all of us. It is about our social approach to the deserving victim and the notion that the victim who deserves to be protected by the law is one who has not contributed in any way by dressing provocatively or by their sexual activity. However, as the committee knows, the law does not restrict its protection to that type of individual. The law is available for the most vulnerable and weak among us, who are likely to be the persons who are preyed on by sexual predators. The law protects those who are, inconveniently, not a Doris Day-type of figure, who comes in utterly sober to give evidence in twinset and pearls, but a young girl who may have been dressed in a suede bikini-type outfit and who may have had five or more Bacardi Breezers and two Aftershocks. The typical member of the public passing by that girl will go, “Well, you know what’s going to happen to her tonight.” To an extent, that clichéd view represents in-built prejudices, which can be held by females as well as men; they are not confined to one gender. Some women would say “Well, I simply wouldn’t get into that situation,” and judge the victim according to their own standards, rather than looking objectively at the fact that these are the very people who are much more vulnerable and more likely to be sexually assaulted than those who are assertive and in control of their life.

Nigel Don: Thank you for that comprehensive answer. To what extent will the bill improve conviction rates?

The Lord Advocate: There is no panacea for the low conviction rates for these types of crime. It must be made clear that there is no magic bullet. I hope that a package of changes and reforms and consideration will adjust the situation. It is not about improving the conviction rate; it is about ensuring that sound cases are put before juries, that juries are placed in a position where they are able to test the evidence that is available and that the process has been expeditious and supportive for the victim as well as fair to the accused. That balance must be achieved because this is a very difficult area of criminality. It is not about looking at a barometer and saying that we want to achieve a certain quota of convictions next year. That would amount to a drive towards miscarriages of justice.

We do not coach witnesses in Scotland, although that is done in some jurisdictions, where witnesses are trained in how to give their evidence. We allow witnesses to give their evidence without any form of training in that respect because that would be considered unethical in this country and, indeed, under our current law, it might amount to an attempt to pervert the course of justice. Certain steps that could be taken are outwith our powers and not something that we would do.
I hope that, by modernising the law as it relates to the crime of rape, the bill will give us greater understanding. Equally—it is important that this message is conveyed across the Parliament—I hope that, by removing the hierarchy between sections 1 and 2, we will ensure that we do not have references just to conviction for rape. I hope that people will embrace the two sections. There is little distinction in terms of seriousness between some of the crimes in section 2 and those in section 1. Therefore, that change will assist with providing greater clarity. The change from the criterion of subjective honest belief to the bill’s criterion of reasonable belief will be of some assistance to that, too, as will the statutory exclusions of certain circumstances that might currently be inferred as a basis for consent—for instance, intoxication and incapacity.

There are ingredients in the bill that will assist with the clarity of the law but not assist universally in curing the low conviction rate. The other variables are also important. The law of evidence in particular is crucial in relation to the conviction rate in Scotland. That law must be examined and a decision must be made as to whether it remains as it is or whether consideration should be given to variation—for example, in relation to the Moorov doctrine and its operation. Equally, our attitudes are important. There must be education about autonomy and the right of individuals not to have sexual intrusion without their consent, and a consistency of belief across the community about that because, undoubtedly, significant numbers of people simply do not believe that such victims deserve the protection of the law.

**Nigel Don:** On that point, would it be appropriate to do what I think was suggested by a witness at last week’s committee meeting, which is to undertake research into why jurors come to the conclusions that they do in rape cases?

**The Lord Advocate:** Research on jurors’ decisions is currently prohibited by law. That is partly in order to protect jurors from intrusive, invasive questions that may render them more vulnerable and perhaps less willing to do jury service. Again, that is an issue for the Parliament to consider because we would need an amendment to the law to allow such research.

Jurors are generally not very different from the public. Well, they are not different—they come from among the public; in essence, they are 15 people taken off the pavement and put into a courtroom. From surveys carried out by Amnesty International, Rape Crisis Scotland and Scottish Women’s Aid, it is clear that there is a preponderance of one view. The view permeates society, and you do not need to do a great deal of research to find that out. When people come to try a rape case, they still start off with a rebuttable presumption that some woman has been dragged down an alley and forcibly engaged in intercourse, rather than a presumption that it will be the type of situation that I described earlier. There is a significant psychological obstacle to overcome when a jury suddenly realises that the two people were boyfriend and girlfriend, had been partners for 20 years, and were in their bed when the rape occurred, after having engaged in some form of consensual sexual conduct. That is a significant challenge for us all. The Parliament, the media, education services and prosecutors can all help to change attitudes, if society wants to provide protection.

Before we can begin to change, there has to be an honest dialogue about what it is that we seek to protect. Of course, research of any description would help, but that would be for the Parliament to determine.

**Nigel Don:** Witnesses to the committee have been exercised about the use of the word “rape”, and have endorsed your view that the current use of the word is far too restrictive. What are the distinctive characteristics of rape?

**The Lord Advocate:** They are about to change. Are you asking about the current law, or—

**Nigel Don:** What should the definition be? We acknowledge that the current definition is restrictive—and any new definition ought to include it—but what criminal offences should the word “rape” cover?

**The Lord Advocate:** Section 1 of the bill relates to penetrative abuse with a penis—and it relates to abuse committed by both men and women. I think that there has been a suggestion in the committee that such abuse could be committed only by a man, but it could be committed by a woman with an artificial penis or by a woman who has a surgical prosthetic. Equally, it can be committed by a woman and part, or in concert, with a man. There is no intention to abbreviate or adjust the common law or the statutory provisions on art and part as they appear in the Criminal Procedure (Scotland) Act 1995. Such provisions will still apply.

The characteristic that section 1 embraces at the moment is penetrative abuse that is penile in nature and relates to any orifice of the body. We have to give this issue balanced consideration, and my perspective is based on my experience as a prosecutor. As I have said before, penetration with an object can be one of the most horrific forms of sexual violation. It is just as serious as penile penetration. There have been cases, in Scotland and abroad, where knives, guns, batons and other objects have been used to cause huge sexual humiliation and desperate physical damage, with horrendous consequences for the
victim. It will be for the Government, and the Parliament collectively, to consider whether such abuse should be embraced in section 1. It is currently dealt with in section 2. However, I want to make an important proviso: there should not be any discrimination or hierarchy between section 1 and section 2.

You could replace the word “rape”; you could call the offence “penetrative sexual assault” if you wished. The crime is very old. It was a most serious plea of the Crown; it was a capital crime along with murder, restrictively. For a woman in the 17th and 18th centuries, the consequences of being raped were cataclysmic in terms of her reputation and social value. The emphasis on penile penetration at that time was clearly part of the social environment.

The consequences for a victim of penile penetration can be extremely serious because of HIV and hepatitis as well as pregnancy. An aggravation can come from that. However, other forms of penetration can also cause massive psychological destruction and physical injury. I would say that that also characterises the crime of rape.

Nigel Don: Can I therefore take it that you would support the idea that there might be a further statutory crime of rape with an object, or possibly another body part?

The Lord Advocate: The penis of an animal is another object that can be used. We have had to deal with such a case.

10:45

Nigel Don: So you would be supportive of such a further statutory crime.

The Lord Advocate: It is a matter for the Parliament. Sections 1 and 2 do include such crimes—there is no question about that. It is a matter for the Parliament to determine whether it wishes to identify such a crime as something separate and distinct from what is covered by sections 1 and 2, or whether it is content that the fact that the two crimes rank equally means that it would be of no particular consequence to cover such offences in either of those two sections.

Nigel Don: Quite a number of witnesses were exercised by the fact that section 2 does not include the word “rape” under circumstances where they felt that it would be appropriate. Many people have told us that they would like there to be some mention of rape with an object, in addition to the provisions in section 2 as they stand.

The Lord Advocate: It is important to listen to such requests, and I hope that the committee will give consideration to such matters.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): I have a point about the overlap between section 1 and section 2—section 2(6) in particular. Some people who have given us evidence believe that an overlap is created between sexual assault and rape. Are there any cases where it might be appropriate for the Crown to charge penetration with the penis as a sexual assault, rather than as rape?

The Lord Advocate: Not if it could be proved. The difficulty would be in cases where it might not be possible to corroborate the fact that it was a penis that made the penetration. Victims might be blindfolded in some cases, and they might have no idea with what they have been penetrated. That is why I mentioned the somewhat grotesque descriptions of what is possible.

The victim has the opportunity to give her evidence, in the context of section 2(6). She will be able to articulate that it might have been a penis but that she is not absolutely sure, or evidence could emerge in the context. Our policy would be that if there is a crime that supports the offence of rape, we will prosecute it as rape.

The Convener: I turn now to the coercive aspect that is dealt with under sections 3 to 5. With your experience as a prosecutor, can you describe some of the situations that those sections are intended to cover?

The Lord Advocate: There is an infinite selection of scenarios. My colleagues might be able to provide more examples than I can. The classic situation would be where an individual is detained and obliged to watch other people engaging in sexual activity in front of them, or they are forced to watch hardcore pornography, with the clear inference that it is being done for the sexual gratification of the individual or for the purposes of humiliating or distressing the individual.

In relation to that aspect of sexual coercion, I note that it is unusual to have the purpose or motive defined in a section. That could present a further challenge to prosecutors to corroborate the matter. The mens rea, or the mental element of a crime, is usually intention or recklessness in such situations. The actual motivation, or the reason why something has been done, is not something that we ordinarily have to prove. The only exception would be assault with intent to ravish or assault with intent to rape, when we consider the objective of the individual—their purpose in dragging someone to the ground, for instance. If someone intervened, the individual might never have got to rape the other person. In such cases, we might try to show what the individual’s motivation was.
It is fine that the purpose is there, as it expresses the nature of the offence, and anchors it, but I am not sure that it is absolutely necessary to have it—I wonder whether it is implied in the nature of sexual coercion and whether it is therefore not necessary specifically to address the purpose that the accused had in committing the offence. Some of the worst sexual offenders are utterly inanimate, according to how the victim describes their conduct during the res gestae—the event itself. The victim might be suffering terribly but not expressing a great deal, with no florid crying or distress being expressed, although she will be in a state of fear and anxiety. The accused might not be expressing anything; he might not be telling his victim what he is thinking or doing.

We have to provide evidence from the circumstances that will infer what the purpose of the accused was in doing what he did to the other individual. To be able to prove that it was sexual coercion is one thing, from the actus reus, or physical acts, that have taken place. Inferring that he intended to do it is fairly straightforward, but showing what his purpose was can be a bit more of a challenge. We might want to consider that particular qualification before stage 2.

The Convener: We always have to look for the unintended consequences of certain situations. For example, what would happen with a situation in which a couple have consensual sex in the bedroom where their infant child is? The child might be aware that some activity is going on and clearly has not consented to sex taking place. Technically, that would stand as an offence under the bill.

The Lord Advocate: Let us consider people’s economic circumstances. Many people in Glasgow lived in single ends, and if they were ever going to have a family, they had no choice but to have sex in the presence of their children because they all slept in the same bedroom. To an extent, one has to consider the prosecutor’s common sense. When conduct takes place in a flagrant, reckless way—with wilful blindness—and people who are out of their minds with drink strop about naked having intercourse in an obvious way in front of children who are conscious and running about, having intercourse in an obvious way in front of children who are conscious and running about, although she will be in a state of fear and anxiety. The accused might not be expressing anything; he might not be telling his victim what he is thinking or doing.

If the couple happened to be poor—living in a tent, for example—and were in bed, one would consider whether those facts and circumstances inferred a recklessness about their conduct, and they would be asked whether the children were sleeping at the time. Although current common law offers possibilities to bring the law to bear in ways that would seem disproportionate and unreasonable, we do not use it in those ways; we attempt to use the law in a way that is fair and in the public interest. We would take into account circumstances such as those that I described.

The Convener: I am relaxed about the idea that the prosecutor would use their powers with discretion, but I wonder whether we might still have to look at the drafting of the bill.

The Lord Advocate: Andrew McIntyre has a comment.

Andrew McIntyre (Crown Office and Procurator Fiscal Service): Under the bill as currently framed, I hope that we will not run into such situations, because the bill includes the purposes behind such conduct. We would have to show not just that the child was present during the act but that the intention of the parties was to obtain sexual gratification or to humiliate or distress the child. We have expressed concern that that approach sets a standard that is too high for the prosecutor. Our concern might be addressed by having a reasonable inference test, which would allow us reasonably to infer that, in all the circumstances, the purpose of the conduct was to obtain sexual gratification or to humiliate or distress. That would solve our problem of the standard in the bill being too high—we did something similar with the Prostitution (Public Places) (Scotland) Act 2007. In cases involving circumstances such as those that the Lord Advocate described, in which there was anxiety that the act was perfectly reasonable, it would not be reasonable to infer that the conduct met that test.

The Convener: Do both the conditions that are outlined in paragraphs (a) and (b) of section 4(2) have to apply, or does one in isolation suffice?

Andrew McIntyre: As I read it, only one condition has to apply. My reading of section 4(1) is that we would have to prove that one of those conditions, rather than both, applied.

The Convener: We will have to look at the matter again.

The Lord Advocate: To further clarify the matter, we could simply insert an “or” between paragraphs (a) and (b) of section 4(2).

The Convener: It will not be beyond the wit of the Scottish Government to come up with a drafting amendment at stage 2. Thank you for that, Mr McIntyre.

We will now consider consent and reasonable belief with Robert Brown.

Robert Brown (Glasgow) (LD): Section 9 defines consent as “free agreement”. Does that definition advance the law? Does it offer a scintilla of extra meaning? If that is what consent means, why is the phrase “free agreement” not used
throughout the bill? Using two words rather than one might make things simpler.

**The Lord Advocate:** The term “free agreement” is readily understood in that context because of its breathtaking simplicity and beauty. The term “consent” is in use, but we know from the authorities and case law that, in developing jurisprudence, people have struggled with the extent to which consent can be inferred.

I do not see any difficulty with the term “consent” as an overarching legal test that includes the specific definition of free agreement. Someone who is suffering from Alzheimer’s can consent to go on holiday to Jamaica in June with another person, and whether that is free agreement depends on the state of their mental capacity and whether they understand the proposition and its consequences. That is the nature of the definition. I do not think that it is tautologous. It will be a useful tool for us in helping juries to understand what consent means, especially in the context of rapes that take place in a domestic violence environment or when someone has been abducted and detained. Although those circumstances are referred to in section 10—they are specifically listed in section 10(2)—it is still helpful to be able to explain the term to a jury.

**Andrew McIntyre:** I agree that there is something attractive about replacing “consent” with the term “free agreement” throughout the bill. I have said in the past that that would be better as it would remove one of the layers of definition. The only thing that makes me pause is the extent to which the common law will continue to apply, which we discussed earlier. There is a great deal of common-law interpretation of consent. I do not know authoritatively, but I wonder whether retaining the term “consent” in the bill will allow us to introduce more easily its interpretation in the circumstances of the case, which has assisted us in the past. That is one thing to bear in mind. If we decide that the term “consent” should no longer apply, we might be putting a pen through all the authorities that have considered what consent is—and what it is not.

**Robert Brown:** If I understand correctly, there are two issues. First, there is a language aspect, in that the words “free agreement” are more easily understood by the public—they are a clearer, more common expression in the English language. Secondly, as the Lord Advocate indicated, it goes a bit further, in that there are nuances of meaning in the expression. However, I challenge your last point. If we redefine consent, will we not, almost by definition, be throwing out previous definitions of consent?

**Andrew McIntyre:** That is one argument. However, the other argument would be that in redefining consent, we would be widening the definition, rather than restricting it. We would be adding a dimension to it—it has to be free agreement, not just agreement. There would still be a kernel of consent, which would be the same as it always was—simply, the agreement part of it. How we view it will change, depending on the circumstances of the case and the authorities that we rely on in future.

**Robert Brown:** The circumstances in which conduct takes place without free agreement have given the committee a bit of trouble in a variety of ways. Section 10 and all the different situations that it lists sound terribly complicated. In general, will section 10 make it easier for you, as prosecutors, to convince a jury that what took place was done without consent—without free agreement—or do you anticipate any practical problems?

**The Lord Advocate:** With all new law, particularly a radical change such as the bill, we anticipate challenges in court. Challenges are inevitable, and they are why, if one were risk-averse, one would never change the law: one would just take the safe course of action and stick with what one has. The nature of litigation is that if something is new, it may be worth testing in court. It is not a bad thing if, early on, we have interpretation from the courts of a statutory definition. As we all know, what legislators want and what they achieve can be quite different. The courts must interpret the law that they get, and not what the parliamentarians hoped they would get.

My understanding from the Scottish Law Commission was that the situations that are listed in section 10 are commonly used as examples of circumstances that do not amount to consent. Section 10 simply bolts that down—it codifies it and puts it into statute. However, the list in section 10 is not exhaustive. There is an infinite variety of circumstances that may elide free agreement, but section 10 gives examples of those that have been accepted by the courts previously. The situation is more complex because free agreement is not part of the existing definition, but it is part of the jurisprudence that supports that definition.

Rape might be defined in common law by a simple phrase but, behind that phrase, hundreds of cases explain and interpret each word in the phrase and the jurisprudence that supports it. If the notion is that the situation is simple, I am sorry, because it is far from simple for prosecutors. Even the recent jurisprudence that developed on consent in the cases of Cinci and McKearney meant that we had to rework to an extent the definition as we had understood it.

It is not the case that the common law provides certainty; the common law also develops and changes. I suspect that the provisions will require
some interpretation and might require adjustment with the passage of time.

11:00

Robert Brown: Should other circumstances be added to the list in section 10?

The Lord Advocate: Circumstances could be added—that is the nature of the issue.

Robert Brown: I appreciate that a general provision applies.

The Lord Advocate: Yes.

The bill says that consent is not present when a person “submits to the conduct because of violence used against B or any other person, or because of threats of violence”.

The extent to which that provision applies will be important. I hope that it could be used in the context of domestic abuse, when the threat of violence does not immediately precede the rape—when the perpetrator does not say, “Take off your clothes—I’ll thump you if you don’t have sex with me.” The provision could apply to something that had taken place the night before, when the woman had been battered. It could apply when the woman knew, and the facts and circumstances—the evidence of their lifestyle—supported the conclusion, that if she refused to have intercourse, she would be assaulted.

A woman in such circumstances lives under a permanent threat of violence. We will have to prove that—it will not simply be asserted. We will have to establish the circumstances of the relationship to show the absence of free agreement. The court will interpret the extent to which the provision applies to the circumstances that prevailed at the time of the crime.

Robert Brown: Are you happy with the phraseology? As you know, some witnesses have expressed reservations about the extent to which situations of historic abuse will be covered. Would the words “threats of violence made then or at some previous occasion”, or another elaboration, do the trick? As a prosecutor, are you happy that the phraseology is adequate to cover such situations?

The Lord Advocate: The committee must look carefully at the drafting. Further consideration would be helpful. A causal nexus would have to exist between the previous incident and the event. Something might have happened 30 years ago, but everything might have been a honeymoon since then, so the problem might not have recurred. We would have to show in evidence how the previous incident affected consent on the relevant occasion, which would be extremely difficult to do. The wider the gap between the incident and the threats or violence, the more difficult it will be for the court to infer an absence of free agreement and the awareness of the accused. Part of the mens rea is that the accused was aware that the woman did not agree in the circumstances.

Robert Brown: The concept of prior consent in section 10(2)(b) has caused some difficulty. First, it sounds a bit odd—it suggests somebody signing a form to agree to sex later, after they have fallen asleep. Some people have suggested removing the phrase “prior to becoming asleep or unconscious” or removing the whole of paragraph (b) and leaving the question to be subsumed in the issue of consent. Do you have a view on that and on the difficulties of prior consent that some witnesses have described?

The Lord Advocate: The issue is difficult. At the moment, if a woman is sleeping or is unconscious from alcohol and someone has intercourse with her, the Crown proves its case on the basis of the circumstances and the absence of consent. However, we would still have to take into account any evidence that, 10 minutes before, she had said, “I’m very happy to have sex with you under any condition whatever. Just have your wicked way with me”, giving the man carte-blanche.

That is an extreme example, but an issue is the right of individuals under article 8 of the European convention on human rights to enjoy a private, sexual and family life as they wish to without undue interference from the state. A danger lies in criminalising conduct that is currently lawful—if people who are in a long-term or even a short-term relationship agree explicitly or impliedly to such activity, it is not criminal.

The important thing is to protect people who find themselves in that situation, and it strikes me that the provision on reasonable belief for the defence assists in that respect. Is it absolutely necessary to have prior consent if reasonable belief exists? The consideration whether something was reasonable in the circumstances must be one of the ingredients. Indeed, I wonder whether the concept of prior consent needs to be defined or further refined to ensure that it does not cover a situation in which, for example, someone who makes a casual suggestion in a state of sobriety wishes, five hours later, to exercise some autonomy or even, in sobering up, takes a very different view of what happened when they were sleeping. A person should not be tied to a decision that they might have made earlier. If an accused was clearly aware that someone was unconscious or sleeping, they cannot cite as a bar to prosecution some distant recollection of consent given hours or days before in very different circumstances.
Andrew McIntyre: Making prior consent an explicit part of the defence would shift the burden of establishing such consent on to the accused and would have the same practical effect as the approach that exists in the current operation of prosecutions.

Robert Brown: I appreciate that a lot of this comes down to practical circumstances. What about circumstances involving, say, a husband and wife or long-term partners who routinely sleep together? A lot of alcohol might have been consumed and if one party fell asleep the other might touch them in a sexual way—as, indeed, they have done before with consent. If these matters are not tightly defined, there might be a lot of potential for all sorts of criminal difficulties to arise from intrusion into personal circumstances. If, as you have indicated, these are criminal offences of a capital nature—

The Lord Advocate: They are not of a capital nature.

Robert Brown: Well, they are serious offences that are prosecuted in the High Court. Does the bill do the trick in excluding more ambiguous situations—if I can describe them that way—from criminal liability?

The Lord Advocate: That is the aim that the bill seeks to achieve, and I believe that it achieves it. However, it might be beneficial and worth while to consider before stage 2 whether the notion of prior consent should be refined to ensure that it does not have some meaning that the legislation did not intend to convey. It would certainly not be the intention of the prosecution to prosecute, for example, a husband who might wake up his wife by kissing her on the stomach or by any other action that might be expected in a perfectly happy, consensual sexual relationship. The provision is intended to protect women and their autonomy from people who might take advantage of them when they are at their most vulnerable, such as when they are in a state of utter intoxication, are unconscious or are asleep. Many serious rapes of that nature have taken place and have been prosecuted.

Robert Brown: On a slightly different point, the Faculty of Advocates, in particular, has suggested that, under section 10, a man who induces a woman to have sexual intercourse by deceiving her about his age is committing rape. I have to say that I did not read the section in that way, but is that a possible interpretation of the provision?

The Lord Advocate: The intention behind section 10 is to address deception in relation to purpose. For example, doctors have been prosecuted for rape or sexual assault when the nature or purpose of a medical examination or other activity that they were undertaking turned out to be very different in quality. At a de minimis level, it would all depend on how important the factor of age was in the circumstances. The same might apply if, for example, a person pretended to be a man or unmarried to have sex with a woman, although technically some of those cases might be prosecuted as fraud rather than as rape. The prosecution would have to consider the material nature and purpose of the deception and whether, as a result, the victim did not give true free agreement to the activity.

Robert Brown: So in broad terms it is unlikely that section 10(2)(e) would cover the circumstances that the Faculty of Advocates highlighted.

Andrew McIntyre: The point is that the provision would cover all such situations. However, as the Lord Advocate says, it would become a matter of materiality and discretion as to whether the factor was sufficiently important to merit prosecution. Prosecutions on such grounds are the very cases on which we need the courts to make decisions and establish a line of authority. The aspect that you mention could conceivably be covered.

The Lord Advocate: As long as I am Lord Advocate, the prosecution of a person on the basis that they deceived someone about their age will not materialise. We prosecute serious sexual offences, rather than indicting someone for what may be a trivial deception or something that is not of particular significance. My own gender is often guilty of not telling the whole truth about age in social encounters.

Robert Brown: I have a question on the objective nature of the consent that is implied in section 12, and how it applies to the position that is set out in section 10. Is there any danger that we are creating an offence of strict liability in relation to any of the situations that are listed in section 10? We are talking about an allegation of a serious crime against a person.

The Lord Advocate: No, because there must be mens rea—intention or recklessness. Mens rea is part of the process—the offence involves not only the actus reus of a person having sex with a woman who is unconscious or asleep, but that person’s knowledge that the woman is unconscious or asleep and their intention to have sex with them in circumstances in which they have no reasonable belief that the woman consents. That is not strict liability.

Robert Brown: In section 10(2)(a)—the alcohol provision—the issue is that consent is defined as being absent. However, the only indication of expression of consent is that the conduct occurred when the person was drunk. Does that not come very near to creating an offence of strict liability?
The Lord Advocate: No, because it must be shown that the individual intended to have sex with the woman and that they were aware, or had a reasonable belief, that the woman was incapable. It will be for the courts to determine incapacity in those circumstances. We know that there are degrees of sobriety and that people manifest insobriety in a variety of ways—some very floridly, by falling across the pavement, and others by sitting quietly in a semi-fugue state in the corner. Much will depend on the facts and the circumstances, and I think that the court will apply the law fairly in circumstances in which it was patent to all who were present that the individual was intoxicated and not in a state to make a free agreement.

In one case, a girl had consumed a huge amount of alcohol in the presence of the accused while they were at a party, so he had that knowledge. She had to be carried out of the room and placed in bed, where she subsequently vomited on to the bed sheets. She was in a state of semiconsciousness; the accused went into the room and she was raped. We are talking about that type of circumstance—not someone who was a bit tipsy on two martinis. We are talking about circumstances that are clear and in which the case can be safely prosecuted on the basis of objective facts.

Robert Brown: So in short, the phrase “incapable” is a substantial challenge to the prosecution?

The Lord Advocate: Yes—the court will interpret that subsequently.

Johann Lamont (Glasgow Pollok) (Lab): I appreciate the opportunity to ask a question—I will be brief, so as not to take away time from committee members who have a significant number of questions.

With regard to the list of circumstances in section 10, has the inclusion of prostituted, trafficked or bonded women been considered, on the basis that they do not have free control? I know that the Equal Opportunities Committee has heard evidence on that. There is a concern that although the list is not exhaustive, there is an implied hierarchy. Will you examine that further? I would welcome your comments.

Secondly, given that we accept that emotional abuse and controlling behaviour are part of the spectrum of violence against women, does unlawful detention include situations in which a woman has been so controlled by her partner over a period of time that she has no control over her own life and therefore submits to his wishes, as she does not know how to get out of those circumstances?

The third issue that I want to raise is that of reasonable belief. As we are all aware, in 2002, changes were made to the way in which sexual history evidence is treated under the law. How has that worked out in practice in the courts? Does not the danger remain that the person complained against could use the reasonable belief provision in the bill to say, “I am aware of the victim’s sexual history. She has been like this in the past. Other people have told me that—she has told me that herself.” What protection does the victim have in court?

Finally, when asking whether the circumstances of prostitutes or trafficked women should be included in the list, I should also have asked you to consider the circumstances of women who are groomed and become victims of sexual assault and abuse.
circumstances. Certainly, we would not rule out such prosecutions because, in some circumstances, they would come under the general detention provision.

I turn to the second issue of those who have suffered over time severe emotional and controlling abuse that has affected their self-esteem, their will to live and so forth. Again, whether such abuse amounts to unlawful detention depends on the circumstances. If an individual had been subjected to mental torture, including threats and isolation, over a number of years by a partner such that they were effectively detained, we would have to prove that detention and the extent to which the partner’s threats, implied threats and controlling behaviour had overcome the individual’s will. An individual is taken to have free will. We would have to prove, in evidence, that the individual had been detained. Obviously, there are extreme examples; some cases will be more difficult and challenging. In terms of domestic violence, in arguing the case, we would bring to bear the “threats of violence” provision in section 10(2)(c).

I turn to the third issue of sexual history and reasonable belief. I hope that the point that the member raised will not be the case. Reasonable belief relates to the res gestae, and the sexual history shield is available to us. Two weeks ago, I said in the chamber that protection under the legislation on sexual history evidence is not universally successful. When a rape victim gives her precognition to a procurator fiscal, we cannot give her a guarantee that her character will not be attacked. Undoubtedly, the victim’s sexual history is one of first routes of attack for the accused in cases in which that can be explored.

It is important to ensure that legislation is made to work. The jurisprudence that has developed has limits. We cannot guarantee with absolute certainty that evidence about character, and previous character, will be excluded. Indeed, there is an inherent risk in excluding it. Some months ago, we lost a conviction in the appeal court—I think it was the case of Macinteer. The exclusion of the fact that the complainant had previously worked as a prostitute—both judge and prosecutor objected to the evidence being led—was held to have amounted to a miscarriage of justice and the conviction was quashed on that basis.

There are difficult judgments to be made, but I do not think that they will be affected by the reasonable belief provision. That said, there is undoubtedly a need to continue to examine how the legislation on sexual history evidence is working in practice and what the Parliament wants to do with it.

Andrew McIntyre: It will be difficult for the Crown to establish that a history of domestic abuse, without immediate threats of violence, is sufficient to come under one of the circumstances listed in section 10. If we are ever able to do that, it will be through section 10(2)(c). It is important to recognise that section 10(2)(c) is not restricted by time. It relates to threats that were made at any time—not just threats of violence, but threats in the wider sense. In situations of domestic abuse, threats are not restricted to violence. The accused can threaten to kill himself, to make disclosures about his intimate relationship with the victim or to humiliate them in some other way. If we accept that the provision has wide latitude in time and is not restricted to threats of violence, it could be used to establish lack of consent in cases of domestic abuse.

The Convener: We move on to the question of reasonable belief. You will have noted that last week we heard evidence that section 12 is not as effective as it might be because it does not provide for the accused to be compelled to give evidence. Do you see that as a problem?

The Lord Advocate: There is no difference from the current situation. The only alteration that the bill will make is that we will move from an entirely subjective test—the accused’s honestly held belief, however unreasonable it may be—to a test based on reasonable belief, which is more objective. That should make matters easier because what is reasonable in the circumstances will be inferred from the facts and circumstances that are put before the court in proof. Individuals may speak to the conduct of the accused and the victim at the time of the alleged offence. They may describe how the accused and the victim were behaving—at a party, for example—and how the victim appeared to them. Was she happy? Did she look safe and content in the accused’s company? Those factors, as well as anything that the accused said to his friends, when he was being interviewed under caution by the police or—more rarely—during judicial examination, may be derived from the evidence.

The bill does not shift the current position in any way and places no obligation on the accused. If there is an irresistible case crying out for an explanation, under common law the judge may suggest that the accused needs to rebut it, but that mechanism is used very rarely and conservatively. The bill does not shift the position in a way that will make a practical difference for us.

The Convener: Has conservative use of the power that you describe been governed by the fact that more frequent use could cause difficulties under the European convention on human rights?

The Lord Advocate: There is no absolute right to silence under ECHR—there is a presumption of innocence, which does not require the accused to indicate his position in all circumstances.
However, European jurisprudence views some degree of proactivity on the part of the accused as acceptable in a criminal trial. In solemn proceedings, an accused cannot plead an alibi or self-defence without giving prior notice. The notice does not establish the defence—the accused must find a basis for the alibi or defence of self-defence in the Crown case, or must lead evidence that raises reasonable doubt about the Crown case and establishes the defence. There is no expectation of utter passivity from the accused in the trial process. Cases such as we are discussing will be no different.

**The Convener:** I accept that an accused cannot argue a special defence unless he gives evidence in support of it. However, we are talking about a slightly different situation, in which the accused stays completely quiet throughout proceedings. Would that put the Crown behind the 8-ball?

**The Lord Advocate:** At the moment, we must prove mens rea: we must show that the accused intended to do wrong, or acted recklessly, which, incidentally, shows that he had no reasonable belief as to consent or knowledge. When we investigate cases as prosecutors, we do not do so with a view to obtaining a conviction at all costs. Our role is to ensure that the evidence is fair and balanced to the victim and to the accused, not to skew the case or exclude evidence that may support our case but be inconvenient to the proposition that the prosecution is putting before the court. That is an important part of the prosecutor's function as an officer of the court.

**The Convener:** Last week it was stated to us in evidence that the Scottish Law Commission intended that the provisions relating to consent and reasonable belief should apply to attempts to commit rape and sexual assault. How that will be achieved?

**The Lord Advocate:** I do not see a distinction between the complete offence and an attempt to commit that offence. The latter is also a crime, and the same provisions would apply. However, evidence must be available to support that, therefore much depends on what prevented the crime from becoming complete. It is particularly challenging to provide such evidence in rape cases.

There can be circumstances in which people are engaging in consensual intercourse, but there is a change of behaviour on the part of the accused. There is something odd, or the individual just decides that they do not fancy the accused any longer and changes their mind. If the complainer indicates that she does not wish to continue, there is from that point onwards the potential to prosecute for rape. The act becomes rape when consent is withdrawn, provided that it is reasonable, in the circumstances, to infer that the accused had the mens rea to know that consent had been withdrawn, or was utterly reckless in respect of whether there was consent. As members can imagine, the challenge of proving such circumstances is immense.

There is no distinction between the complete offence and attempts or assaults with intent to rape.

**The Convener:** I cannot see, in the bill, any provisions that deal with attempts.

**The Lord Advocate:** If the offence is available for the completed crime, it has to be available for an attempt. It is the same with theft. A defence in the case of theft is that the person is the owner of the property or had no intention to steal—that applies equally to an attempt to steal. We can consider the matter further if the committee would feel more comfortable if it was specified in the bill. However, the difficulty is that there are also conspiracies to commit crimes. It might be necessary to list all the inchoate offences, not just the attempts. The offence would also need to be made available in cases of conspiracy to rape.

**The Convener:** We will consider that in due course.

Part 4 of the bill is on children. Our questions will be led by Angela Constance.

**Angela Constance (Livingston) (SNP):** The offences against young children that are set out in sections 14 to 19 are designed to protect young children, but can also be committed by young children. Is it correct, as a matter of principle, that offences that are designed to protect young children can also be committed by members of that protected group?

**The Lord Advocate:** Whether that is right is a matter for Parliament. I am the prosecutor and I implement the law that Parliament and the Executive determine. As for what is right, if you are asking for the personal view of the Lord Advocate, I suppose that it is a matter of indifference to the world what my view is. My job is to implement the law and to interpret the public interest when that law is in place.

The current position is that I do prosecute children for non-consensual offences against other children when my doing so is in the public interest. However, that is extremely rare because we have a strong system in which most cases of offences by children are reported to the children's panel.

As chief prosecutor, I have no wish to criminalise children unnecessarily, but when there is an absence of consent and someone under 16 commits an offence against a younger child, prosecution is considered. If a 15-year-old abducts a four-year-old and sexually assaults them, prosecution is considered, particularly where the
behaviour was aggressive and where there might be a propensity to reoffend. The individual could become a lifetime sex offender, so we have to consider the facts and circumstances of such cases carefully.

Cases vary considerably, from children simply experimenting with each other in an innocent, explorative way— which we would never dream of characterising as criminal by way of prosecution— to serious offences that can permanently damage children or cause serious psychological or physical damage.

Angela Constance: I ask you to consider examples in which both the alleged perpetrator and the victim are under 13. If a 12-year-old girl invites a 12-year-old boy to touch her in a sexual manner, will both be guilty of an offence?

11:30

The Lord Advocate: The provisions in the bill suggest that there should be equality in relation to gender. In contrast with the law that we had in the past, when we consider how to legislate, we now have to ensure that the law complies with article 14 of the European convention on human rights and is non-discriminatory. We can justify a departure from that only where there are good reasons to discriminate between the genders.

A case involving the scenario of a 12-year-old touching another 12-year-old would never see the light of day in the criminal courts. It would possibly not even be reported to the children’s panel, because such a scenario probably takes place in numerous neighbourhoods during the summer holidays. There may be some form of exploratory touching by children within a normal childhood.

It would be very different if a 12-year-old was bullying another 12-year-old, aggressively coercing them, and showing conduct that might illustrate a propensity on the part of the aggressive 12-year-old— female or male— to commit sexually aggressive behaviour for the course of their life. In those circumstances, the reporter to the children’s panel would consider whether care and protection were necessary under the Children (Scotland) Act 1995 or whether the conduct was so serious that prosecution was merited.

I must say that, as the prosecutor, I consider the age of criminal competence of eight in Scotland to be extremely low. Consideration needs to be given to that, although not in the context of a particular bill.

The Convener: Yes. That is for another day.

The Lord Advocate: It is a much wider issue that needs substantial consideration by Parliament, and not just in the context of a particular bill.
sanctions. The bill does not adopt that approach in relation to various penetrative sexual activities. However, Professor Gerry Maher stated in evidence that

“the bill represents the worst of all worlds, because it will extend decriminalisation by listing a wide variety of what would otherwise be offences, but will keep criminal liability for certain acts”.—[Official Report, Justice Committee, 18 November 2008; c 1370.]

How frequently are older children prosecuted for consensual sexual relations?

The Lord Advocate: They are prosecuted very rarely. From our research, I think that there have been eight prosecutions in the past three years.

Stuart McMillan: Under what circumstances are such prosecutions brought?

The Lord Advocate: That depends on the circumstances, which can be very varied. We would consider the circumstances of both the victim and the accused. Some cases will relate to aggressive conduct on the part of the boy in the relationship—in the past, only boys could commit the offence. There might often be allegations of non-consensual intercourse for which we do not have the corroboration that would allow us to prove that. That is an important factor. In many cases, we have insufficient evidence to prove rape.

We prosecute under section 5(3) of the Criminal Law (Consolidation) (Scotland) Act 1995 for consensual intercourse with a child where we believe that the case is sufficiently serious, such that it is in the public interest to prosecute. It is very unsatisfactory for a victim to go through that process when the assertion is that she consented and her position is that she did not. However, if consensual intercourse with a child is all we can prove, that still allows us to get a conviction and it allows for the individual to be placed on the sexual offenders register, when we have a clear account from the police report that there is a real danger that the individual’s offending will continue and that his disposition is such that he is an aggressive sexual offender. The eight cases that have been brought probably represent such circumstances.

We would consider whether there was exploitation of vulnerability, for example if the other child has learning disabilities. There might be a Euston-station situation, whereby an adult has got another child to go out and fetch a vulnerable child and groom them to engage in relationships. Their vulnerability, which would cause them to consent, might have been exploited cynically by the other individual. That sort of situation would be rare, but we would examine such exploitative situations in which the power balance in the relationship was clear and where there was aggression or bullying in the background.

Parliament might give me, as the public prosecutor, a clear signal that you wish children in such situations to be prosecuted, irrespective of the circumstances. Where there is fresh legislation, and there is a clear message from Parliament that it is to be enforced rigorously, the exercise of prosecutorial discretion is very much more limited. However, there might simply be recognition of the need for the provision for public health purposes, to protect children from exploitation by others, or to give some children a point of reference.

I do not think that anyone in this country wishes to criminalise unnecessarily children who may be involved in exploratory sexual behaviour. Most people would be concerned about the public health issues that may arise and about the welfare of individuals who commence relationships in circumstances that might be dangerous to their health, welfare or morality—they might be thrown into situations in which they are way out of their depth. I have seen cases in which 13 or 14-year-olds attend an apparently innocuous party at which, in fact, group sex is going on. They are utterly bewildered by the circumstances and are sucked into that scenario without having the emotional maturity, communication skills or assertiveness to get themselves out of it.

There might be value in there being a signpost in law to say that certain behaviour is criminal. People could shelter under that. I am not saying that prohibiting something necessarily makes people stop doing it—we know that that is a wish too far. However, the provision could be used as a point of reference to allow some victims not to find themselves obliged to consent because of peer-group pressure or bullying in circumstances that are immensely outwith their capability to deal with.

The Convener: I do not want us to get ourselves into difficulty.

Let us consider a situation in which you prosecute on the valid ground that you have enunciated. If you think that you cannot sustain the idea that there was coercion and a charge is therefore made under section 5(3), do not both people have to be charged?

The Lord Advocate: Discretion is exercised in a full range of circumstances. We would have to treat both people equally. If a girl had behaved in such a way towards a boy, it should be remembered that women can be sexually aggressive sex offenders.

Andrew McIntyre: The important point is that we would not be able to prosecute the female in those circumstances, because section 5(3) protects only females. That is an anomalous
situation. However, on what is to be proposed, either could be prosecuted.

The Convener: Either or both?

Andrew McIntyre: Yes. Either or both.

The Lord Advocate: It is difficult to envisage circumstances in which there would be sufficient evidence relating to both, unless they had done something in the middle of the park with all their friends around them, for example—although that happens.

The Convener: Unfortunately, it does happen, as you say. Therefore, we are left with a welfare or protective offence, and the question has to arise whether it is legally competent to prosecute a member of the protected or defended class with the offence of having had sex with someone under the age of 16.

The Lord Advocate: Parliament must make that choice and determine where to draw the line. I think that the Cabinet Secretary for Justice’s view is that there are circumstances in which what has been proposed can benefit public health. I accept that there are valid considerations to do with the fact that suggesting that such things have happened might subject a person to the possibility of prosecution, which might deter young girls from seeking medical support or psychological counselling, or from disclosing to an adult. That factor must be taken into account.

Simply to refer such circumstances to the children’s panel, as the Scottish Law Commission has suggested, is one way forward, but the type of situation that I mentioned would be lost by doing so. In some circumstances, we would focus on prosecution and would not be able to prove the absence of consent. Statistically, eight prosecutions are not many, but eight children or teenagers who go on to become serious sexual offenders represent a significant threat to the community in which we live. Therefore, Parliament must strike a balance. I am content to leave it to Parliament to determine where the appropriate line should be drawn and how such conduct should be controlled.

Robert Brown: I entirely understand the motivation behind what you say, but do you have any concerns about prosecuting for a more general crime, for which other people are not prosecuted in circumstances in which you cannot prove the things that you are concerned about?

The Lord Advocate: Yes. However, I suppose that the answer would be to remove the requirement for corroboration, which is another test. I am not suggesting that, but that is the reality. In other circumstances in other jurisdictions, one would be able to prove such things. We can work only with the evidence that we are able to get; if evidence does not exist, we cannot make more of what we have. As the committee knows, people often accuse others of rape and all that we can prove in law in such circumstances is that assault with intent to rape had occurred or that there had been lewd and libidinous practices. That is unsatisfactory for the victim, but it is all that we can achieve within the law, which determines the parameters within which we behave. We use the law where doing so is appropriate and in the public interest. It is therefore timely that Parliament is able to consider whether it wishes to maintain in that way that aspect of criminality for people aged between 13 and 16.

Nigel Don: My question may pre-empt what Stuart McMillan wants to say. Is there a risk that we are generating trials by the Lord Advocate rather than trials by court? In other words, you and your colleagues will decide what should be prosecuted. Forgive me—as you will appreciate, my question is not intended to be personal in any way, and I do not intend to attack the office that you hold.

11:45

The Lord Advocate: That situation applies across the board in Scotland. Of course the prosecutor in Scotland determines what cases will go to court—we are the gateway to the court. We do not apply the principle of legality in Scotland. We imbue, and have imbued, the Lord Advocate and her representatives, the procurators fiscal and Crown counsel, with the discretion to interpret the public interest. That autonomy is not exercised in isolation from the community and the people who provide information to us. We base our decisions on information that is provided by the police about the level of crime in the environment. For example, in Scotland we have a problem with knife crime, and we can adjust policies to take account of the seriousness of the problem. Such flexibility is a core part of our justice system.

Nigel Don’s question suggests that the situation might have somewhat sinister connotations. I hope that we are not exercising our discretion to make decisions about what is in the public interest in a patronising or isolated way. If one thing characterises the nature of prosecution during the past 10 years, it is that we are reaching out to the community and listening to Parliament, interest groups and expert groups. An expert advisory group on sexual offending has been established and we are listening to its advice; we are not working in glorious isolation. However, decisions must ultimately rest with the prosecution and must be made independently of any other person, in terms of our statutory obligation.
Nigel Don: Thank you for putting that on the record.

Stuart McMillan: Would a welfare intervention in relation to consensual sexual relations between older children give rise to issues under article 8 of the European convention on human rights?

The Convener: Article 8 is about the right to privacy.

The Lord Advocate: Article 8 protects privacy and the rights of the family, but Strasbourg gives a margin of appreciation to states. There might be different cultural phenomena in different societies in Europe. In some states, the age of consent for sexual intercourse is as low as 12—I think that it is 12 or 11 in Spain. The situation varies considerably in Europe from one jurisdiction to another. Strasbourg has not put in place a high threshold for interference; there is a low common denominator on the extent to which the state can interfere with private lives, family choices or individuals’ sexual lives.

There is recognition that states are entitled to consider protection of their most vulnerable citizens. People who are young or emotionally immature can be at risk of all sorts of diseases, the consequences of which they might not be aware of when they are only 13, 14, 15 or 16. Therefore, a margin of appreciation is afforded. I have not looked at the matter in detail, but I think that the short answer to your question is that it is perfectly legitimate to take a welfare approach.

If, as a result of taking such an approach, action is taken that limits or restricts the rights of an individual in a way that would engage article 6 as well as article 8, there must be some form of article 6-compliant tribunal, to deal with the article 6 rights that are inherent in any action that is taken on the basis of article 8.

Paul Martin (Glasgow Springburn) (Lab): Schedule 1 to the bill sets out penalties. The maximum penalty for rape of a young child would be

“Life imprisonment or a fine (or both),”

and the same maximum penalty would apply to other, equally serious, offences. Do you understand that to mean that a person who raped a child could receive a fine?

The Lord Advocate: The bill replicates the current law, which is that a fine is available on conviction for rape. I am subject to correction on this, but I think that the last time that a fine was imposed for a rape was in 1999—I cannot remember the name of the case, but it is somewhere in the back cells of the brain. No fine has been imposed for rape in the past decade. I suspect that if there had been such a case I would have immediately considered it in the context of unduly lenient sentences. I find extraordinary the prospect of only a fine being imposed.

As I understand it, it is intended that the fine would be a cumulative and not an alternative penalty, so that if an accused were very rich they could be fined as well as imprisoned. That could be cleared up in the drafting of the bill, if the situation is not currently clear.

Paul Martin: Should the implications of the move from common law to statutory law—where different minimum and maximum sentences apply—have been considered in that context?

The Lord Advocate: I am not sure what the Scottish Law Commission recommended in that regard.

In the context of cumulative penalties, I would like consideration to be given not just to a prison sentence but to a compensation order—that is not a matter for me, but I make the suggestion.

In circumstances that involve a very wealthy accused with a big mansion, for example, who rapes four or five children, it is very nice to be able to sell it and to make a compensation order in favour of the victims. That could be considered, although certainly not as an alternative to imprisonment in those circumstances—

Paul Martin: Lord Advocate, I understand the current position, and I appreciate and thank you for that point, but does the bill not offer an opportunity to refresh the legislation to ensure that the opportunity to impose a fine—

The Lord Advocate: Yes. You might want to consider amending the wording at stage 2 if it is considered that it is ambiguous and would not achieve the intention of imposing a cumulative penalty. However, I do not believe for a second that it is intended that a fine would be an appropriate penalty on its own.

Paul Martin: But your reading of the wording is that there is a possibility of the sentence being a fine only.

The Lord Advocate: Yes. The wording at the moment says “or a fine”. That would have to be changed.

The Convener: Perhaps you can satisfy my personal curiosity by letting us know in which case in 1999 it was felt appropriate to impose a monetary penalty for rape.

The Lord Advocate: I may be wrong. With the passage of time, my memory is not what it was. However, I think that 1999 was the last year in which a fine was imposed.

Non-custodial sentences are sometimes imposed by the court for rape. There have been instances of probation and community service
being used. In a number of those cases, I have taken appeals against the sentences as being unduly lenient, but I have been unsuccessful. The Parliament might want to consider that in its consideration of the penalties.

The Convener: Well, that comes within the discretion of the courts, and is subject to your appeal.

The Lord Advocate: Absolutely.

Cathie Craigie: At present, the criminal law does not extend to a girl who is aged under 16 who engages in consensual sex. However, the bill will extend the criminal law and the girl will be committing a criminal offence. Over recent weeks, we have heard evidence of concerns about that. We have also heard that a pregnant girl who is at risk of being prosecuted might suggest that she was raped. How might your office deal with such cases?

The Lord Advocate: As I have said, very few cases of that nature are prosecuted and the evidence is likely to show patently what took place. The current trend is to suggest that, when someone young suggests that intercourse has taken place, they do so only because they were late and their parents were going to give them a row. There are trends and fashions regarding the defence that is put to the victim, but it is likely that that suggestion might be put to victims in the future when cases are prosecuted. Nevertheless, I expect such cases to be relatively rare, and I hope that even if that suggestion is put, it will not be borne out by the evidence that is available to the court.

Cathie Craigie: Is there justification for extending the criminal law to girls who are under 16?

The Lord Advocate: It is not a question of justification; it is about compliance with the European convention on human rights. Article 14 of the convention states that, when a right or obligation is created on the part of citizens, it should be applied without discrimination to particular groups. However, application can be varied if there is objective justification for doing so. The issue is whether there is justification for not applying rights or obligations to a particular gender.

The psychologists will correct me if I am wrong, but I think that girls mature emotionally more rapidly than boys. I am not sure at what stage boys catch up, but at that stage there is no objective basis for taking a different approach. A girl pushing a 12-year-old boy about and forcing him to have sex is clearly a matter of concern to the public as well as to the boy. Justification is a matter for the Parliament to determine. Given that one of the attractive prospects of the bill is the fact that it makes rape a gender-neutral crime—it will apply to male victims as well as female victims and whether the accused is male or female—there is an issue of consistency in how far that is taken, which must be balanced on the basis of the evidence that the Parliament has heard and weighed.

Cathie Craigie: Sticking with the group of older children for the moment, will there be any practical difficulties in prosecuting or dealing with under-16 consensual sex, since both parties could be guilty of an offence?

The Lord Advocate: We will have to decide whether to use one of the parties as a witness, which currently happens in many cases where we have an insufficiency. For example, with some of our serious crimes, such as a murder where there are two people in a room with a dead person and there is absolutely no evidence other than uncorroborated forensic evidence, we know that two people were involved and we have to decide who was the principal actor and how we can prove that in the public interest. In those circumstances, we sometimes have to use accused persons as witnesses. So the decision that you are talking about is not different from the decisions that prosecutors have to make every day on the full spectrum of offending.

Cathie Craigie: You will be aware of the evidence that we have heard that there is a strong body of opinion that under-16 consensual sex should be treated as a welfare issue, not as a criminal offence. That leads us to looking at past decisions of the European Court of Human Rights, which has held that a state cannot claim that the retention of criminal sanctions is necessary while at the same time indicating that ordinarily there will be no intention of applying them. However, you said that you use your judgment about whether to apply the criminal law, and the Government’s policy documents in support of the bill indicate that there is no real intention to use the particular provisions in the bill. How do we balance the situation?

The Lord Advocate: That does not quite state the position. The Strasbourg jurisprudence relates to a blanket disapplication of the law, but I am saying that we will look for facts and circumstances that are consistent with the criteria that I have pointed out where there is absence of corroboration.

Registration on the sex offenders register achieves something very different from what the welfare system achieves. Registration is not available to the children’s hearings system, because under-16 consensual sex is treated not as an offence but as a ground for care and protection, so there are distinctions. There is no blanket non-application of the law; we do not
intend not to use the law. However, as long as I am Lord Advocate, guidance will be given to the police, whether or not in statute—I already have the power to issue guidance under section 17 of the Police (Scotland) Act 1967—that recognises that I have discretion and that the law will be applied with discrimination, not universally. If the Parliament signals otherwise and tells the prosecution in Scotland that it wishes there to be ubiquitous and widespread prosecution of children between the ages of 13 and 16, I will have to take that into account. However, if the Parliament supports a discriminating approach, I will be able to continue with our current approach to this aspect of criminality.

The Convener: That is the way out of that one.

Cathie Craigie: I will move on. Section 27(7) says:

“The Lord Advocate may issue instructions to chief constables in relation to the reporting”—

I will not read it all out. Section 12 of the Criminal Procedure (Scotland) Act 1995 has a similar provision. Why is it necessary to restate that?

The Lord Advocate: It is not necessary. It states what my powers are already. I think that it is in the bill to acknowledge explicitly the Lord Advocate’s powers when Parliament passes provisions that create a new offence for girls between the ages of 13 and 16. On summary justice reform, for example, there has been some debate about the use of the discretionary power, and whether the power was intended to be used for such crimes.

If the Parliament gives a clear signal that it is not expected that the power will be used in the manner that I have described—in other words ubiquitously, whereby all cases will be reported by the police—the provision can be removed, but it may be that the Parliament wants to reinforce the message. I do not think that section 27(7) in any way compromises the Lord Advocate’s independence; it simply restates what is in section 12 of the Criminal Procedure (Scotland) Act 1995 and section 17 of the Police (Scotland) Act 1967. The provision is harmless; it is simply a signpost to what the Parliament intends, but it is not necessary.

12:00

The Convener: Arguably, it is redundant.

The Lord Advocate: That is a matter for the Parliament to determine; the Parliament might not consider that that is the position. Whatever view—whether majority or unanimous—the Parliament comes to on that, I as Lord Advocate will take cognisance of it.

Cathie Craigie: Last week, I heard you talking on the radio about guidance that you had issued. I do not want you to go into details, but does that guidance include the older children age group?

The Lord Advocate: That guidance includes instructions on the investigation of crimes against children, but it does not relate to the prosecution of children. It is about how the police investigate serious sexual crimes that involve adults and children. It is not a determination of prosecution policy or an instruction to the police about how to report crimes; it is about how they set about their investigations. It is quite different from the guidance that I will issue to the police following the enactment of the bill.

The Convener: Finally, we turn to the abuse of a position of trust.

Paul Martin: You may have heard that on 11 November, Enable Scotland set out that, in the case of mentally disordered persons, criminalising sexual abuse of trust “does not seem to work”—[Official Report, Justice Committee, 11 November 2008; c 1313.]

and that the application of the criminal law in such cases is counterproductive, as it acts as a disincentive to disclosure of possibly inappropriate sexual conduct. What are your views on that, from your experience of dealing with cases of sexual breach of trust in such circumstances?

The Lord Advocate: I have not seen Enable Scotland’s written submission; I can speak only from my experience as a prosecutor over some 25 years. People in institutions or care homes who suffer from mental disorder or disability—I include children as well as the elderly—are among the most vulnerable individuals in our community. When I was a young prosecutor, there was a culture, even among the police, of wishing to deal with domestic abuse privately, outwith the courts. The exploitation of mentally disordered people’s vulnerability must be dealt with in the most draconian way and should include a deterrence element. I consider the physical, sexual or mental abuse of any such person to be a matter of the most serious nature. When such conduct amounts to a crime, it can be dealt with properly only by the criminal courts.

Paul Martin: So you do not accept Enable Scotland’s point that, given the low level of reporting of such cases and the low success rate of prosecutions, another approach should be considered.

The Lord Advocate: Over the years, there have been many reports of the abuse of people with mental disabilities, including the elderly and children, by people in positions of trust. I dispute that it is not possible to prosecute in such cases. It
is extremely challenging to do so, but we have been successful in a significant number of cases. The fact that the process is challenging should not dissuade us from treating the issue with the greatest seriousness.

I do not see the attraction of disclosure as opposed to prosecution—I am talking about cases involving criminal sexual conduct rather than some breach of regulations—other than that it would obviate criminal responsibility. I presume that the matter would be dealt with on a disciplinary basis or through counselling. Members of our community who are trusted to look after those who suffer from mental disability are in the greatest position of trust. A breach of that trust has to be responded to seriously and openly in our courts.

Angela Constance: I note what the Lord Advocate says about the seriousness of breach of trust by people who, because of their employment, have power over vulnerable people. Enable Scotland has asked about scenarios in which the client—for want of a better word—has a mental disorder but would normally have the capacity to consent to sexual activity. What are your views on the criminal law in such scenarios?

The Lord Advocate: I do not see a difference. In those circumstances, one person would be in a position of care, and exploiting that position in a sexual way or allowing a romance to develop would be a failure of duty. If the person in the position of care sees that a relationship may be about to occur, they must desist. There are means by which they can get themselves out of the situation, so that they are no longer in a position of care or trust, and so that they are able to pursue a lawful relationship. A relationship should not happen while the person is in a position of care or trust. If it did, it would be exploitative, irrespective of how we characterise it.

The Convener: Lord Advocate, that concludes this evidence session. I thank you, and I also thank Ms Holligan, who has sat quietly all morning—they also serve who only sit and wait—and Mr McIntyre. I am sorry that the session has taken so long, but you will appreciate the importance of these matters. We needed maximum input from you. Thank you very much.

12:06

Meeting suspended.

12:11

On resuming—

The Convener: Our second evidence session is with the Cabinet Secretary for Justice, Kenny MacAskill; Gery McLaughlin, the bill team leader with the Scottish Government; Patrick Down, who is from the bill team; and Caroline Lyon, from the Scottish Government’s legal directorate.

We will go straight to questions. What are the main justifications for the changes to the current law that are proposed in the bill?

The Cabinet Secretary for Justice (Kenny MacAskill): Significant public concern has been expressed by politicians of all parties and beyond in civic Scotland. There is a problem with ensuring that those who commit such heinous offences are dealt with properly. Our law has been built up over many years, so the bill is not an all-singing, all-dancing solution that will sort everything, but it is meant to ease a particular problem with the definition of consent and to deal with legal matters that came up in legal challenges. It also seeks to continue our country on its journey in trying to deal with sexual offending in a better way. Some measures have been taken internally, such as the changes in Crown procedure. The bill’s aim is to improve matters. On its own, it will not resolve everything, but it is part of a general strategy by Government, Crown and police to deal with the issues better and to seek to assist when there are interpretation difficulties in judicial matters.

The Convener: The policy memorandum that accompanies the bill draws attention to the “wider context” of the bill, particularly the need to address matters of evidence and procedure in relation to the criminal law more generally. Why does the Scottish Government think it appropriate to introduce this bill before the work on the wider context has been completed?

Kenny MacAskill: The bill is one aspect of our approach to addressing those significant issues. The Lord Advocate commented on how we deal with evidence and corroboration and the Mooroov doctrine. Those are on-going issues. Rather than waiting until we get all the ducks in place, we are doing what we can, but at a reasonable rate to ensure that we get it right. We are pressing on with appropriate measures while other processes take place in parallel. Depending on what the Scottish Law Commission comes back with on, for example, the law of evidence, more measures may be taken at a future date.

The Convener: Will the bill result in an increased rate of conviction for rape and sexual assault?

Kenny MacAskill: We hope that it will help in a variety of ways. On its own, it simply tries to provide consolidation and clarification, as well as assistance for juries in reaching decisions—whatever the Faculty of Advocates may say—and indeed for the judiciary. That is the intention and we hope that it does so. We do not expect the bill to be the sole, simple solution. If there were such a solution, it would have been found a long time
ago. We must also change attitudes because of how individuals in Scotland, including, sometimes, those who sit on juries, perceive matters. The bill is meant to improve what we accept is a lamentable situation in Scotland. The bill will not be the only solution, but we hope that it will be part of a broader effort to tackle a dreadful situation.

12:15

**Cathie Craigie:** Many witnesses to the committee have broadly welcomed the extension of the definition of rape in section 1. However, can you explain why the crime ofrape has been confined to penetration with the penis?

**Kenny MacAskill:** We accepted the Law Commission for Scotland’s proposals in that regard, but made two particular changes. We made one because of representations on sadomasochism and the difficulties that that might imply. The other change was to address the problem of underage consensual sex. We acknowledge the view of the Crown and others on penetration with objects, and we accept that these matters are finely balanced.

Apart from the two aspects that I mentioned, the bill that is before the committee simply confirms what we said at the outset, which was that we regarded the matter as non-party political and would bring in the Law Commission's proposals. However, we are more than happy to consider comments on the bill, particularly those made by my learned friend the Lord Advocate. We will also consider the committee’s reflections on the bill.

As I said, the bill’s definition of rape comes from the Law Commission’s proposals. However, the Crown has suggested in evidence, and it has been said privately to me, that the definition should include the horrendous incidents of penetration with an object as well as penile penetration. We will certainly be happy to consider those views.

**Cathie Craigie:** Are you confident, cabinet secretary, that the bill’s definition of rape is consistent with current public understanding of the term? The Faculty of Advocates was concerned that juries might have difficulty with the bill’s definition.

**Kenny MacAskill:** Debates about nomenclature are always difficult. However, the bill’s criterion of free agreement is standard for such matters in many countries throughout the world, and certainly in Europe. There is no simple definition that will suit 100 per cent of the population. However, the bill’s proposal gets us close to making it as clear as possible to a jury of our peers what is required. The criterion of free agreement is the best one that we can see at the moment. If there are other, whizz-bang suggestions, we will be more than happy to consider them. However, we have taken it on board that the current position is unacceptable, that there is a problem and that there must be change. Whatever my learned friends in the Faculty of Advocates may say, juries have had difficulty with the definition, so we must improve it. Is the bill’s definition word perfect? Well, we hope so. Our view is that the bill gets it as clear as is possible. Our understanding of various groups’ evidence to the committee is that they accept that we are on the right track.

**The Convener:** Perhaps we can explore that a little bit further. You have obviously appraised what the Faculty of Advocates said at last week’s committee meeting. Have you any views on extending the definition of rape to include oral sex and so on?

**Kenny MacAskill:** We have taken the bill on board, but we are more than happy to look at the wise counsel that the committee and others will come back with. We accept that some changes need to be made, so we will propose amendments at stage 2. We will be more than happy to take the view of the committee and the wider public on the question of oral sex. However, it appears to us that there are problems around how it would be detected and how a law on it would be enforced, and whether it would be better dealt with through a sexual health and education strategy. As I said, we will be more than happy to take the question on board, but it seems to us that we are addressing most of the matters that we need to. We accept that certain proposals must be amended at stage 2, and we will deal with that. We will take on board others’ views on the question of oral sex, but we think at the moment that the bill’s definition of rape is satisfactory.

**The Convener:** We go to Stuart McMillan, although to some extent you have anticipated his questions, cabinet secretary.

**Stuart McMillan:** Yes, that was regarding rape with an object.

What is the distinctive wrong inherent in the crime of rape, and what is the value in maintaining a separate and distinct crime of rape?

**Kenny MacAskill:** From discussions, both private and with the Lord Advocate, you will know that in other jurisdictions rape is simply described as a sexual assault. However, rape is within the public understanding. There is a clear requirement to define it, which is what the bill is about, and the circumstances in which it occurs, which is why we require to clarify consent. I tend to think that the serious nature of the offence should be marked and differentiated from a wider offence of sexual assault.

**The Convener:** We now turn to questions on consent and reasonable belief, with Robert Brown.
Robert Brown: Cabinet secretary, you may have heard the evidence on free agreement and consent, whether there is a difference in meaning between the expressions, and whether “free agreement” should be used throughout the bill. Do you have anything to add to the Lord Advocate’s helpful comments?

Kenny MacAskill: No. I did not listen to the whole of the committee’s evidence session with the Lord Advocate, but I heard most of it, and we are more than happy to accept the wise counsel of my learned friend.

Robert Brown: There are some areas of difficulty in section 10. Section 10(2)(a) deals with people being under the influence of alcohol or other substances, and you might have heard the evidence about that. Do you think that the provision does the trick in giving sufficient guidance to the court and juries on when a person is incapable of consenting? We are dealing with a common human position.

Kenny MacAskill: The provision is supposed to provide a non-exhaustive list of factual circumstances. The details may change, although it might take the wisdom of Solomon to define them at any specific juncture, as society and matters change. Our view is that the current list in the bill is adequate, but we will happily take on board any additional circumstances that people feel it would be appropriate to specify. We have the flexibility to make changes if we discover that we have not addressed all the matters or if circumstances change.

Robert Brown: We are dealing with serious criminal cases in which there has to be a high standard of proof. Is there any risk that section 10(2) introduces a strict liability version that undermines the ability to prosecute in some instances. It is about striking a balance. We should not interfere with legitimate behaviour that is not criminal or that is intended to be perfectly innocent in a relationship between individuals—even if it is not behaviour in which some would indulge. We think that the bill strikes a reasonable balance but, if others, including the committee, think that that is not the case, we will be happy to review the position.

Kenny MacAskill: If we leave it out, we will undermine the ability to prosecute in some instances. It is about striking a balance. We should not interfere with legitimate behaviour that is not criminal or that is intended to be perfectly innocent in a relationship between individuals—even if it is not behaviour in which some would indulge. We think that the bill strikes a reasonable balance but, if others, including the committee, think that that is not the case, we will be happy to review the position.

Robert Brown: Section 10(2)(c) relates to conduct that is agreed or submitted to because of threats of violence. We received evidence—you may have seen it—that provision may not deal adequately with situations involving past abuse or on-going relationships in which an implied threat is lurking in the background. Do you have any thought about the provision, in light of the evidence that we have heard?

Kenny MacAskill: That is a good question. The issue causes considerable concern to those who deal with domestic abuse issues. Domestic abuse has a history and leaves a legacy. We believe that
the current provision is adequate, because it covers instances of domestic abuse that have happened in the past. I accept that it is difficult for the Crown to prove such cases, but the law allows past abuse to be used as evidence that consent was given because of threats and coercion. The problem is more with persuading juries of that than with the law, which allows past instances of violence or threats—not simply those that have happened within 24 hours or a similarly short period of time—to be taken into account.

**Robert Brown:** In short, as the Cabinet Secretary for Justice, you are satisfied that the phraseology of section 10(2)(c) allows that to be done in a sensible and reasonable manner.

**Kenny MacAskill:** As I said at the outset, the Scottish Law Commission drafted the phraseology of the section. If the committee or others think that it is inadequate, we will be more than happy to consider that. At the moment, it appears to us that the problem is not that the law does not allow us to take into account past incidents but that we need to persuade juries to do that. If it is felt that the phraseology can be tightened in any way, I will be more than happy to do that.

**Bill Butler:** Section 1 makes it clear that a belief in consent will not exclude responsibility for rape or any other offence set out in parts 1 and 3 of the bill if it is not a reasonable belief. Does that mean that rape can now be committed negligently? For example, A may intentionally commit a sexual act against B in the belief that B is consenting, but where that belief has been carelessly formed.

**Kenny MacAskill:** No. At the end of the day, under mens rea and other principles that have always existed, for an act to be a crime, it must be committed with the intention to do wrong. I find it hard to think of circumstances in which someone could negligently commit the crime of rape. It comes back to the issues of how we deal with free agreement and reasonable belief. Some of it comes down to commonsense interpretation.

12:30

**Bill Butler:** That was a clear answer, cabinet secretary.

The committee has heard concerns that section 12 may not operate appropriately if the accused declines to give evidence. In such a case, it may be difficult or impossible to determine what steps the accused took to ascertain whether there was consent. Is there a potential difficulty there?

**Kenny MacAskill:** These are difficult issues—not only for those who draft the legislation but for those who interpret it and those who prosecute using it. I think that the balance in the bill is right, but we will be more than happy to make amendments if they will improve the bill.

A jury will be capable of inferring whether there was prior consent, based on matters that were not commented on, investigations that were not made, or refusals to answer or to say what investigations were required. There is a limit to what the law can specify in the nature of some defences. We therefore have to allow inferences to be made; we have to allow the jury to use common sense.

**Bill Butler:** You have answered the question that I was about to ask, which was on the idea of a jury drawing an inference.

Could an onus be imposed on the accused to show that he had taken steps to ascertain whether there was consent? Would you be open to such an amendment?

**Kenny MacAskill:** I would certainly be happy to consider it—but it would run contrary to the idea that, in Scotland, people are not required to state their defence and are entitled to hide behind a denial. We have to challenge such ideas, although society has usually been reluctant to change them. However, I think that the balance at the moment is correct. A case can be founded on a line of questioning by the police: during the prosecutors’ line of questioning, they can ask why particular issues were not mentioned earlier. Then, if those issues are still not mentioned when the opportunity is given, prosecutors can ask the jury to draw the appropriate inference. That will doubtless be commented on by the judge.

I do not rule out an amendment along the lines that Mr Butler suggests. However, it would be a fairly major step, and some people might point out that such an onus was not required in other types of defence.

We would not rule out an amendment out of hand, but the police will assume, and the prosecution will certainly home in on, the jury’s ability to draw an inference.

**The Convener:** Part 4 of the bill deals with children.

**Paul Martin:** On 4 November, the committee heard evidence from the Commissioner for Children and Young People. She said that children under the age of 13 should never be held criminally responsible. What are your views on that?

**Kenny MacAskill:** That is a separate and wider issue. There are specific and general issues. Some issues have been raised by the United Nations and other issues have been raised about the age of criminal responsibility in this country. The issue that Mr Martin raises has been considered in years past, and it is under review by the Government.
Earlier, the Lord Advocate spoke about the number of people who are prosecuted, and such issues will have to be considered in due course. At the present time, they should be left to the discretion of the Crown.

Paul Martin: Sections 14 to 19 have been designed for the protection of children. However, those crimes can also be committed by children.

Kenny MacAskill: As I have suggested, there are two separate issues, one of which is the age of criminal responsibility in this country. If you want to argue for a change in that, we could have a debate at an appropriate time. The issues are under consideration. There have been comments from the UN, but those are separate issues.

We are talking about the Sexual Offences (Scotland) Bill and about protecting our children. Therefore, the issue that Paul Martin raises is one for the discretion of the prosecution service.

Paul Martin: Is treating children who are under 13 as not being mature enough to make decisions about sexual conduct inconsistent with holding them criminally responsible for engaging in that conduct, especially when no evidence of coercion or exploitation exists?

Kenny MacAskill: I return to what I said. We are dealing with two issues, one of which is the age of criminal responsibility. If people want to revisit that, that can be done, but that is what applies at present. The bill is intended to make the law better and more fit for purpose and to protect our children.

Does a clear dichotomy exist between having the ability to prosecute a child and at the same time protecting that child? The answer is, of course, yes. However, the solution with regard to the age of criminal responsibility lies elsewhere. The bill’s purpose is to protect children who are under 13, who we do not think are capable of consenting to sexual activity. The Crown will consider how to deal with any child who is under 13 who carries out such conduct.

Paul Martin: I appreciate that you have said that the issue is not a matter for the bill, but the children’s commissioner said in her evidence that children who are under 13 should not be criminally responsible. All that I am asking is whether you support that suggestion—yes or no?

Kenny MacAskill: That is a matter for another day.

Paul Martin: I appreciate that, but we have received that evidence from the commissioner in response to the bill.

Kenny MacAskill: I as an individual and the Government are considering and reflecting on the matter.

Paul Martin: So you have no response to that evidence that we have received.

Kenny MacAskill: We are considering it. We have had representations from the United Nations. I am more than happy to take on board your view, if you are willing to give it.

Paul Martin: I am asking the questions.

Kenny MacAskill: I have given you the answer.

Paul Martin: You are not giving me an answer—

The Convener: We are not getting terribly far.

Robert Brown: I understand that a slightly more subtle aspect is that a legal doctrine links offences that relate to the protection of victims to situations in which it is not normally regarded as appropriate to prosecute people who are in that category of victim. If we forget about the underlying general ability to prosecute children who are over 8, does a major inconsistency remain not just in practice, but in legal principle, in the idea of prosecuting children who are under 13 for conduct from which they are supposed to be protected?

Kenny MacAskill: The short answer is yes. As I told Mr Martin, such matters must be examined. The Government, the Parliament and the country have received representations from the United Nations and others, which must be considered. If members have views, they should let us know them and the Government will reflect on them.

We must allow the Crown to act on the basis of whether a crime has been committed, whether it can be proved and whether prosecuting it is in the public interest. The Crown has always had to and will always have to answer those three questions. We always fall to the third question: is prosecution in the public interest? That judgment is exercised with great discretion and judiciousness by the Lord Advocate and the Crown. I have great faith in them.

Robert Brown: Would the issue be squared off by an understanding that, in the circumstances under the bill, perpetrators who were under 13 would not be prosecuted but would routinely be referred to a children’s panel?

Kenny MacAskill: The intention is that such matters will routinely go to a panel. We must consider the facts and circumstances and trust the Lord Advocate and her successors to act in the public interest.

Stuart McMillan: The Scottish Government has departed from the Scottish Law Commission’s approach to decriminalisation of sexual conduct between older children.
Professor Gerry Maher gave evidence to the committee that

"the bill represents the worst of all worlds, because it will extend decriminalisation by listing a wide variety of what would otherwise be offences, but will keep criminal liability for certain acts."—[Official Report, Justice Committee, 18 November 2008; c 1370.]

Why did the Scottish Government follow the route that it took?

Kenny MacAskill: We understand the Scottish Law Commission's general intention, but a great deal of public concern was felt that the message that would be sent and the inference that the public at large—not necessarily legally qualified people—would draw would be that consensual sexual relations between 13 to 16-year-olds were being legalised. That would be a retrograde step. We have problems with sexually transmitted diseases, teenage pregnancies and all the difficulties in which children become involved. It would be inappropriate to allow the inference to be drawn that the bill legitimised and decriminalised underage sex for kids who were aged between 13 and 16.

We think that it is necessary to make that clear in the law, even if the intention is, in the main, not to prosecute but to refer to the children's panel for care and welfare. We felt that we struck the appropriate balance by making it clear that we do not condone underage sex between those aged 13 to 16, nor do we want it to be suggested in any way that we wish to legalise it. Equally, we recognise that prosecution is not necessarily the best way to go. We think that the correct balance will be struck by maintaining the law, so that nobody draws any false interpretation from our approach; at the same time, we will ensure that the care and welfare that are often what is needed are provided by a reference to the children's panel.

Stuart McMillan: I have a couple of examples of cases in which such issues could arise. First, why should it be a crime for a 15-year-old boy to have consensual sexual intercourse with his 15-year-old girlfriend, but not a crime if a 15-year-old boy has oral sex with a 13-year-old boy?

Secondly, in a case in which an adult who is 16 years and one day old had sex with a girl who is 14 years and one week old, could not section 29(3) be considered to be reducing the age of consent by the back door?

Kenny MacAskill: The short answer to your final question is no, it could not be.

As a society, we believe—and the Government is articulating this broad view—that 15-year-old boys and 15-year-old girls should not have sexual relations, because the nature of maturity with regard to health and other social problems makes it inappropriate. We want to ensure that we continue to drive that message home. Section 29(3) on age proximity does not apply to intercourse. On oral sex, as I say there are issues about how it is proven and how it is seen. Our view is that if the committee suggests that the matter should be dealt with in the bill, we would be more than happy to consider and reflect upon that option, but it seems to us that many such matters are best dealt with through education and health counselling. We must take into account the difficulties in locating such activity, proving it in court and progressing such cases. It is about striking the right balance.

Stuart McMillan: What is the justification for extending the criminal law to girls under 16, who currently do not risk prosecution for engaging in consensual sexual conduct?

Kenny MacAskill: That relates to the ECHR's requirement for gender neutrality. I do not want to be flippant, but it could be argued that perhaps many of those girls should be referred to the children's panel so that we can look after their care and welfare, because teenage pregnancy is a considerable problem for our society and it causes great difficulty and distress for the girls and their families.

Stuart McMillan: Paragraph 174 of the policy memorandum states:

“The Scottish Government is satisfied that the provisions of the Bill are compatible with the European Convention on Human Rights.”

However, it makes no mention of the privacy rights of older children. Does the Scottish Government believe that older children have rights to sexual privacy under article 8(1) of the convention?

Kenny MacAskill: Our view is that they are children and that children are covered by the ECHR in the same way as adults. Those matters relate to how we interpret the convention and the broader views that we take as a society on children’s rights. We think that we have struck the appropriate balance. That is why we differentiate between children who are aged under 13 and older children. It could be argued that those things relate to the maturity of individual children—a younger child may be very mature and an older child may be immature—but, as a society, we have to set down some provisions that trigger messages and lay down the rules and parameters within which we operate. We believe that we have got the correct age balance. We do not believe that under-13s are capable of providing appropriate consent.

We must protect the rights of children between 13 and 16, who we believe are not in a position properly to consider their own interests on such matters. It is a question of balance. Of course
children have rights under the ECHR, but, as the Lord Advocate said, there is a margin of appreciation. Society has a choice about where to set the parameters and we have decided to make provision for 13 to 16-year-olds. Other jurisdictions take a different approach, but I do not think that anyone is suggesting that we change our approach.

12:45

Stuart McMillan: If intervention can be made through the children’s hearings system to deal with underage sex, why is it necessary to resort to the criminal law to deal with the issue?

Kenny MacAskill: There was a considerable view that if we did not do that and simply adopted the Scottish Law Commission’s initial view, the Parliament and the Government would pass a law that would trigger the message that we were decriminalising consensual sex between 13 and 16-year-olds, which seemed to be a retrograde step. We want such matters to be dealt with sympathetically in most instances, given the clear need to consider a young person’s care and welfare, but we must also trigger a message on the issue to the public, young and old, and there must be a caveat in relation to the—thankfully—few instances in which there might be doubt or a requirement to prosecute.

The Convener: Further to your response to Stuart McMillan, where do you place your reliance on the bill’s compliance with article 8.2 of the ECHR?

Kenny MacAskill: We place our reliance on the advice of our legal team and consultation with the Lord Advocate. It would be incompetent of the Government to ask the Parliament to pass a bill that was not ECHR compliant. The best advice that we have is that it is ECHR compliant.

Cathie Craigie: I am sure that you have followed the evidence that the committee has received in recent weeks. There is overwhelming evidence from the majority of witnesses who work with young people that the age of consent should not be lower than 16. However, people are concerned that the bill will criminalise young people who might be better served by welfare intervention. People still think that to enshrine in legislation provision for referral to the children’s reporter would be a better way of dealing with the problems that you described, such as STDs and teenage pregnancy. I think that we all agree that it is not good for young people under 16 to be sexually active. Would it be better to engage with the public and discuss using the children’s hearings system to try to resolve something that has been a problem for a good number of years?

Kenny MacAskill: We are open to the committee’s suggestions. Our view is that the approach that we are taking provides for what you describe. We are making it clear that we think that it is wrong for young people under 16 to engage in sexual intercourse; we are giving the Lord Advocate flexibility to ensure that children’s care and welfare are considered; and we are making provision for the fiscal to address the issue in the odd instance in which there is good reason to do so. We are leaving it to the Lord Advocate to provide guidance and we are satisfied with that approach, but if the committee wants us to enshrine matters in the bill we will consider doing so.

The Convener: Let us see whether you can convince Mrs Craigie that your approach is sufficient.

Cathie Craigie: The approach that is proposed in the bill is already being taken. Cases are referred to the Lord Advocate for decisions. However, while we consider the bill the problem is growing and we are not able to deal with it. Sexual activity carries risks for the future wellbeing of the young person. For those reasons, do you not think that the bill provides the opportunity to consider something slightly different that would ensure that young people who are engaging in sexual activities would be referred on to the children’s reporter and would be provided with the necessary welfare responses, education and support through a difficult time in their life?

Kenny MacAskill: I agree fully with your intention and share your sympathies. However, we are dealing with specific legislation on the criminal law on sexual offences. The matters to which you refer would be dealt with appropriately by other agencies, by colleagues in other Government departments, or by local government and voluntary organisations. As you correctly said, we believe that, to some extent, the bill simply seeks to maintain the status quo in the law as it pertains to sexual intercourse between people under the age of 16. There is merit in the maxim, “If it ain’t broke, don’t fix it.” We do not need to change that law; we can tackle sexual acts between those who are under the age of 16, but there are other problems and we have to consolidate the legislation. Your points about how we deal with the other aspects of the issue are valid and I share your sympathies. However, they would be best dealt with by legislation but by health and education.

Cathie Craigie: We would all agree that, “If it ain’t broke, don’t fix it”; however, it is broke. More and more young people are presenting with sexually transmitted diseases and we do not seem to be able to tackle the problems of teenage
pregnancy, which can have a huge effect on a young woman's future prospects.

If it comes to the attention of the authorities that a young person is engaging in underage sex, and the legislation provides that they will be reported to the children's reporter, they could be offered the support that they would otherwise miss. At the moment, not every young person who becomes pregnant under the age of 16 is reported to the authorities so there must be a large group of young people who do not get any help or support and have to rely on their families.

Kenny MacAskill: When I say, “If it ain’t broke, don’t fix it” I refer specifically to the law on underage consensual sex between children aged 13 to 16. If you wish to suggest further changes by referring to oral sex, for example, I am more than happy to look at them.

However, there is a wider problem. That is why we have the getting it right for every child programme, health strategies, advice, and working groups elsewhere. Some aspects of the problem have to be dealt with in a way that is not simply legislative or related to criminal justice; other departments and organisations have to deal with them, too.

Today, we are dealing specifically with the question of offending. The Government wants to ensure that we continue to make it clear that sexual relationships between people who are under the age of 16, consenting or otherwise, are not acceptable. Will a law on its own solve the problem? No, it will not. We have to educate our young people, warn them and provide them with health and education.

We are happy to consider any proposals for changes to the legislation, but many of the other issues that you have raised would be better dealt with by health and education, or other departments, rather than justice and legislation. That is why we have GIRFEC.

Cathie Craigie: One of my colleagues will probably raise this point later, but I am pleased that you are talking about the health and education departments being involved. We might be able to discuss that issue later, but I do not want to steal a colleague's thunder.

The Convener: It is an important issue.

Robert Brown: I want to approach the same issue from the other side. The Lord Advocate said that only a small number—between 10 and 12 a year—of section 27-type cases of sex between older children are prosecuted. She said that there were often situations in which coercive elements, for example, could not be proved. Is that a rather unsatisfactory, narrow base on which to build a more general law that applies to people across the board?

Kenny MacAskill: It is unsatisfactory, but I cannot think of anything else that can be done. Either we do not proceed against people when there is clearly a reason to believe that something untoward and illegal has happened, or we do the best that we can. The situation is not ideal, but we should try to ensure that something is done, with at least some caveat. That is the position that we find ourselves in. To some extent, the Crown deals with such matters reluctantly, on the basis that other options that are open to it would be incapable of being proven.

Robert Brown: The vast bulk of children under 16 will end up at a children's hearing anyway, even if the prosecution route is gone down. Would it not be more sensible to put things to a children's hearing in the first place?

Kenny MacAskill: No. In some instances, if the Crown has been unable to prove that a more serious sexual assault has taken place, we should, at the minimum, seek to record matters. There is good reason why that option should be available to authorities. Such matters would not be best dealt with simply by leaving them to a children's panel.

Nigel Don: Good afternoon, cabinet secretary. You will be aware of the substance of section 27(7), which states:

“The Lord Advocate may issue instructions to chief constables”.

The Lord Advocate said that she regards that subsection as redundant in the light of section 12 of the Criminal Procedure (Scotland) Act 1995, and I think that you would share her view. I understand why we should restate the Lord Advocate’s discretion and why we would want to put the provision next to the preceding subsections, but is there not a risk that, by including it, every subsequent statute will have to include such a provision, as leaving it out would mean that a different approach was being taken? That is a statutory issue. In addition, is there not a risk that, by including the provision, we will read its absence into previous Scottish Parliament statutes? Will we set a dangerous precedent by including a redundant provision?

Kenny MacAskill: I do not think so. I must accept the best advice of people who are professionally qualified in such matters. It seems to me appropriate to include the subsection, and I do not see why it should set a precedent. There is no clear evidence that it will undermine previous legislation in any way. If it is appropriate for the bill, we should do what is right.
The proposal is part of a journey, not all of which is about what we do in legislation. The issue is how we tackle a particular problem. I am satisfied that the provision will not undermine the criminal law as it applies across the broader sweep of Scottish society.

Nigel Don: On a completely separate issue, Scotland’s Commissioner for Children and Young People, among others, suggested to the committee that we should have consulted the young people who will be affected by section 27. Not many 15-year-olds have been consulted about a law that will affect them. What is your perspective on that, please?

Kenny MacAskill: We have spoken to various organisations and people, including Scotland’s Commissioner for Children and Young People, Barnardo’s and Children 1st. We went out of our way to ensure that we consulted 13 and 14-year-olds, if not specifically and directly. We consulted organisations that articulate and advocate for them and represent them.

Nigel Don: But is it fair that they represented those young people? I am not disparaging the organisations and person you referred to, but if you want to talk to 14 and 15-year-olds, should you not do so?

Kenny MacAskill: Obviously, Governments seek discussions with stakeholders and interest groups as a matter of course, and we have done that. We will get into difficulties if we ensure that in considering any legislation we must speak to X or Y percentage of people or people who are this, that or the next thing. We took a broad range of views. As I have said from the outset, we are still listening, and we are happy to discuss matters, but we have acted appropriately and obtained the appropriate information. The caveat is that we are still happy to listen and make changes if need be.

13:00

Cathie Craigie: You say that you are happy to listen and make changes. In the evidence we have heard, children's organisations and church organisations strongly expressed the view that we should be consulting young people. This is perhaps the last chance we will get for a good number of years to consider and legislate in the area, so it is right that young people should be consulted. If the committee’s report suggests that the Government should extend the period between stage 1 and stage 3 to allow a consultation exercise to be undertaken, will it consider doing so?

Kenny MacAskill: That would cause a great deal of difficulty. I would have to speak to parliamentary business managers. If the committee wishes to extend its evidence-gathering sessions, I am more than happy for the Government to facilitate that. If you want to ensure that groups of children are brought in to give evidence, that is fine. The Government will help you with that. I cannot commit the Parliamentary Bureau or the business managers beyond that, but if that is what you want to do, because you feel that we have not done it appropriately, we will happily help you to do it.

Cathie Craigie: Convener, I do not want to do that; it is the responsibility of the promoter of a bill—in this case the Government—to consult properly on the legislation that they propose. It is not the committee or the Parliament that should do the consultation. Witnesses have identified a serious flaw in the process that the Government undertook to produce the bill. If we want to take seriously the people who come along to engage with the Parliament—and, through the Parliament, the Government—by giving evidence to committees, surely we should listen to them.

Kenny MacAskill: Absolutely. Legislation is about checks and balances, though. That is why we have a committee structure in the Parliament.

I do not believe that the Government has got the bill wrong. I believe that we have appropriately checked with stakeholders and representative bodies, but if you think we have not, the opportunity lies with you to seek to do so. I am not prepared to undertake to extend the consultation process, but I am prepared to facilitate things for you as an individual or the committee as a whole if you wish to carry out an investigation and discussion with others to whom you think we have not spoken.

Cathie Craigie: That is a disappointing answer and I am sure that other members of the committee will be equally disappointed by it.

Before Nigel Don came in, we were discussing the involvement of the Government’s education and health departments. Do they agree with the way forward that the Government proposes in the bill? Is there agreement between the justice department and the health and education departments?

Kenny MacAskill: Yes.

Cathie Craigie: Okay.

Robert Brown: The minister will be aware of the broad thrust of the UN Convention on the Rights of the Child, the Children (Scotland) Act 1995 and the like, under which previous Governments have taken the view that proper consultation with children and young people on matters that affect them is part of the process. Such consultation is an obligation that falls on a Government, is it not? Has the cabinet secretary taken guidance from the Cabinet Secretary for Education and Lifelong
Learning about the process that she would advise should be gone through?

Kenny MacAskill: I think I have already answered that, convener. We are more than satisfied that we have gone through matters. If we have been remiss, Parliament has been set up with checks and balances. The same offer applies to Mr Brown as applies to Ms Craigie. The Government will support them in whatever ways we can if they wish to investigate matters, but having spoken to a broad variety of organisations we are satisfied that we have done what is appropriate.

Robert Brown: Does the cabinet secretary accept that there is an obligation on the Government to take on board the spirit of the UN convention—in respect of which, incidentally, a report was made recently about certain deficiencies in UK and Scots practice? Does the cabinet secretary realise that that is an obligation on the Government?

Kenny MacAskill: Well, these obligations fall upon our Government just as they fell upon previous Governments. Our position is that we believe we have consulted appropriately. If individuals or the committee believe we have not, they have the opportunity to sweep that up as part of the checks and balances that we have in a democratic society.

The Convener: We will move on to questions about the abuse of a position of trust.

Angela Constance: A few weeks ago, the committee heard evidence from Enable Scotland, which claimed that criminalising sexual breach of trust in the case of mentally disordered persons “does not seem to work”.—[Official Report, Justice Committee, 11 November 2008; c 1313.]

According to Enable, the potential application of the criminal law in such cases is counterproductive because it acts as a disincentive to the disclosure of possible inappropriate sexual relations.

Kenny MacAskill: We heard that, but we are not persuaded. Enable gave evidence that was contrary to its initial position. The legislation that we are introducing has been discussed with organisations including Enable and the Mental Welfare Commission for Scotland. We feel that some protection is necessary. These issues are a matter of balance. We have to ensure that we do not cast the net too widely and interfere with organisations and individuals who are acting legitimately and thereby jeopardise a variety of aspects of the care and wellbeing of individuals, but we have to protect those who have mental disabilities. We believe that we have struck the correct balance. That said, we will reflect on what the committee concludes at the end of its evidence-gathering sessions on whether provisions should be extended to youngsters.

The Convener: Finally, we have a question on penalties from Paul Martin.

Paul Martin: I would like you to clarify whether I am misreading schedule 1, which relates to penalties. I understand that, for the rape of a young child, the maximum penalty on conviction is life imprisonment, or a fine, or both. Is it possible that a court’s disposal for the rape of a young child could be a fine?

Kenny MacAskill: I think I heard the Lord Advocate answer that question earlier. I can only repeat that we view rape as a heinous offence, which is why we are taking action in the bill. There have been problems in Scottish society that we are seeking to address. We expect those who perpetrate rape to be dealt with severely. Gerry Maher and the Lord Advocate indicated that the general intention was that the fine should be an add-on rather than an alternative. Having checked, I can confirm that in the past 10 years nobody has been given a fine for rape. I assure you that we will check the drafting to ensure that if there is a drafting error, it will be addressed.

You have my assurance that the situation you fear has not happened and that we will not allow it to happen. However, there was merit in what the Lord Advocate said. A fine would not benefit the victim, but I could be persuaded that a compensation order should be added on to the sentence of a rich man who committed such a heinous offence and who could afford to pay. I hope that you accept the Government’s assurances that the situation that we inherited does not seem to present a problem but, for the avoidance of doubt, we will ensure that it does not.

Paul Martin: I just want to clarify what you said. Are you disappointed with the current drafting of the bill, which results in the possibility of a fine being imposed?

Kenny MacAskill: No. I said that if there is a problem or ambiguity, we will address it. The current circumstances are the circumstances that have always existed. If what you are concerned about is that previous Administrations have not addressed matters appropriately, you can rest assured that we will seek to do so. I am giving you an assurance that nobody has been fined, instead of being imprisoned, for rape since 1999. It is our intention to ensure that people who commit that offence are dealt with severely. It is our understanding that the fine was to be cumulative; it was not meant to be an alternative. There was a great deal of merit in what the Lord Advocate had to say about that, particularly in relation to compensation orders. We will ensure that there is no ambiguity about these matters.
Paul Martin: You referred to previous Administrations, but the issue is too serious for us to try to score political points.

Kenny MacAskill: Perish the thought.

Paul Martin: The point I am making is that the current law is common law. We have an opportunity in the bill to introduce minimum standards in relation to sentencing options. What I am trying to extract from you is humility about the fact that the current position in the draft bill is unacceptable and an assurance that you will lodge an amendment to it.

Kenny MacAskill: I thank you for that selfless, non-partisan interpretation. I reiterate that the Government will ensure that our people are protected, that the victims of rape are treated with dignity and respect and that the perpetrators are appropriately punished. As I said, if there is a drafting flaw—I am not qualified to comment on drafting—it will be addressed, so you can sleep easy.

The Convener: I want to do a bit of sweeping up on sections 40 and 41. Is it the Government's intention to do away with only the common law offences that are defined in those sections?

Kenny MacAskill: Yes, that is the case as per those sections.

The Convener: Will the common law offences that are mentioned there as being taken off the statute book be used only in historical cases?

Kenny MacAskill: Yes, that is our intention.

The Convener: Can you enlighten us as to which situations are potentially envisaged under section 41?

Kenny MacAskill: I think that they will probably be matters of an historical nature—clearly, it is more for the Crown to comment on what circumstances are envisaged—that come to light once the bill has been enacted. We all know that many matters that are—thankfully—successfully prosecuted may be of an historical nature. The fact that matters occurred many years ago does not mean that the perpetrators should be able to avoid punishment.

The Convener: Basically, the bill takes a belt-and-braces approach?

Kenny MacAskill: Yes.

The Convener: I thank Mr MacAskill—

Robert Brown: Convener, if I may, I would like to catch up with the minister on a couple of equalities issues.

Section 1 uses phraseology that refers to “artificial penis” and “artificial vagina”. As you may be aware, equalities groups made some criticism of that phraseology and suggested that the reference in the English legislation to “surgically constructed” parts was more in tune. Do you have any views about that? Are you sympathetic to looking at that again?

Kenny MacAskill: Mr Brown, both you and I are legally qualified, so we are very conscious that legal draftsmanship is a technical matter. I am more than happy to leave such matters to those who are better qualified, but I am also happy to seek the views of the Scottish Government’s legal department. If the committee is persuaded that the nomenclature that is used south of the border is better, I will not have a difficulty with that unless those advising me say that there is some technical problem in Scots law.

Convener, perhaps I may advise the committee on what other matters we intend to lodge amendments at stage 2. I can confirm that they include extending the offence at section 5 to catch sexual images such as genital nudity as well as images of sexual activity; extending the offence at section 8 of administering a substance for a sexual purpose to cover circumstances in which the substance is administered by a third party albeit that the offence is committed by another; redrafting the offence at section 7 to ensure that the same approach is taken as in sections 4, 5 and 6; and amending the non-physical sexual offences at sections 4 to 7 to ensure that the purpose of such acts is subject to an objective, rather than a subjective, test. We intend to lodge amendments on those provisions as well as on other, minor, technical matters.

As I said at the outset, we view this as a non-partisan bill, so if, upon reflection, members think of other amendments—whether they relate to equal opportunities issues or to other matters—we will be more than happy to consider them. We seek to improve the law. The bill will not take us into a perfect world of how to deal with rape—that requires other things—but we believe that it will make it easier for justice to be done.

Robert Brown: That is very helpful.

Another, more general, point concerns the references to outdated phraseology in section 13—“Homosexual offences”—of the Criminal Law (Consolidation) (Scotland) Act 1995. It may or may not be appropriate to deal with that in this bill. Does the cabinet secretary have any thoughts on how the inappropriate language in that section can be got rid of? Is there any intention to consider that in a subsequent bill or to revisit it in this one? The equalities organisations made some valid points about that.

Kenny MacAskill: I am happy to consider that. I tend to think that the purpose of the bill is to build on the views of the Scottish Law Commission,
which addressed the specific problem of sexual offences in relation to ensuring that we improve on current circumstances, in which far too many people who perpetrate rape are not brought to justice.

There are other issues relating to how we deal with homosexual offences and the perception thereof in Scottish society, but I think that this is not the appropriate juncture at which to bring those in. I am not aware of any current proposals to change the legislation as Robert Brown suggests, but that is something we can discuss. Our priority in the bill is to improve the plight of the victims of rape by ensuring that those who have to go through the ordeal of court cases are treated with dignity and respect. It is hoped that some of the people who have managed to fall from the clutches of the system when justice has not been served will be brought to book.

13:15

The Convener: Have you finished, Mr Brown?

Robert Brown: Yes. I am sorry about that.

Cathie Craigie: I have a final question about consultation in general. The Government launched its consultation on the bill following the publication of the Scottish Law Commission’s report on rape and other sexual offences. It is not clear from the documents that accompany the bill who was consulted on the bill. Can you advise the committee on that? It appears that there was consultation on the Scottish Law Commission’s report, but I am unsure who was consulted on the bill.

Kenny MacAskill: I do not have a list of the consultees, but I am more than happy to write to the committee with a full list of everybody we consulted.

The Convener: That is covered in paragraphs 26 and 27 of the policy memorandum.

Kenny MacAskill: Thank you.

The Convener: I am doing your work for you, Mr MacAskill—not for the first time, I may say. I thank you and your officials for your attendance and for the prior notification of some of your intentions at stage 2. That is particularly helpful.

The committee will now move into private session for the remaining agenda items.

13:17

Meeting continued in private until 13:49.
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