The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

JUSTICE COMMITTEE

Tuesday 17 November 2015

Session 4

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JUSTICE COMMITTEE
32nd Meeting 2015, Session 4

CONVENER

*Christine Grahame (Midlothian South, Tweeddale and Lauderdale) (SNP)

DEPUTY CONVENER

*Elaine Murray (Dumfriesshire) (Lab)

COMMITTEE MEMBERS

*Christian Allard (North East Scotland) (SNP)
*Roderick Campbell (North East Fife) (SNP)
*John Finnie (Highlands and Islands) (Ind)
*Margaret McDougall (West Scotland) (Lab)
*Alison McInnes (North East Scotland) (LD)
*Margaret Mitchell (Central Scotland) (Con)
*Gil Paterson (Clydebank and Milngavie) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Detective Chief Superintendent Lesley Boal (Police Scotland)
James Chalmers (University of Glasgow)
Catherine Dyer (Crown Office and Procurator Fiscal Service)
Gerard Maher (University of Edinburgh)
Michael Matheson (Cabinet Secretary for Justice)
Clare McGlynn (Durham University)
Michael Meehan (Faculty of Advocates)
Vanessa Munro (University of Leicester)
Grazia Robertson (Law Society of Scotland)

CLERK TO THE COMMITTEE

Peter McGrath

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Justice Committee

Tuesday 17 November 2015

[The Convener opened the meeting at 09:45]

Subordinate Legislation

International Organisations (Immunities and Privileges) (Scotland) Amendment Order 2015 [Draft]

The Convener (Christine Grahame): Good morning and welcome to the 32nd meeting in 2015 of the Justice Committee. I ask everyone to switch off mobile phones and other electronic devices. No apologies have been received.

The first agenda item is consideration of an instrument that is subject to affirmative procedure—the draft International Obligations (Immunities and Privileges) (Scotland) Amendment Order 2015.

We last took evidence from the Cabinet Secretary for Justice on the instrument on 27 October. The motion to approve the instrument was not moved at that meeting in order to allow time for the Government to provide more information on the instrument. Parliament subsequently agreed to suspend the standing orders rule on deadlines for scrutiny of affirmative instruments to allow the committee to complete its consideration of the instrument.

I welcome to the meeting Michael Matheson, the Cabinet Secretary for Justice, and Scottish Government officials Nicola Wisdahl from the civil law and legal system division, and Alastair Smith from the directorate for legal services. I remind everyone present that officials can take part in this agenda item but not in the formal debate on the motion that follows.

I thank the cabinet secretary for the further information that he provided in advance of the meeting. Members should also have received a submission on the instrument from an external organisation, which the clerks forwarded on Friday. Cabinet secretary—I invite you to make an opening statement.

The Cabinet Secretary for Justice (Michael Matheson): Good morning. Although the draft order is quite short, I appreciate that members have a number of queries about its purpose. As the committee and Parliament have not seen a similar order for some time, it might be helpful if I begin with a few words about the purpose and effect of the order and the international organisation that it concerns.

The order would confer various legal immunities and privileges on, or in connection with, a new international organisation—the Asian Infrastructure Investment Bank, which is a multilateral development bank. Multilateral development banks are institutions that are established by international agreements. Their goal is to provide finance and advice for the purposes of development. They finance projects by providing loans and grants to borrower countries, using funds from—or raised in—donor countries. The World Bank is a well-known example.

The purpose of the AIIB is to address the gap in investment in infrastructure in Asia. The United Kingdom Government signed up to be a prospective founding member. Prospective members have concluded an international agreement setting out the structure and functions of the organisation. The agreement also sets out the organisation's status in international law. To enable the independent exercise of the AIIB's functions as an international organisation, certain privileges and immunities are to be afforded to it. Those privileges and immunities will apply in all the states that become members of the organisation. As the organisation is international, no individual country should derive undue fiscal advantage from it.

The conferral of those immunities and privileges is, in effect, a condition of membership of the organisation. However, the AIIB and its officials would be expected to comply with UK law and Scots law. Some privileges and immunities relate to reserved matters and have been conferred by legislation at Westminster.

Since the committee last considered the order, its United Kingdom equivalent has been approved by both Houses of Parliament, without opposition, and the Privy Council approved the order on 11 November. However, some of the privileges and immunities relate to devolved matters. That is why this order is before the committee and subject to affirmative resolution of the Scottish Parliament.

The purpose of the order is to add the AIIB to the list of organisations that have been granted similar privileges and immunities in Scotland. Some multilateral institutions have privileges and immunities that predate devolution—they include the European Bank for Reconstruction and Development and the Inter-American Development Bank. Other organisations have been afforded privileges and immunities since devolution—these include the International Maritime Organization and the European Police College.

The draft order will add the Asian Infrastructure Investment Bank to the post-devolution list—the list in the schedule to the International Organisations (Immunities and Privileges) (Scotland) Order 2009. The nature and scope of the immunities and privileges for the Asian Infrastructure Investment Bank are set out in the schedule to the draft order. They reflect those in the equivalent Westminster order and the terms of the founding agreement.

The purpose of the draft order is to help the UK to fulfil, with respect to Scotland, the international obligations that will become effective on the coming into force of the agreement establishing the Asian Infrastructure Investment Bank. Those international obligations were entered into by the UK Government with the intention that they will take effect throughout the UK.

In entering into those obligations, there is considerable opportunity for people who work in the financial and professional services sectors in Scotland. Those sectors employ almost 100,000 people directly and about the same number indirectly. Scottish companies already have a strong background in those fields. Committee members will be aware of the success of the UK Green Investment Bank, which is based in Edinburgh. The draft order is necessary if Scottish businesses are to be able to take advantage of the potential work that membership of the Asian Infrastructure Investment Bank might generate.

I hope that that is helpful. I am more than happy to take questions from committee members.

Christian Allard (North East Scotland) (SNP): Good morning, cabinet secretary. Thank you very much for your clarification—in particular, the list of organisations that you gave us. That is very helpful for us to understand exactly what we are agreeing to. I welcome the order and I will be happy to support it.

John Finnie (Highlands and Islands) (Ind): Good morning, cabinet secretary. Thank you for the additional information. I am not convinced that it takes us much further forward, so I will follow up on some of the points that you raised. In your letter, you say:

"It is countries, as shareholders, who will be involved—not ordinary individuals."

However, the policy note's introduction talks about legal privileges and immunities being conferred on

"persons associated with the Bank,"

so clearly the draft order relates to individuals. Do you accept that?

Michael Matheson: The bank is owned by 57 member states that are either regional or non-regional members. However, the immunities and privileges are for those who are employed by the bank and involved in its functions.

John Finnie: So, the immunities and privileges are conferred on individuals.

Michael Matheson: Yes they are—for purposes that are related to the functions of the bank.

John Finnie: I am an internationalist: I want international co-operation. I want Scotland to be a good global citizen and to help the rest of the world. I also want us to clamp down on money laundering, fraud and all the worst practices of the banking industry.

The policy note talks about the draft order being required for the bank to "operate effectively". How would the bank's effectiveness be affected in Scotland were we not to say, "You are immune to criminal prosecution" or to confer all the other privileges that are listed?

Michael Matheson: I suspect that that would put a challenge to the UK Government, which is a founding member of the AIIB, because it would not be able to meet all the obligations that are set out in the international agreement for the bank's establishment. I imagine that the AIIB would be reluctant to engage with the financial and professional services sector in Scotland because it would not have here the privileges and immunities that it would have in other countries. How that would play out in the bank's behaviour is a matter for the bank, but I imagine that it would be reluctant to engage with Scottish institutions that may wish to offer it financial and professional services, because it would not have the protections that it would have in other countries.

John Finnie: There is a difference between protections and immunities. We are all protected by the law, but we are not immune from prosecution if we err in law. Is it not the case that the public would expect the Cabinet Secretary for Justice in Scotland to exhort people to adhere to the law, rather than their being granted immunity from adherence to the law in Scotland?

Michael Matheson: Keep in mind that the immunities are for functions relating to the bank—

John Finnie: I am not bothered what they are for. The law is the law.

Michael Matheson: It is worth keeping it in mind that, even where immunities and privileges are provided, under normal diplomatic conditions, individuals are expected to adhere to the laws of the given country and host countries can ask individuals to give up those immunities and privileges for the purposes of pursuing legal matters with them. It is part of the international agreement that the UK Government has entered into—a condition of which is that all 57 member countries provide the immunities and privileges.

John Finnie: Are you able to tell me what "immunity from" judgment means? That is one of the effects of the order.

Michael Matheson: I presume that that would relate to judgments on matters in a court.

John Finnie: What does

"The Bank's premises are inviolable"

mean in practical terms?

Michael Matheson: It means that you cannot interfere with its premises.

John Finnie: The covering paper tells us:

"No equality impact assessment has been completed as there is no effect on people other than those to whom the UK Government has afforded privileges and immunities."

However, it is the Scottish Government that is asking us to afford those privileges and immunities.

Michael Matheson: In so far as?

John Finnie: The UK Government may well ask, but we still have a situation in which the Cabinet Secretary for Justice in Scotland is coming to request that this committee agree.

Michael Matheson: Yes.

John Finnie: Okay. What is your view on the response to the committee's question about the effect of the instrument not being passed, which is the single sentence:

"This is a matter for the UK Government"?

Is that respectful of Scots law and, indeed, the committee?

Michael Matheson: Are you asking what the UK Government would do if the Parliament withheld its consent?

John Finnie: Your final sentence, when asked what the UK Government would do—

Michael Matheson: The final sentence in what?

John Finnie: In the annexe to your letter dated 12 November, you state:

"Members of the Committee asked what the UK Government will do if the Order is not passed in Scotland."

The official reply is:

"This is a matter for the UK Government."

I find that dismissive.

Michael Matheson: No, it is a matter of fact. That would be a matter for the UK Government, because it has entered into an international agreement.

John Finnie: Cabinet secretary, do you understand any of the concerns about a presentation that asks for political immunity and exemption from the normal rule of law? Would it not raise suspicions with you as an individual if someone said, "I'll transact business for you if you guarantee my immunity"? Would that not immediately raise suspicions? If the answer is that we have aye done it that way, it is time for change.

Michael Matheson: Well, that may be your view—

John Finnie: It is my view.

Michael Matheson: That may be your view, but you asked me specifically about the final sentence in the annexe, and it is a fact that it would be a matter for the UK Government. It has entered into an international agreement.

John Finnie: Thank you.

Elaine Murray (Dumfriesshire) (Lab): We have received a supplementary letter—I do not know whether you have seen it, cabinet secretary—that indicates that developing countries in Asia will require some $8 trillion for infrastructure over the next 10 years. Thank you for the additional information. I have no desire to do anything to prevent those countries from getting the investment that they require, but I am still uncertain about some aspects. For example, why should the bank have relief from non-domestic rates for its premises? If it is handling billions of dollars of investment, surely it can pay its non-domestic rates. It seems peculiar to give it that type of immunity. The order also states:

"No devolved and local taxes shall be levied on or in respect of emoluments paid by the Bank to a person connected with the Bank."

Again, that looks like some degree of tax avoidance by somebody who works with the bank. I see the purpose of the bank in terms of its investment and the opportunities for developing countries to get that investment, but in terms of having a level playing field, I am not sure why the bank should not pay its rates.

Michael Matheson: That is part of the international agreement—the privileges or immunities must be provided to the bank by all the countries who want to join the bank or be members of the bank. Protection must be given from local taxation, local rates for buildings that it might occupy and so on.

10:00

The other factor, which Elaine Murray mentioned, is our giving the bank a level playing field with other international development banks that have been afforded similar rights. That will allow it to undertake its work in a similar way. That flows from the international agreement that the UK Government entered into, which is why we have

been asked to sign up to the provisions that have been set out in the international agreement.

Elaine Murray: It seems a little odd for institutions that handle enormous amounts of money to be exempt from the taxation that other businesses are subject to. I am not saying that the Scottish Government arranged that; I appreciate that it is in some sort of international agreement. However, does it not reveal something dubious; that many large and wealthy organisations are enticed to have a presence here by the offer of an arrangement whereby they do not pay taxes?

Michael Matheson: Hold on. It is worth keeping it in mind that the bank is a non-profit-making organisation. It is owned by the countries that are members of it, which raise capital in their own territory for the purposes of investment in Asia. It is not like a large corporate bank—a profit-making institution—being afforded protection from paying local taxes on its property and so on.

Your wider point around international agreements and whether organisations of this type should be given such immunities and protections is part of a wider debate that would have to take place on an international basis, because international treaties have been drafted in such a way as to provide such immunities and protections. That would have to be taken forward by the UK Government. I am not aware of any intention on its part to do so, and I am not aware of any appetite for such a debate on the part of other nations.

As I said, we are talking about a non-profit-making organisation. The money that it makes goes back into the investment processes for which it has been set up by the member states that own it.

Elaine Murray: That is a helpful clarification. Is there any likelihood that the bank will be based in Scotland?

Michael Matheson: Its principal base will be in Asia. That is why the UK Government was keen to be a founding member. It has done that with a view to the professional and financial sector in Scotland in particular participating in it and offering services to it, with an overall beneficial impact on the UK. The bank might not have a physical presence here, but we have the opportunity to engage with it and to offer services to it, especially because Scotland has a large financial sector that has experience of multilateral investment processes. That would involve not only organisations that are directly involved in investments, but pension funds and insurance companies that are based here that might wish to work in partnership with the bank in relation to some of the infrastructure projects that are to be funded in Asia.

Elaine Murray: So, might some of the provisions in the order not have any effect, in reality.

Michael Matheson: There might not be a building in Scotland, but the order will allow the organisation to operate with financial and professional institutions in Scotland.

The Convener: Margaret McDougall has a question.

Margaret McDougall (West Scotland) (Lab): Elaine Murray has asked my question.

Roderick Campbell (North East Fife) (SNP): I want to make a couple of quick points. Whatever the benefits of the bank, is it the case that our failure to pass the instrument would be nothing but damaging to the Scottish economy?

Michael Matheson: It is clear from the letter that the committee has received from Scottish Financial Enterprise that it believes that that could be the case. Such failure could result in the bank being reluctant to engage with the Scottish financial services sector, which might otherwise be able to offer expertise to the bank and the infrastructure developments that it will invest in. Failure to pass the instrument could have a negative impact on the Scottish economy.

Roderick Campbell: Am I right in assuming that France and Germany feature as shareholders, among the 57 countries that are participating in the organisation?

Michael Matheson: There are two classifications of members: regional members and non-regional members. France, Germany, Iceland, the Netherlands, Norway, Sweden, Spain, Switzerland and the UK are non-regional members. Regional members go from Australia to Vietnam, alphabetically.

Alison McInnes (North East Scotland) (LD): When the instrument came before us, I noted that it concerned something that I had not seen before. I welcomed the opportunity to have a pause in consideration in order for us to gather some more information. It would have been wrong if, through some sort of misunderstanding, Parliament had prevented the UK from fulfilling its obligations as a founding member.

I would not like anyone to suggest that we are suggesting that the AIIB is somehow not of the same standing as other international organisations—the Caribbean Development Bank, the Asian Development Bank and the Inter-American Development Bank—such as the cabinet secretary has mentioned. I am reassured by what I have found out about the process and I want to offer the organisation a chance to operate on a level playing field with the other ones.

The Convener: Does Margaret Mitchell want to ask a question?

Margaret Mitchell (Central Scotland) (Con): No, I am satisfied.

The Convener: That takes us to item 2 on the agenda, which is the formal debate on the motion to approve the instrument. I invite the cabinet secretary to move motion S4M-14396.

Motion moved,

That the Justice Committee recommends that the International Organisations (Immunities and Privileges) (Scotland) Amendment Order 2015 [draft] be approved.—[*Michael Matheson*.]

The Convener: I take it that no member wishes to speak in a debate on the motion, as we pretty much had the debate under item 1.

The question is, that motion S4M-14396, be agreed to. Are we agreed?

Members: No.

For

Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
McDougall, Margaret (Central Scotland) (Lab)
McInnes, Alison (North East Scotland) (LD)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)
Paterson, Gil (Clydebank and Milngavie) (SNP)

Against

Finnie, John (Highlands and Islands) (Ind)

The Convener: The result of the division is: For 8, Against 1.

Motion agreed to.

The Convener: As members are aware, we are required to report on all affirmative instruments. Are members content to delegate authority to me to sign off the report?

Members *indicated agreement.*

10:07

Meeting suspended.

10:09

On resuming—

Abusive Behaviour and Sexual Harm (Scotland) Bill: Stage 1

The Convener: We move on to our first evidence session at stage 1 of the Abusive Behaviour and Sexual Harm (Scotland) Bill. I welcome our first panel of witnesses: Michael Meehan from the Faculty of Advocates; Grazia Robertson, a member of the criminal law committee at the Law Society of Scotland; Detective Chief Superintendent Lesley Boal of Police Scotland; and, from the Crown Office and Procurator Fiscal Service, Catherine Dyer, who is Crown Agent and chief executive, and Lisa McCloy, from the policy division. I understand that the relevant member of staff from the Crown Office was unavailable to attend, so we have two witnesses standing in—I am not giving the Crown Office special favours.

When any of you wants to answer, just catch my eye and I will call you. Your mic comes on automatically.

Roddy Campbell has a declaration to make.

Roderick Campbell: I refer to my entry in the register of interests as I am a member of the Faculty of Advocates.

The Convener: Thank you. We move straight to questions from members; Margaret Mitchell is first.

Margaret Mitchell: Good morning, panel. I will start with the provision to introduce for the first time in Scotland statutory jury directions. Views have been mixed, but the overwhelming amount of evidence that we have received has expressed some concern.

The Convener: Who wants to take that one on?

Grazia Robertson (Law Society of Scotland): I am happy to explain the Law Society's position. Statutory mandatory jury direction is very different from the existing procedure. The existing situation is that the judge has a distinct role in the law and the jury has a distinct role in considering the evidence, so statutory mandatory jury direction would be a marked departure.

We in the Law Society appreciate that there are sometimes great departures from existing practice for good reason. Our position is that it has not been made out that there is a good reason to have such a departure, particularly when it singles out a specific type of offence as being worthy of having statutory jury directions. There is no evidence to support what seems to be simply a suggestion that jurors might be thinking in a particular way, without any empirical evidence of how they are thinking. It would be presumptuous to rush to produce directions when we are making assumptions about what jurors might or might not be thinking. I

appreciate that there is a body that is very much in favour of the provision.

The Crown can lead evidence from an expert witness on the late recording of an incident or the lack of injury, which the two directions seek to address, and the expert witness can give evidence to the jury in general terms about such matters. It is then for the jury to consider that evidence in the way in which jurors consider every other piece of evidence and use it to form a view. Our position is that that is a much better way of approaching what might be a possible bias in a juror's mind, although we do not know whether that exists.

Margaret Mitchell: Are you concerned that the provision would take away the judiciary's discretion?

Grazia Robertson: The Sheriffs Association has made the point that it very much would. It is not that a direction should never be given, but it should be done only in serious circumstances in which it is absolutely warranted. In this case, it is not warranted and it would not serve a good purpose.

Catherine Dyer (Crown Office and Procurator Fiscal Service): The Crown supports the provision. Judges explain a lot to juries, and the provisions acknowledge what we now know in society generally about the impact of sexual offending on witnesses who can appear. Some research has indicated that jury members do not necessarily know all about that.

There are safeguards in that the bill takes a modern approach by saying that a judge must be able to explain to people what they should be looking for. That does not mean that jurors would not examine the circumstances of each case to see why there had been a delay in the reporting. For this kind of thing, it would be better if the judge advised the jury. Judges give juries explanations all the time, but there has been a delay in reporting in a number of sexual offence cases and, in some cases, it has been obvious that the traditional idea of rape—that someone has to have resisted and to have injuries—is what people expect to hear. To that end, the bill says that judges are in a position to instruct juries that that is not now the case.

Margaret Mitchell: I understand why the provision is there but, to pick up Ms Robertson's point, is it not incumbent on the Crown and procurators fiscal to lead evidence from an expert witness to cover the matter and allow the jury to make up its own mind?

Catherine Dyer: I think that we are past the stage of needing to have that. It is now in judicial knowledge that, in such cases, what I described is not an infrequent occurrence. Judges give juries lots of examples by telling them what to compare from their own lives. At the moment, that is restricted to things such as non-sexual assaults. We are talking about a specific indicator around sexual assaults that occurs frequently with the victims. Our contention is that it is now so well known that it is appropriate that juries should be warned about it and have to take it into account.

10:15

Margaret Mitchell: Would an expert witness not explain why there could be a delay, or even no evidence of physical resistance, to allow jurors to make up their own minds, without the judge being seen to unduly influence them or place more of an emphasis on certain facts?

Catherine Dyer: I do not think that there would be any question of judges appearing to unduly influence jurors. At the moment, jurors have to weigh in the balance what they find credible and reliable, and they would still have to take account of the credibility and reliability of the witness. However, it is now within a wide range of expert knowledge that this is a particular feature of such cases.

Michael Meehan (Faculty of Advocates): The issue raises at least two points. First, there is the issue of mandatory directions being given at all. When the discretion of the trial judge is being hampered, the judge cannot give directions that he or she may feel are appropriate to the case. The second aspect concerns using the judge's directions to introduce evidence that has not been led as part of the case. As Catherine Dyer said, the point may be widely known by judges but, if it is not widely known by members of the public, that is a classic example for the role of expert evidence.

I have prosecuted in the High Court, where I have sometimes used and sometimes not used experts. If the complainer himself or herself can explain why he or she did not go, that can often be more convincing than hearing from an expert speaking about a generality. However, the advantage of leading expert evidence in a trial is that it is before the jury at a far earlier stage in the case. A concern may be that, because the judge will give a direction, the Crown might think, "Well, let's not bother with the expert evidence," when it would be useful to lead it at an early stage.

Another matter that could be considered is that it is always open to the prosecution, when it serves the indictment, to serve what is called a statement of uncontroversial evidence. As the Crown Agent said, such material might fall into that category, so a statement could be served to say that it is often the case that people delay in disclosing what happened to them and do not fully disclose but that, as the process goes on, they feel

more able to talk about what happened. In most cases, the defence would not challenge that, which would mean that there was no need for expert witnesses and that that evidence was before the jury at the start of the case. If it was challenged, the Crown could decide whether to call expert witnesses.

Margaret Mitchell: As a matter of interest, if the Crown brings in expert witnesses, is there a cost implication?

Catherine Dyer: Yes.

Margaret Mitchell: That is quite significant.

Detective Chief Superintendent Lesley Boal (Police Scotland): I want to reiterate the Crown's position from a Police Scotland perspective. Police Scotland has trained sexual offences liaison officers and senior investigating officers so that they understand the impact of trauma on victims of rape, and delayed reporting is one of the issues that those officers are made aware of. As members will be well aware, the experience of the police, prosecutors and those in the health and support services is that there is no typical rape victim and no typical response to rape. Despite that, common societal misconceptions and stereotypes still prevail.

Given the degree of attention that the key component parts of the criminal justice system have had and given what has been put in place to give people a better understanding of the issue, it is our position that arguably the most critical element of the criminal justice system—namely the body that is ultimately charged with delivering justice—might not have been provided with that same enlightenment. Although we acknowledge that any direction to a jury requires to be balanced to ensure fairness and that the independence of the trial judge must be maintained, Police Scotland's opinion is that such direction would be beneficial in addressing the many societal misconceptions that still persist about what a stereotypical rape victim does or how they react.

Margaret Mitchell: Would leading evidence from an expert witness serve that objective equally well, if not better?

Detective Chief Superintendent Boal: At the start of a trial, it would be good to have the general understanding and reasoning about why victims of sexual crime might delay reporting and how they might react, perhaps as described by the Law Society.

Margaret Mitchell: I will ask about the other side of the coin. Has it been considered that, if such directions were to be given, forensic disadvantage to the accused person would also have to be looked at?

Michael Meehan: There is a possibility that, in anticipation of the judge saying something, the defence would lead expert evidence that it might otherwise not have led. That would be one way to counter the forensic disadvantage, because the defence would be prewarned that the judge would address the matter.

The defence could say with some force something like, "After I have spoken to you, the judge will give you directions about delay in the general sense but, of course, ladies and gentlemen, you have heard nothing in this trial as to why this particular complainer delayed in going to the police or gave partial disclosure." If expert evidence is required and a tailored approach is not taken, the defence counsel might criticise that in their speech to the jury or lead expert evidence in anticipation of that coming along.

Margaret Mitchell: In his review, Lord Bonomy suggested including something in the jury manual instead of going as far as having judicial direction.

Michael Meehan: Although that would change the direction from being mandatory to being suggested, there would still be a danger that a direction on which no evidence had been led would still be made.

The Convener: None of you picked up on Ms Robertson's question about why mandatory directions should be introduced for one category of offence. Will you comment on that? It might be appropriate to give some sort of judicial direction on other criminal offences and prosecutions. Apart from all the other arguments that you have placed before us, should we refuse to introduce mandatory directions because it would be wrong in any event to select one category?

Michael Meehan: There is a danger in whether there is a categorisation of evidence or offence. In his safeguards review, Lord Bonomy raised the issue of directions on the risks of identification evidence. If we consider mandatory directions on one aspect, the debate will become far wider. For example, if an assault charge has a slight sexual element but that element is removed, should there be a mandatory direction? If mandatory directions are to be given on one matter, there will inevitably be requests for them to be considered across the board. The difficulty is that, in the absence of jury research, one does not really know whether the jury would find that helpful.

Catherine Dyer: Juries are drawn from the general populous and, as Police Scotland said, we know that the misconceptions exist. It is important to say that the proposal in the bill is that mandatory directions would be given only if questioning from the Crown or the defence elicited information that there had been a delay. The bill says that, if such a question is asked or a

statement is made with a view to eliciting or drawing attention to such evidence, the judge has to say something about that in their summing up. The judge would not have to give directions in every case regardless of the position; there are safeguards in the bill.

Grazia Robertson: I am sorry; I realise that you want to move on, but I will just say quickly—

The Convener: No—this is important.

Grazia Robertson: There is potential for an unintended consequence. We are suggesting that jurors have preconceptions, misconceptions and prejudices of which we are not entirely aware. Therefore, if a judge says, "I will not comment on the evidence. That is for you to consider," but then makes a direction about not putting any weight on the delay spoken about by a witness, might the jurors think that the judge is endorsing the witness's evidence and supporting them in some way by asking the jury to disregard that matter?

On what we suspect that jurors might be thinking, perhaps they would think that the judge was endorsing that evidence if directions were brought in. By trying to cure a fault that some of us perceive to be there, we might introduce something that is just as bad.

The Convener: Ms Dyer, you did not pick up Mr Meehan's point about what happens when there was an assault that perhaps had a sexual element. We know that not everything is black and white.

Catherine Dyer: It is not. The bill restricts itself to the specific circumstance when there has been a delay in reporting a sexual offence. We have to trust that judges are well used to giving directions to juries—that is the point of their part in the process—so they would be well able to cope with the measure. This is merely about saying that these are recognised phenomena, there are wide misconceptions and the cases in question are very serious. The bill provides that, if such matters are raised in a trial, the judge should be required to direct the jury on them and not just leave jurors without reference.

The Convener: I will move on and let other members in. Rod Campbell is next, to be followed by Elaine Murray and Gil Paterson.

Gil Paterson (Clydebank and Milngavie) (SNP): Can I come in on that point?

Roderick Campbell: My question is on that point, too.

The Convener: Rod Campbell can go first.

Roderick Campbell: My question is on directions in sexual offence cases. The second statutory direction relates to the inference to be drawn from the absence of physical resistance or force. Mr Meehan, you have questioned the necessity of that, given the provisions in the Sexual Offences (Scotland) Act 2009. I would be grateful if you could elaborate on that.

I note that the policy memorandum states:

> "The Scottish Government is not aware of any jurisdiction that has legislated to provide for statutory jury directions concerning what weight to place on the fact that there was a lack of physical resistance on the part of the complainer".

However, in the following paragraph, it draws attention to guidance that is available to judges in England and Wales. In the light of your earlier comments about the jury manual, will you expand quite considerably on what you said about that specific area?

Michael Meehan: For the offence of rape, the focus is very much on consent. In a case where consent was the issue, the jury would be directed on the law in that regard. I am not aware of a concern about there being misdirections when the issue is consent.

From my experience of being involved in prosecuting and defending rape cases, I know that people might have general preconceptions before they come to serve on a jury, such as when one is dealing with a case of prejudicial publicity. However, it is generally accepted that when jurors are involved in the trial process they focus on the evidence in the trial and the lines that are embarked on and they follow directions. I am not aware of a concern about there being a deficiency in the directions that are given now or, in cases where the focus is on whether there was consent, about juries being confused because there was not a focus on whether there was injury.

Does that answer the question in a roundabout way? Jury research would be helpful on the matter. If there was research that showed that, at the end of a case, such preconceptions remained and had led to a perverse decision, that would be one thing. However, in the absence of evidence to suggest that the directions that are given at the moment in accordance with the law are causing a problem, one would be wary about changing the position.

Roderick Campbell: In a nutshell, you are sceptical about whether there is a specific problem that we need to address.

Michael Meehan: I would be more guarded than that and say that before one changed things one would want there to be evidence in that regard. I note that the police submission refers to research in England and a statement from a prosecutor in England. One of the things that Lord Bonomy's review flagged up was the value of there being some jury research.

The Convener: I have wittered on about that for a while. I was quite surprised that one advocate expected another to answer a question in a nutshell. I do not want to be rude, but you are very cautious—and rightly so.

Does Gil Paterson have a supplementary?

10:30

Gil Paterson: I have a supplementary question on directions. I speak as a former board member—of 12 years—of Rape Crisis Scotland. I know that there is evidence available that juries in particular have common expectations. They expect injury to have taken place and for that injury to be significant, and when the person who is claiming rape is present and calm, juries often see them as not being honest—they expect the victim not to be calm and to have resisted. That is very common.

If you talk to anyone who has been raped and whose case has gone forward and resulted in a guilty verdict, they will confirm that that is the case, as will those whose cases have unfortunately been unsuccessful. People who work in Rape Crisis and in other organisations in the area know how common that is.

The Convener: Please ask a question, Mr Paterson. I appreciate your experience, but you seem to be giving us evidence rather than asking the questions.

Gil Paterson: I am leading to that, convener, but I want to counter the point that there is no evidence. There is conclusive evidence that that is how juries think, and in substantial numbers. If that is the case, how do we overcome that prejudice? How do we overcome the common expectation that all those things should happen, when very often things do not happen like that?

Michael Meehan: With respect, may I ask how victims of rape know how a jury is thinking, when jurors do not give reasons for their decisions? We simply do not know. I am not disputing that there are cases in which complainers have given evidence and there has been distress, there have been injuries and there have been acquittals. There are acquittals in a range of cases, perhaps for a range of reasons. Our point is that one does not have evidence as such as to what has happened in an individual case.

In the type of case that Mr Paterson mentioned, perhaps the accused has given evidence and the jury's position is that it is not sure who to believe. That may be the situation—it might not be about the absence of medical injury or the reaction of the witness.

I return to the point that I made earlier. If the sense is that jurors may expect there to be an injury, why not lead evidence from an experienced police surgeon? They can say to the jury, "I have examined victims of sexual abuse and I can say that, even in the case of a child, very often one does not find injury." If the jury hears from a medically qualified person who is experienced in such examinations, that will carry far more force; more important, the evidence will be given at an earlier stage in the case.

Gil Paterson: We have another panel of witnesses today who have produced a paper explicitly on the evidence. Unfortunately, because people who are engaged in juries are not allowed to be interviewed, the evidence has been structured through scenarios using the general public. However, it clearly shows that all the things that I mentioned earlier—all those reactions from juries—happen.

Grazia Robertson: I noticed an academic submission among the committee papers.

The Convener: The submission from Professor Munro.

Grazia Robertson: Yes. While I take issue with much of the findings, I would say that the research did not seem to support the second suggested direction regarding injury. I am not saying that that research is any better than anyone else's, but it shows that it is not quite as straightforward as saying that everyone knows that a certain position is taken.

The Convener: I want to move on, but we can come back to that if we feel that the matter has not been fully explored. We have lots of questions to ask on the bill.

Elaine Murray: The bill introduces a statutory aggravation of domestic abuse, rather than a specific offence of domestic abuse. Do you think that that is the correct approach and, if so, why?

Catherine Dyer: We think that that is the correct approach. The issue is that domestic abuse surrounds particular actions and is not an offence in itself, which makes it difficult to establish. It is appropriate that it is an aggravator. We can get a wide range of charges in an overall domestic abuse situation. For example, in a domestic situation, rape would be aggravated by the fact that a partner or ex-partner carried out the rape. At the moment, the charge just says that the offence is rape and there is no indication for the conviction that the rape was carried out in the context of domestic abuse. Vandalism can also be carried out in the context of domestic abuse.

The approach of attaching a statutory aggravation rather than trying to define domestic abuse is probably the way to go.

Grazia Robertson: You might have noticed that the Law Society was probably the only contributor

that had concerns on this. Our concern was that we do not see that there will be any value in introducing the provision. Aggravations are normally introduced either to increase the penalty—the sheriff sometimes decides that there should be an additional penalty for that aggravation—or to gather information about whether a particular behaviour is a major and continuing problem, such as the introduction of an aggravation to do with racial abuse.

Domestic abuse cases are assiduously prosecuted in the courts and they are given a lot of special consideration. The person is often taken into custody immediately, will appear in court and will be subject to bail conditions and restrictions. In Glasgow, which deals with a lot of these cases, there will be specialist sheriffs and attempts to have not too long a time before the case is brought to trial. A lot of special things are put in place to deal with domestic abuse cases. They are treated seriously in the current system and steps are taken.

When there is a domestic element to a conviction, it is recorded in the conviction so that, if the person appears in court again on a similar matter, the sheriff can see that there is a pattern of behaviour. All the steps are in place. The system already accommodates the importance of domestic violence cases being treated with all seriousness. To add aggravation might lead people to expect consequences that the system will not deliver, so it might lead to disappointment for those who feel that it is a good idea.

Catherine Dyer: The Crown thinks that it is a more transparent way of making it clear to the court and offenders that it is seeking to have an incident considered as a domestic abuse incident. Although there are such mechanisms as bail orders or whatever, the complaint or indictment where the charges are set out does not indicate to the accused person from the outset that the Crown will consider the case in a domestic abuse context. It is more open and transparent to indicate the Crown's position from the outset, to alert the sheriff to the Crown's position and to allow that the evidence indicates that the situation is a domestic situation.

Elaine Murray: One of the bill's definitions of the partner of another person is that they are

"in an intimate personal relationship with each other".

Is that difficult to interpret? Might that exclude someone who has had a short-term relationship and then become abusive to the other person?

Catherine Dyer: We already adhere to that description when the police and the Crown are looking at the case. The courts would also expect that a domestic is not just something that has happened in any house; it has happened between the parties because of their relationship. That is really the definition of domestic abuse. We can already prove that.

Elaine Murray: So it would have to be proved that the people were in a relationship rather than having a brief sexual encounter.

Catherine Dyer: Yes.

Alison McInnes: Everybody has acknowledged that defining domestic abuse is difficult, which is why no specific crime is being brought forward in the bill. However, the statutory aggravation must somehow be defined. How is it easier to define domestic abuse as a statutory aggravation than as a particular offence?

Catherine Dyer: I was not indicating that it is difficult to define domestic abuse as such. That is where there are actings between people who are in an intimate relationship where one is abusive of the other. I was trying to indicate that that can take many forms. There can be vandalism, assaults or threats, and those can already be proved in Scots law. The domestic aggravator would highlight that those offences took place in the context of a domestic abuse situation, so that is why we think that it would be helpful.

The purpose of the aggravator is that it would be quite transparent from the outset that we are dealing not simply with an assault but with an assault that took place in a domestic abuse context, or that it is not just vandalism but vandalism that took place in a domestic abuse context.

I was trying to say that I do not think that it is possible to have a charge of domestic abuse full stop. It will always have to have the elements of the actings that were criminal, but the context will be a domestic abuse situation.

Alison McInnes: Would you expect a greater penalty to be secured as a result of the aggravator?

Catherine Dyer: We would. At the moment, it is difficult to make that clear in sentencing. Domestic abuse happens where people should expect to be safe, in their own home, and with somebody with whom they are intimately involved, so it seems like an even greater betrayal of trust. The criminality aspect is that it involves picking on someone whom a person knows to be vulnerable.

The Convener: I want to ask about a section of the bill that has given me a bit of trouble—section 25, on sexual risk orders. There is a word in section 26(2) that bothers me. It states:

"An appropriate sheriff may make a sexual risk order only if satisfied that the respondent has (whether before or after this Chapter comes into force) done an act of a sexual nature".

It does not say that the respondent must have been convicted, but that he must have done such an act. I have concerns about that because, as I understand it, the sexual risk order is a civil order, so it is decided on the balance of probabilities. I do not understand what is meant by someone having "done an act", when they have not been charged or convicted.

There follows quite a list of severe restrictions. Perhaps I am wrong, but that section seems difficult. Could you comment on that?

Michael Meehan: I am happy to do so. The Faculty of Advocates makes the observation in its written evidence that one is dealing with a situation in which the precondition is that a person has done or committed an act of a sexual nature. What is apparent from section 26(2) is that there is no requirement for that act to have been in any way criminal, but thereafter an order that can impose quite stringent restrictions on a person may be imposed. That is a matter of significant concern, because the nature of the order has been extended to affect more people. Previously, the orders related to children only, but the risk orders can now be extended to adults and they can be made when there has not been a prior crime. I suppose that it prompts a question. What type of sexual act do the police and Crown envisage may be committed that is not a criminal act but which should nevertheless require some restriction on a person?

The Convener: I think that the Crown is about to reply.

Catherine Dyer: It is not really about the Crown. If you look at the wording of the bill, you will see that it is about civil law. An act may be criminal, but it might not be able to be proved to be criminal, partly because of the current requirement for corroboration. It is a civil act where the chief constable applies to the sheriff to say—

The Convener: I appreciate that it is a civil order. I made that point when I introduced the subject. There is a lot of wording that concern me, such as the phrase

"done an act of a sexual nature".

Catherine Dyer: It could be "carried out"; perhaps "done" is not the best English.

The Convener: It is horrible. It is not a very legal word. Have you done your homework?

Catherine Dyer: The Crown is not responsible for the drafting of bills. My understanding is that, if the police have information that is sufficient, on the balance of probability, to say to the sheriff that an event has happened and that a certain person is responsible for it but there is not sufficient corroboration, a civil order can still be taken forward in the way that interdicts can be taken forward for other matters where it might be that there is an act that people would constitute as criminal but where there is not the sufficiency to prove it beyond reasonable doubt with corroborated evidence.

10:45

The Convener: I want to take this a step further. If an order is made by the court—notwithstanding our concerns about the kinds of order that can be made—would it be made in public? Could the court order be publicised, found out about and read about? Could people find their name in the press if a sexual risk order is imposed on them?

Catherine Dyer: I am not clear on that.

The Convener: Findings of the court are usually public. Do you understand my concern?

Grazia Robertson: Part of the point of such an order would be to publicise it and to alert other people, if the chief constable feels that there are people who are a risk to the public. It would have to be made public.

The Convener: It is not that I want to protect evildoers and so on, but it is called a sexual risk order, which would sound criminal to most people. It is a civil order, which is public and is not being tried in court. Those are huge issues for me. I appreciate that it is a civil order and so the balance of probabilities applies and so on, but it has the tenor of a criminal finding.

Catherine Dyer: There was previous legislation on that. SOPOs or whatever they are called—I am trying to read my colleague's notes—are already in existence and have been carried out on that basis. Perhaps Police Scotland would want to comment on that.

The Convener: Yes. Thank you for that.

Detective Chief Superintendent Boal: The amendments are to existing prevention orders. At the moment, we have sexual offences prevention orders, for which there must be a conviction and the individual must be a qualifying offender. Risk of sexual harm orders were introduced in 2005. That created the ability for the chief constable to apply to a relevant sheriff court for a risk of sexual harm order where it appeared that, on at least two occasions, an individual had committed but not been convicted of acts that included

"engaging in sexual activity involving a child or in the presence of a child ... causing or inciting a child to watch a person engaging in sexual activity ... giving a child anything that relates to sexual activity or contains a reference to such activity"

or "communicating with a child" in that way.

That person did not have to have been convicted, but there had to have been two occasions of such activity, because the order is preventative. The threshold was that we had to provide that the information was to prevent serious sexual harm.

Members may remember Assistant Chief Constable Graham being challenged on the low number of RSHOs being applied for and granted with regard to the protection of children. The Association of Chief Police Officers—as it was—did some research about two years ago on how prevention orders were not meeting the protection needs of children, predominantly. The suggestion was made that, as it stood, we would have to prove that the protection was necessary against serious sexual harm, but surely we should be protecting a child from any sexual harm.

The provisions mean that, if we are talking about protecting children, instead of having to have at least two occasions, given that the vast majority of those occasions would allow for criminal proceedings to take place because there may be mutual corroboration and so on, and if there is sufficient information to suggest that a person poses a risk of sexual harm to a child—that risk has now been extended to children outwith the United Kingdom and vulnerable adults—the chief constable can apply to a court for a prevention order, to place either restrictions or obligations on the person.

The Convener: But the provision goes beyond children. It says:

"protecting the public, or any particular members of the public".

Detective Chief Superintendent Boal: Yes.

The Convener: I understand your point about making it easier to get such orders in respect of vulnerable adults and children, but the bill goes beyond that.

Detective Chief Superintendent Boal: Absolutely. It is a protection order.

The Convener: I understand that.

Christian Allard: I have a quick question. Would it be helpful to have a definition of sexual harm?

The Convener: I think that it is defined in section 25.

Detective Chief Superintendent Boal: There is a definition. The bill talks about "physical or psychological harm".

Christian Allard: Is there not a difference between serious sexual harm and sexual harm?

Detective Chief Superintendent Boal: We are happy that the bill is drafted in such a way as to lower the threshold from serious sexual harm to sexual harm.

The Convener: The bill talks about a person who has

"done an act of a sexual nature".

It does not say "sexual harm".

Detective Chief Superintendent Boal: Yes, that is to do with the act, but the consequence of that—

The Convener: I am back to section 26, which I have been wittering on about. It talks about

"an act of a sexual nature",

not an act of sexual harm.

Detective Chief Superintendent Boal: Sorry, but I was talking about the—

The Convener: I am getting back to definitions here. The question might be: what is an act of a sexual nature and is it always harmful? Do you see what I am saying?

Catherine Dyer: Section 26(2)(a) makes it a bit clearer. It is not just about an act of a sexual nature; it is about protecting from the harm of that. The bill indicates that harm means

"physical or psychological harm caused by the person doing an act of a sexual nature."

I know that it is kind of circular.

The Convener: It is badly drafted in my book. I do not like the terms "done" and "sexual nature". The bill could have said other things, but there we are. [*Interruption*.] I am getting disagreement from members of the committee.

Christian Allard: I am still confused about what the definition is. We have talked about the terms "done" and "sexual nature". What is the definition?

Detective Chief Superintendent Boal: The definition in the bill of sexual harm is "physical or psychological harm". To be honest, Police Scotland highlighted in our submission that we do not like the word "done" either.

The Convener: I am not seeking a job, because I know how difficult it is to be a parliamentary draftsman. It is for the very skilled, but there we are.

Elaine Murray: I seek clarification, because I am not sure that I understand the difference between a sexual harm prevention order and a sexual risk order. Could somebody clarify the difference?

Detective Chief Superintendent Boal: A sexual harm prevention order is when a person is a qualified offender, so they have already been convicted and they are being managed through

the multi-agency public protection arrangements, or MAPPA.

Elaine Murray: I see—and the sexual risk order is when somebody has not been convicted. Thanks.

The Convener: There is a mountain of difference, I think.

John Finnie: On that point, I seek the panel's views on whether we have the balance right. Clearly, everyone wants to protect the public, including children and young people, but is the balance right? Are there implications for Police Scotland to do with the protection of an individual who becomes the subject of such an order? I presume that a risk will be posed to them as a result of publicity?

Detective Chief Superintendent Boal: On whether we have the balance right, with the applications that we make now for risk of sexual harm orders, which will become sexual risk orders, we go through a stringent process. The officer who identifies the individual has to assess the risk that they pose. That is then assessed by the relevant detective superintendent and, if he or she agrees, the police might be able to take other actions without going for a prevention order. The matter is then passed to our legal services department to consider before applying to a sheriff, who will consider whether to grant an order.

There are a number of safeguards in the application process. Each application has to be absolutely justified and proportionate to what we have assessed the risks to be. Any conditions would be put in place only in order to meet those risks. The individual who is subject to the risk order would be managed in a certain way, which is far easier when there is already a conviction, because they will already be managed by the multi-agency public protection group, but for an unconvicted person who is subject to an order there will be interaction with the police, which will include a safety assessment of that person. That is fine, because we are trying to protect people and we are using a protection order.

In our response, we have asked for further consideration of including in the MAPPA structure individuals who have not been convicted and are then subject to a prevention order, so that there is that multi-agency information sharing and wraparound approach in relation to those individuals and their potential victims.

John Finnie: It is clearly a poor second to getting someone convicted and punished appropriately. Is there a danger that such orders would become a soft option where there is not enough evidence to proceed?

Detective Chief Superintendent Boal: No, I do not think so. We would rather prevent a sexual crime than have to investigate and convict someone for that crime, for a whole range of reasons, but most importantly for the victims.

John Finnie: Thank you.

The Convener: To go back to RSHOs, do we know how many have been applied for and refused?

Detective Chief Superintendent Boal: No, although I can tell you how many we have got at the moment.

The Convener: Perhaps you could find out how many have been applied for and refused.

Detective Chief Superintendent Boal: I do not have that information, but I can come back to the committee on that.

As of the end of October, we had, in total, 483 sexual offences prevention orders—those are orders where the person has a conviction.

The Convener: Over what period of time?

Detective Chief Superintendent Boal: In October.

The Convener: Currently?

Detective Chief Superintendent Boal: Yes, in October there were 483 registered sex offenders who were the subjects of sexual offences prevention orders, 13 of which were interim and 470 of which were full orders. Across Scotland, there were 20 risk of sexual harm orders—which are for individuals who do not have convictions—seven of which were interim and 13 of which were full.

The Convener: Please can you get back to us with the figures on the number of RSHOs applied for, to give us an idea about how that is currently operating?

Detective Chief Superintendent Boal: Yes.

I have some information that members might find interesting. After legislation was introduced in England and Wales, five full and eight interim risk of sexual harm orders—for individuals who have not been convicted—were granted between March 2014 and September 2014. After the introduction of new legislation that is similar to what is proposed in the Abusive Behaviour and Sexual Harm (Scotland) Bill—with a lowering of the threshold of seriousness and without the need for there to have been two similar occasions—there were 32 full orders and 13 interim orders over a similar time period. That means that there was a 3.5-fold increase.

The Convener: I would still like to know the number of orders applied for in the current system.

I want to open up questions on the posting of intimate images on the internet, which is known as revenge porn. At the moment, how do Police Scotland and the Crown Office deal with such incidents? We just want some background to that.

Catherine Dyer: Much like domestic abuse at the moment, we have to consider which particular aspect of the law is being broken. That can mean that it is not necessarily clear to the public that engaging in such activity is an offence, because at the moment it could be a breach of the peace or a contravention of section 38 or section 39, which is on stalking, of the Criminal Justice and Licensing (Scotland) Act 2010.

We are supportive of the introduction of such an offence. Because of societal change, it has become very common for people to take images of each other in relationships, regardless of what one thinks of that or whether one is in favour of it or not. There have been a number of cases in which such images have been shared inappropriately for the purpose of causing harm to the individual whose picture has been taken. Instead of having to fit such activity into the context of some other crime, the idea of the bill is to say that it can now be identified on its own and that it would be clear for the public if it were made a specific offence.

11:00

The Convener: What do you use at the moment?

Catherine Dyer: At the moment, we use offences such as breach of the peace or uttering threats or extortion, which can sometimes go along with the sharing of intimate images. Conspiracy is another option. There are all sorts of categories that such activity, part of which involves sharing an intimate image, could fall into. I think that the point has come whereby the extent of such activity and the harm that is caused to the individuals who find images of themselves paraded across the internet, with the result that their friends or family, or their employer, can see them, is such that it has become clear that we need to send a signal to people that, just because it is possible to take images very easily, that does not mean that they are entitled to share them, because that causes harm, and that if they do that, they know that that is what they are trying to do.

Detective Chief Superintendent Boal: Responding to reports of intimate images being shared—I do not like the term “revenge porn”, for all the reasons that have been outlined on the back of the research that was done—is difficult. Operational officers will take a statement from the complainer on a statement form. They will try to work out whether there is a bit of legislation that would render what has been described a crime or offence. For us, that is where the risk lies, because there are some inconsistencies as regards that initial assessment.

When a crime has been established, if it is a domestic incident, an input will be made on our vulnerable persons database. In addition, the local domestic abuse unit will be notified. Members of the unit will meet the victim and ask a series of domestic abuse questions, which will allow victim safety planning to be done. If a crime is recorded, officers will work together to gather the evidence, including productions from screenshots and other relevant material.

The inquiry will then be processed. That is done predominantly through our communications investigation unit, which is part of the specialist crime division. It acts as a single point of contact for co-ordinating any authorisations that will be made. If an authorisation is required for subscriber checks, that will be done at inspector level, or if it is for more significant traffic data or service history data, that will be done at superintendent level.

What happens thereafter is quite operational, so I would not want to go into detail in a public forum.

The Convener: I am just trying to establish whether you deal with such activity through domestic abuse processes. Is that all that is left to you? Is that what you have to do?

Detective Chief Superintendent Boal: To be honest, as Catherine Dyer said, it is a question of which legislation fits, and we sometimes find that very little legislation fits the bill. We can consider using section 38, but sometimes the circumstances do not allow that.

The Convener: Which act are you referring to?

Detective Chief Superintendent Boal: The Criminal Justice and Licensing (Scotland) Act 2010. Section 38 is on threatening or abusive behaviour.

There is also the possibility of using section 127 of the Communications Act 2003, which covers the sending of a message that is “grossly offensive”, but sometimes the communications or images that we deal with do not reach the threshold of being “grossly offensive”, even though they cause heartache and distress to the person concerned.

There are issues with using section 6 of the Sexual Offences (Scotland) Act 2009. We would have to prove that an image was shared for the purpose of “obtaining sexual gratification”, and on a number of occasions that has not been the motive. On some occasions, we have had to fall back on a breach of the peace charge.

There is underreporting of the crime, often because victims are unclear that it is a crime or offence. Some police officers, given some of the

circumstances, are not clear exactly which crime or offence category it fits into. There must be a clear message to perpetrators that such behaviour is absolutely not acceptable in society.

The impact on victims is devastating. We interpret the bill not only as covering the disclosure of intimate images in a domestic setting but as applying more broadly, and we welcome that. I will give you an example. Between 20 and 22 August this year, in quite a small area of Scotland, we had 25 separate reports from members of the public regarding the unauthorised posting of intimate images. They, or their partners or friends, had taken the images, and they had stored them on their personal computers. An individual or individuals unknown had then hacked into their computers and posted the pictures, along with their personal information, on the internet. That did not take place in a domestic setting: we have done a lot of work with and questioning of the 25 victims, and there is no suggestion that the offender was a partner or prior partner of any of them.

The work that has followed on from that is significant. The impact is just as stark for those 25 women as it would be for victims in a domestic setting. Because of such examples, we welcome the fact that the bill is broader and does not apply simply to a domestic setting.

Catherine Dyer: Again, it is about transparency. We need to make it clear to members of the public that such behaviour cannot be tolerated. The legislation that is coming into force will mean that such behaviour will appear on a list of somebody's previous convictions. At present, it would appear as an offence under section 38 of the Criminal Justice and Licensing (Scotland) Act 2010, and the court would not really have a feel for what was going on if someone had been doing it on more than one occasion.

The Convener: That is very helpful.

Detective Chief Superintendent Boal: If the legislation is broader than simply covering the domestic setting, a person who was convicted would have a domestic abuse aggravator.

The Convener: Thank you—that is helpful in setting the scene.

Margaret McDougall: What you have said has added to what we have in front of us. Is the offence of threatening to disclose an intimate photograph or film already covered by section 38 of the 2010 act? Will the legislation before us help in that respect?

Michael Meehan: I do not have a copy of the statute in front of me, but my recollection is that section 38 covers threatening behaviour. What Margaret McDougall describes is behaviour, and I think that it is threatening behaviour, so I would have thought that it would be covered.

Margaret McDougall: Detective Chief Superintendent Boal spoke about the difficulties in tracking down offenders and said that the bill would help in that regard. How difficult is it to track down people who have sent such images? We hear about IP addresses and other web terms with various connotations. Is it difficult to find the people who have sent the images, or is the real issue something else?

Detective Chief Superintendent Boal: There will always be challenges, but there are good processes in place. Our communications investigation unit has links with service providers across the world. The level of difficulty depends on the different service providers. Some will assist as an act of good will, whereas some may require a warrant. However, we will follow all opportunities in seeking to identify the person.

I have some statistics here, but you will have to bear with me while I find them. Because of our legacy systems, it has not been easy to pull out information. The best that I can get at the moment is information on the 2014-15 financial year for four divisions—Aberdeen, Fife, Forth valley and Tayside—in Police Scotland, which gives a bit of a flavour. In those four divisions, there were 57 incidents where intimate images were shared or the threat was made to share such images in a domestic setting. Those are specific examples of—I hate to use this terminology—revenge porn. Reports were submitted for 39 of those incidents—in other words, there was sufficient evidence to report 39 of the cases to the Crown Office and Procurator Fiscal Service.

Margaret McDougall: Is that number a huge increase from the previous year? We have heard that incidents are on the increase.

Detective Chief Superintendent Boal: To be honest, we did not record that information. It is also difficult to say because of the different crime types that we used to pull out any information. However, from the information that we have from support groups and victims, this is without doubt an increasing activity.

Margaret McDougall: Is there an argument that offences should be extended to include other forms of communications, such as text messages, letters, videos and so on?

Catherine Dyer: Again, there is something specific about a visual image that can be flashed across and seen by hundreds of people. The bill is trying to get at that activity in particular and to say that that is just not acceptable.

When we were wondering how we should work in that regard, no one came to us with an example

in which a text could be more intimate than an image. People's concern is more about having their image taken and for that image then to be spread about and there for other people to see for ever.

Grazia Robertson: The one thing that we want to draw attention to is intent. The bill says that there has to be intention or recklessness. I think that you will be hearing representations on that from James Chalmers, who is on your next panel.

There should be intention to cause harm or humiliation, rather than recklessness. The term "recklessness" is too wide. I do not like the term "revenge porn", but I think that we all understand what it means. The issue is not the porn; it is the revenge element. Revenge is crucial in order for it to be that type of offence; if a person has exposed images that we find embarrassing, humiliating or upsetting, for example, that would be more of a privacy offence.

The bill covers situations in which a vengeful or a hurtful act is being perpetrated on someone for the purpose of revenge, and not simply for a laugh or a carry on, with the person not realising the effect. If the purpose is to encapsulate that offence, the bill should be restricted to intention, which I think is reflected in the English legislation. That is the only point that the Law Society wants to make on the matter.

Michael Meehan: I agree with that. The bill is drafted very widely. In England, there is no requirement for recklessness. Recklessness may simply be that a person has not thought about the matter. I think that it is fair to say that a lot of people will put things on social media without really thinking about it. A person, without intending any harm, could very quickly be guilty of reckless behaviour.

I want to touch on another matter with regard to the bill's very wide drafting. The committee will see that a category of offence relates to situations in which a person is covered only with underwear. Such a situation is not an offence in England. I will give an example. A person comes home to find his flatmate asleep on the couch wearing only his boxer shorts and takes a picture of the flatmate. If he was simply to show that to another flatmate, he would be guilty of an offence under the bill. The bill provides no defence to that. Photographing a person in their underwear would be an offence; the reference to recklessness would make it so. A person might think, "This is amusing," and take a photograph to record the amusing moment. The last thing that that person intended to do was to cause fear, alarm or distress. However, because that requirement is not there, taking that photograph would be criminal conduct.

11:15

The Convener: There are images passing through my mind that are making this committee meeting interesting for the wrong reasons.

Catherine Dyer: I am a bit concerned about the example of pictures being taken of people sleeping in their underwear. I think that that is probably an intrusion. However, the issue relates to the effect on the victim. That is the raison d'être of the provision. It is not about jokes or whatever. There are certain types of image that it would obviously be inappropriate to share with people. The focus is on the impact on the victim. There has to be a victim. It is not to do with jokes. There must be a person who indicates that the exposure was harmful, upsetting and distressing to them.

Margaret McDougall: Should we include sexting—someone sending or receiving a sexually explicit text, image or video on their mobile phone?

Catherine Dyer: The bill is not to do with people consensually passing images between themselves; it concerns someone who has access to an intimate image that was not meant to be shared with a third party.

Sexting, as it is known—it is another term that it is difficult to put into dry legal terms, but we could define it as the exchange of images, texts or whatever between consenting persons—is not what the bill is concerned with. The bill concerns situations in which an image is shared with other people of an individual who does not want that image shared, yet it is shared without their consent.

Michael Meehan: Sexting could come into play, though. If someone were to send an intimate image to a person's phone, and that person then showed it to the person sitting next to them, saying, "Look what so-and-so's just sent me," the person who showed it would be guilty of an offence.

Catherine Dyer: Again, it comes down to the issue that, when determining criminal activity, we have to have proof through the evidence. It is down to the individual circumstance and it is about the expectation of the person who sent the image that it would not be shared.

The Convener: Is there not a problem with the use of the word "reckless" when we are talking about quite young people? It is a different culture today, and people in that generation might do something that, to somebody else, might seem a stupid thing to do, but which, at a certain age, is extremely common. That brings us back to the issue of recklessness and there being no ill intention involved. Is there not a bit of a generational problem here, too?

Catherine Dyer: It comes down to whether someone feels that they are a victim. People do not see themselves as victims unless something has happened to them.

The Convener: I appreciate that, but we are talking about criminalising people. I appreciate that someone's action might have an effect on someone else, but the decision to re-send a picture might have just been a daft, stupid thing to do, rather than something that was done with ill intention.

Catherine Dyer: Prosecutors and the police deal with young people all the time, and they think about whether young people's actions amount to criminal behaviour or are just daft behaviour. It is a fact of life that people send these images to each other and sometimes share them. However, we must consider the issues in a sensible way and determine whether it is possible, through an objective test, to say that harm was done and that it would be obvious to anyone that sharing an image widely was likely to be harmful or distressing.

Part of the reason for the legislation is to enable society to say that if people have such images, they have to be aware that they should be taking care of them and that they are not really for sharing willy-nilly with anybody.

Roderick Campbell: I have a small point for Mr Meehan. Will you elaborate on your concerns about section 2(3)(d), which refers to it being a defence if disclosure is "in the public interest"? You mentioned the journalistic material defence.

Michael Meehan: Journalistic material is a defence that applies in England. The concern is over the application of different tests for different parts of the UK when there are publications that are UK wide. It may well be that "in the public interest" is prayed in aid for journalistic material. There may be an overlap. However, I was just raising the point that there is a distinction between the legislation in England and the legislation in Scotland.

Christian Allard: I return to the intention to cause fear, alarm or distress. Some people ask whether that should be in the bill. Ms Dyer described it well when she talked about consent. If there is no consent, does the perpetrator's intention matter? Perhaps the legislation would be a lot simpler if it was just a matter of consent.

Catherine Dyer: Section 2(1)(c) talks about consent.

Christian Allard: But would it not be a lot clearer if the bill focused only on consent, rather than trying to introduce questions of intention or whether behaviour was reckless?

Catherine Dyer: I suppose that that takes us back to some of the difficulties. The bill tries address what the public have, quite rightly, identified as an issue. It is in situations in which it causes fear, alarm or distress to an individual that disclosure becomes a criminal act.

Christian Allard: Would it not be a lot simpler if we gave the strong message that it is a matter of consent? It does not matter what your intention is or whether you are being reckless—if you do not have consent, you should not do it. Would that help Police Scotland, for example?

Detective Chief Superintendent Boal: The consent aspect is already in the bill. I agree that there has to be an outcome. Whether there is a level of distress or upset, the outcome is important, too. For us, consent is the vitally important part of the legislation.

Christian Allard: If it is so vital and important, perhaps it should be to the forefront—perhaps we should forget about intention and recklessness.

Detective Chief Superintendent Boal: There is probably a need to mention both in the legislation.

Grazia Robertson: Without intention, you do not have the crime that you are purporting to introduce in the bill. Its whole purpose is that this is about revenge, hurt and control: a person is seeking to hurt someone else by acting or threatening to act. That is an intrinsic part of what the Government says that it is trying to introduce. If you simply say, "You must not share an image of someone in their pants, whether or not they consent to it", you are moving into more of a privacy issue, in that people are entitled to have images protected for reasons of privacy. It appears to me that that is not the Government's intention. What the Government is saying is that you should not seek to hurt, control or express your vengefulness on someone by issuing, or threatening to issue, an image that you have of them. That seems to me to be an integral part of what the Government is seeking to introduce. If you remove intention completely, you will have a completely different set of circumstances.

Christian Allard: Do you share the concern that young people and teenagers might not see the difference, and that it would be a lot easier if you referred only to consent? Do you think that we are giving mixed messages by trying to define intention, particularly given what we have heard about young people and teenagers doing that kind of sexting?

Grazia Robertson: I would assume and hope that the Government's intention is not to criminalise children unnecessarily. Therefore, regard must clearly be had to the activities of young people. Remember that the term "children"

is variable: children are sometimes considered to be those under the age of 16, but quite often those under the age of 18 are considered to be children, because of their vulnerability. I hope that the Government is not seeking to criminalise young people unnecessarily, so regard should be had to that.

Michael Meehan: I echo what Grazia Robertson has said. It would be extremely unfortunate if, although the court was completely satisfied that the person never intended in any way for the harm to be caused, it convicted them of a very serious offence because they did not pause to think. The conviction would stay on their record and could cause them real difficulties with integrating in society, when what was really at stake was not whether there was criminal intent but whether there was perhaps a lack of maturity or judgment.

The Convener: I take it that that would also apply to vulnerable adults, and that in similar circumstances you would perhaps say that they were unaware.

Michael Meehan: Yes.

Margaret Mitchell: My question is for Ms Dyer and is about commission of certain offences elsewhere in the UK—such situations are covered in sections 7 and 8—and in particular the reference to habitual residence. At present, if the act is not a crime in England, it becomes a crime only if someone is a habitual resident of Scotland. However, under proposed new section 54A(8) of the Sexual Offences (Scotland) Act 2009, which section 8 seeks to introduce, if they subsequently take up habitual residence in Scotland, they can be charged with the crime. Can you comment on that?

Catherine Dyer: In what sense do you want me to comment on it?

Margaret Mitchell: If they had habitual residence in Scotland when the crime was committed in England—although it was not a crime there—I am assuming that they could be charged under Scots law.

Catherine Dyer: Yes.

Margaret Mitchell: Under proposed new section 54A(8) of the 2009 act, if they subsequently took up habitual residence here they could be charged with the crime. Could you comment on that?

Catherine Dyer: What that section is trying to get at relates to when the report of the crime is made available to us. It covers people who are habitually resident in Scotland and we know that a crime has been committed, and somebody who commits a crime and then moves to Scotland. I think that that is what the provision is trying to catch.

Margaret Mitchell: Are you aware of the suggestion that that could breach article 7 of the European convention on human rights?

Catherine Dyer: Those issues are matters for Parliament to look at and for the draftsmen to consider. The bill is trying look at the matter on the basis that, if acts are committed in England, we can deal with them in Scotland if the person concerned lives in Scotland or has moved to Scotland.

Margaret Mitchell: What about article 7?

Catherine Dyer: There is always a balance to be struck, because rights under the convention also apply to the victims of crime, so that is one of the areas where there is a balance and it is going to be—

Margaret Mitchell: It is the retroactivity part of the provision—

Catherine Dyer: It is not really retroactivity. To put it simply, the bill is drafted in a way that addresses a situation in which someone commits an offence on day 1 and then moves to Scotland on day 2. It is not retrospective, because that must clearly happen after the offence is committed. That is not retrospective; it is not going before you have committed—

Margaret Mitchell: Is the point not that you cannot commit, and cannot be punished for, a crime that is not an offence when it is committed?

Catherine Dyer: I am sorry; I am not quite getting this.

The Convener: You will need to repeat that, Margaret, for my muddled brain.

Margaret Mitchell: My understanding of article 7 is that someone cannot be punished for a crime that was not an offence when it was committed. So, if something was not an offence but there is subsequent legislation—

Catherine Dyer: No. Proposed new section 54A(2) of the 2009 act makes it clear that it covers only situations in which

"the act would also constitute an offence under the law in force in the country where it took place."

It covers the situation in which somebody commits an offence in England, say, and then moves to Scotland. At present, by the time that it is ascertained that the offence was committed—and it is something that is an offence in England—they cannot be prosecuted because they now live in Scotland. However, under the bill we will be able to prosecute them in Scotland. That is what the bill is trying to do. I am sorry if I was slow on the uptake there.

11:30

Margaret Mitchell: I thought that they could be prosecuted here only if they had habitual residence when the offence was committed: it was not an offence in England but it was an offence in Scotland, where they had habitual residence, and therefore it was a crime.

Catherine Dyer: To my mind, proposed new section 54A(2) is really quite clear. It states:

"a person who is not a habitual resident of Scotland commits an offence by virtue of subsection (1) only if the act would also constitute an offence under the law in force in the country where it took place."

That comes down to saying that either they were habitually resident in Scotland or they have moved to Scotland.

Margaret Mitchell: But the act was not in place when they committed the crime when they lived in England—that is the point.

Catherine Dyer: Pardon?

Margaret Mitchell: The act was not in force at that point, and then they moved to Scotland.

Catherine Dyer: We are talking about what the position will be once the legislation comes into force. There will be a commencement date for the act, as with other acts. I do not think that the idea is to deal with anything retrospectively. It is about giving notice that, from now on, someone who moves from England will not escape justice, because, under Scots law, we will be able to prosecute them for something that is a crime in England. That cannot happen just now. However, there will be a commencement date for the act, and it will not be retrospective, as far as I understand it.

Margaret Mitchell: I will be interested to hear more evidence on that later, because I am not entirely convinced.

Can I just very briefly ask you—

The Convener: Before you move on, I just want to clarify all this. Perhaps Catherine Dyer can explain further, because I am muddled. What is the current position for the police and the Crown Office on prosecuting crimes? How will the bill change the situation in relation to residence and where a crime is committed? It would be helpful if you clarified that.

Catherine Dyer: At the moment, certain things are covered by UK-wide acts of Parliament and can be dealt with in a number of places. However, assaults or whatever have to be dealt with where the act took place.

The Convener: So if an Englishman, a Welshman or an Irishman, as the story goes, committed a criminal act in Scotland, they would be prosecuted in Scotland because the crime took place in Scotland.

Catherine Dyer: Yes.

The Convener: We have sorted that bit out. What about the business of being habitually resident? If a person from Scotland commits a crime in England—

Elaine Murray: And they move here.

The Convener: No, they stay here—they are habitually resident. If Her Majesty's Revenue and Customs has them as habitually resident here but they commit a crime in England, can they be prosecuted in Scotland?

Catherine Dyer: No, not just now. To go back to sexual offending, a good example would be where somebody who ends up in Scotland has committed an offence in England and an offence in Scotland. We have had cases where there was insufficient evidence in either jurisdiction to prosecute the person unless we took the two offences together. The bill will allow us to apply the Moorov doctrine and prosecute the person in Scotland for the totality of their acts. As you will probably know, there have been serial murderers whose victims were found in different places, so we had to have different trials and all the rest of it.

The Convener: So we do not need the Moorov doctrine now. What you are saying is that if the person—

Catherine Dyer: No, we still need the Moorov doctrine.

The Convener: But not if the bill is implemented.

Catherine Dyer: No, we would be allowed to use the Moorov doctrine in connection with an offence in England that was corroborated by an offence in Scotland. We would be able to prosecute that, whereas at the moment neither England nor Scotland would necessarily be able to prosecute it.

The Convener: Now, here is the third difficult question.

Catherine Dyer: I hope that I can answer it.

The Convener: I do not know whether I know what I am asking. If someone who is habitually resident in Scotland does something in England that is not an offence in England but would be an offence in Scotland, can they be prosecuted?

Catherine Dyer: I hesitate to answer—it would probably be better for the bill team to respond to that—but I do not think so. I do not think that that is what the bill is trying to get at.

The Convener: I was just thinking about transmitted images and so on. It might be an

offence in Scots law for certain images to be transmitted, but if they are only seen by or sent to someone in England, could the person in question be prosecuted? That is the question.

Catherine Dyer: I do not think so.

The Convener: Anyway, I have asked the question. Perhaps someone will explain.

Detective Chief Superintendent Boal: No great difficulties will be posed for the investigative side of things, as we already have a close working relationship with police forces in the other parts of the United Kingdom.

Operation hydrant, which was mounted in 2014 and covers the whole of the UK, looks at the reporting of non-recent child sexual abuse either by persons of public prominence or in an institutional setting. As part of that operation, live and on-going investigations across the whole of the UK, including investigations in the Channel Islands and investigations that Ministry of Defence police are undertaking, are also being looked at in order to join the dots. In relation to an individual who moves around the country, we might have an on-going investigation in Scotland while a similar investigation is going on in other parts of the UK. The question is how we join the dots in that respect. Unfortunately, we have experienced difficulties when we have not been able to use mutual corroboration, and the expectation then is that a victim will be put through two different trials in two different jurisdictions. I might say that seven investigations are on-going, when in fact other investigations are going on that meet those criteria of being non-recent, involving people of public prominence or involving an institutional setting.

As far as Police Scotland is concerned, we might need clarification of whether the provisions will be retrospective. We expect that with on-going inquiries, such as the Goddard inquiry in England and Wales and the public inquiry in Scotland, there will be more cases involving investigations by police forces across the UK.

The Convener: I doubt very much whether the provisions will be retrospective, given that very little of the legislation that has been passed in Scotland has been.

I do not know whether I am any clearer about the whole business of a crime happening in one place being committed by someone who is habitually resident in another. I will have to read the *Official Report* to find out. My point is about difficulties that arise with electronic communications, which change the whole landscape for prosecutions.

Catherine Dyer: They do, but a helpful example might be that of a case in Scotland in which indecent images were found that had been taken without the person's permission—which brings us back to Mr Meehan's point. A young lady had gone on holiday with family members and a family friend; the male person in question had set up a camera to take pictures of the young lady when she was naked in the shower; and those images were recovered when the police raided the man's house in Scotland. However, because it could be identified that the images were taken in England, there had to be two trials. At the moment, we cannot conjoin these things; the voyeurism offence—in other words, the setting up of the camera and the taking of the images in the shower—happened in England and had to be dealt with under English jurisdiction, while the keeping of the images happened in Scotland.

England is one of the places where we do not have the cross-border ability for courts in Scotland to take account of certain pertinent matters. This is an attempt to deal with the point you raise, if the law is changed as proposed in the bill.

The Convener: I am being advised that the provisions apply only to child sexual offences. Is that correct?

Catherine Dyer: The bill talks about the committing of certain offences and refers to a schedule in the 2009 act that sets out the type of offences.

The Convener: There is the crime that is committed by the person sending or posting an image—no matter whether we agree that there was intent or that it was reckless—but what about the situation in which a person, with good intent and not committing any crime themselves, sends an image to another person, but the second person, who lives in England, sends it on to someone else, thereby committing a crime because they do it out of revenge or whatever? What happens then? Who will be prosecuted? A sends an image to pal B with good intent, but B, who lives in England, says, "I'm going to do something with this", and spreads it around the world. Where has the crime been committed, and where will it be prosecuted?

Catherine Dyer: This is all about unpicking each case on its merits, but from the description that you have given, if the image is appropriately sent in the first place and then misused in England, the crime has happened, and will therefore stay, in England.

The Convener: Right. [*Interruption*.] Pardon? What did you say there, Ms Dyer?

Catherine Dyer: If the act itself occurred in England while the person was resident there but they then hotfooted it up to Scotland and became a resident here, we could, under the bill, prosecute them in Scotland.

The Convener: This reminds me of those questions that my arithmetic teacher used to pose about the number of buckets of water you could get out of a bath with two taps running. I am going to have to clear my mind and think this through. I wonder whether the committee, too, feels a bit confused.

Catherine Dyer: I am sorry, convener.

The Convener: It is not your fault.

Roderick Campbell: I think that we will be able to touch on the matter with the next panel.

The Convener: The next panel will no doubt unconfuse us.

As there are no further questions, I thank the witnesses for their evidence and suspend the meeting for five minutes.

11:41

Meeting suspended.

11:48

On resuming—

The Convener: I welcome our second panel of witnesses: James Chalmers, regius professor of law at the University of Glasgow; Gerard Maher, professor of criminal law at the University of Edinburgh; Clare McGlynn, professor of law at Durham University; and Vanessa Munro, professor of law and society at the University of Leicester.

I thank you for your written submissions. We will start by having you explain to us the end of the previous session. Rod Campbell has a question—perhaps he can put the matter simply.

Roderick Campbell: Good morning. My question is for Professor Chalmers in particular. In paragraphs 7 and 8 of your written submission, you pose the conundrum with which we had difficulty in the previous session.

Can you explain your concerns a wee bit more clearly? Is there a way round the concern—for example, by removing a few words from subsection (8) of proposed new section 54A? I appreciate that that might leave a gap elsewhere in the 2009 act with regard to the provisions in sections 54 and 55, as your submission mentions. If you can simplify the matter for the committee, I am sure that we would all be grateful.

James Chalmers (University of Glasgow): I shall do my best to try to explain. Catherine Dyer, in her answers to you, referred to the way in which the bill is envisaged as operating, but that would not in fact be the effect of the wording of the bill in practice.

The proposed section 54A(2) draws a distinction based on habitual residence. It can be put quite simply. If you are a habitual resident of Scotland, you carry Scots criminal law with you when you go outwith Scotland, and therefore you can be prosecuted in Scotland for a criminal offence under Scots law that took place in England, regardless of whether what you did was a criminal offence in England. If you are not a habitual resident of Scotland, you can still be prosecuted subject to other provisions here, but dual criminality would need to be shown, and what you did would have to be a criminal offence both in Scotland and in England. So far, so good.

The problem arises because a habitual resident of Scotland for these purposes is not only somebody who is habitually resident at the time they do the act. It is also somebody who becomes habitually resident in Scotland afterwards, and that is where retrospectivity effectively kicks in.

This would be an extremely unlikely scenario, and I do not think that anyone would want the bill to cover it. If someone did something in England that was not a criminal offence there but was a criminal offence in Scotland, and they were not habitually resident in Scotland, they could not be prosecuted, yet the language of the bill implies that once they become habitually resident in Scotland, they could then be prosecuted for the offence. All that matters is that someone is habitually resident at any point, not at the time of the offence.

The Convener: So it is sort of retrospective.

James Chalmers: Yes.

Roderick Campbell: Would the answer, but for the problems with sections 54 and 55, be to remove the words

"or who has subsequently become"

from the reference to someone being

"habitually resident in Scotland"?

James Chalmers: Yes. I cannot see any value in those words aside from creating the problem that I described.

Roderick Campbell: Yes. That is what I thought.

Gerard Maher (University of Edinburgh): Can I point out another possible anomaly? The bill makes no amendment to section 55 of the 2009 act. Section 55 uses the connecting factor not of habitual residence but of residence, so it appears that a contrast can be drawn between the effect of offences outside the UK and offences committed outside Scotland within the UK.

Roderick Campbell: I take that point on board.

Gerard Maher: Habitual residence is not the same as residence.

Roderick Campbell: Indeed.

Gerard Maher: Habitual residence is used as a connecting factor used in private international law, and it has now lost the simplicity that it once had as a connecting factor. Trying to establish habitual residence—unlike trying to establish residence—is not straightforward.

Roderick Campbell: So, in essence, there is work here for the parliamentary draftsmen.

Gerard Maher: Yes.

James Chalmers: Yes.

Elaine Murray: I have a supplementary with regard to what Catherine Dyer said in the previous session. Her argument was that the subsection (2) of proposed new section 54A of the 2009 act states:

"However ... a person who is not a habitual resident ... commits an offence by virtue of subsection (1) ... only if"

the act would also constitute

"an offence under the law in force in the country where"

it took place. I thought that she was implying that, if the person then moved to Scotland, it would be an offence only if it was also an offence in the place that it had taken place.

James Chalmers: That is what the proposed amendment to the 2009 act should say, but it is not what the bill says.

Elaine Murray: It is not clear, but that is certainly how Catherine Dyer was interpreting it.

James Chalmers: On the basis of the section 54A(8), one could read section 54A(2) as saying, "However, a person who does not subsequently become habitually resident in Scotland commits an offence only if this condition is satisfied." That is where the retrospectivity problem comes from.

Elaine Murray: There is a lack of clarity.

James Chalmers: Scots and English law are broadly similar in this area, so cases in which that could present a problem will be exceptionally rare, but they could occur because the laws are not identical.

The Convener: I love the explanation that being "habitually resident" means that you carry criminal law with you. I followed that bit, and I followed the bit about dual criminality. As I now understand it, given the wording of the bill, if someone moves back to Scotland, that is the problem.

James Chalmers: Yes, exactly.

The Convener: I do not want anybody to explain any more to me about that, because I have grasped that bit.

Gil Paterson: I have some questions for Vanessa Munro regarding her research on directions in particular. With the benefit of your research, how do you think directions would impact on juries?

Vanessa Munro (University of Leicester): Obviously, the first thing to say about the context of our research is that it is not research with real jurors, given the nature of the restrictions. You always need to bear that in mind when we talk about the transferability of any findings of our research into the courtroom proper.

That said, what we found in the study that looked at the impact of educational guidance—which we gave in two forms to our jurors: expert evidence or traditional direction—was that it did, for the most part, have a productive impact in removing certain assumptions from jurors that might have otherwise impacted negatively on their ability to assess a case on its merits. That was not universally the case.

As I said in written evidence, we looked at three particular types of what might be seen as misconceptions that jurors might hold—one around timescales for reporting an offence; one around evidence of resistance and injury, both of which are dealt with in the bill; and one around demeanour. We found evidence of a shift in the way in which jurors approached complainants who had delayed reporting or who had a calm demeanour when they gave their testimony, where the jurors had had the benefit of some judicial instruction. It was a fairly modestly crafted judicial instruction that simply said that some complainants will be emotional when they give evidence, some will not and there are many reasons why that might be—it does not necessarily indicate anything about the truth or falsity of the allegation.

With regard to evidence of injury and resistance, we did not see the same impact as a result of the educational guidance or instruction. We would not necessarily read that as saying that instruction on injury and resistance would not work. We found that the jurors in our study struggled to translate the kind of freezing response that they were educated about into the context where the assailant was an acquaintance. They felt that the freezing reaction of a victim would be credible only when the perpetrator was a stranger. We hypothesised that some reshaping of the judicial direction might have an impact on jurors' approach to that context as well.

Gil Paterson: Can I ask a cheeky question? Why did you conduct the research in the first place? What led you to conduct it?

Vanessa Munro: In England and Wales, the Office for Criminal Justice Reform had put out a proposal to introduce in rape cases general expert testimony that was designed to counteract juror stereotypes. Our research was part of the backdrop to that.

That proposal had two underlying assumptions: one, that jurors hold those stereotypes in the jury room; and two, that some sort of educational guidance can counteract them. We were interested in testing both those assumptions. However, as we put the study into motion, the response to the consultation for the Office for Criminal Justice Reform suggested that some people preferred a judicial direction approach rather than an expert evidence approach, so we factored in judicial guidance as another mechanism by which that material could be introduced.

Gil Paterson: Does your research lead you to believe that directions would be beneficial to justice?

Vanessa Munro: In short, yes.

Gil Paterson: That was your conclusion.

Vanessa Munro: Yes.

Gil Paterson: Did you look into any other evidence—I know that other evidence is available—before you conducted your research, or did you cross-refer your research with other evidence that is available?

Vanessa Munro: What sort of evidence? I do not quite know what sort of evidence you have in mind.

Gil Paterson: I know that Dame Elish Angiolini, in her report, referred to evidence from London. Were you aware of that evidence?

Vanessa Munro: The Angiolini report came some time after this study, which was conducted quite a few years ago. We have subsequently done other mock-jury studies, but they were looking at different issues, related to the impact of special measures testimony. This study predates the Angiolini report; the key results were published in 2007 or thereabouts.

Gil Paterson: Thank you very much.

12:00

Gerard Maher: Can I comment more generally on the question of statutory jury directions? I am not opposed to jury directions on the two points that the bill addresses, but I wonder why that has to be put in statute and it is not simply left to the Judicial Institute for Scotland to provide the jury directions in the jury manual. I am concerned that there would be two categories of jury directions—statutory and non-statutory—and I wonder how they are supposed to interact.

In a recent case, the appeal court has said that it is not enough simply for a judge to go to the jury manual and read out the directions. The judge has to tailor the overall directions to the jury to the facts and circumstances of each case. I wonder whether having statutory jury directions affects that obligation. Some countries have a whole body of statutory jury directions; that is the case in many of the Australian jurisdictions. I am starting to worry that we are introducing something without seeing the complete picture of what jury directions are supposed to achieve.

In the state of Victoria, which has revised its jury directions act, there is a controversy about a particular direction in relation to delay in reporting. Some think that the directions should also include a direction called forensic disadvantage, which you might say was in favour of the accused. If the jury is to be directed about the effect of delay in understanding the position of the complainer, it should also be directed in respect of the possibility of prejudice to the accused in waiting so long for a trial to come into being.

The Convener: Does anybody else wish to comment on the same point?

James Chalmers: One difficulty with suggesting that the directions might be dealt with by the jury manual committee is that that committee has traditionally seen its role as being to compile the guidance of the appeal court in previous cases and the requirements of statute elsewhere, in order to tell the judges what they should do. Although it is not the first time that it has been suggested, to ask that committee to innovate and suggest directions that may in fact not have a clear legal basis is asking rather much of that body.

Gerard Maher: I have presented seminars to the other judicial institutes and those issues have arisen in judicial training. It may well be that, as appropriate cases arise, jury directions will be modelled to deal with the two issues that the statute is addressing.

The Convener: I know why we have professors appearing together; it is because they do not agree. It is excellent.

Vanessa Munro: I share the concerns about the idea of there being a hierarchy of two different types of directions—statutory and non-statutory. The statutory directions that we are talking about cover only two very specific instances and there might well be other situations in which, in an ideal world, we might wish the judge to direct the jury.

The benefit of the statutory basis for the directions is that they would then be mandatory, subject to the subsection. Evidence in England and Wales, where directions are voluntary and done much more through the "Crown Court Bench Book" because they are suggested directions, has been very mixed. There is some anecdotal evidence that the directions are being used regularly and that when they are used they are having what some judges have reported to me as a productive effect. Equally, there is evidence suggesting that they are not being taken up as fulsomely as might have been hoped.

Gil Paterson: Can I come back in?

The Convener: Is it still on jury directions?

Gil Paterson: Yes, it is on the same thing.

I put this question to the whole panel. Is there not a problem when evidence suggests that, because they have no experience themselves of being raped, people in general have preconceived ideas about how they would respond, which may be entirely different from what actually happens? Would you be convinced if evidence was presented that juries need some education as to what actually happens to someone who is, or has been, raped? If people think that, because they have seen something in a movie in which something dramatic happened, that is how it should be—even though that is not how it really is—is there not a problem that we need to address?

Gerard Maher: I very much agree. There are so-called rape myths out there. Members of the public have certain views about what a typical rape case may be and how a person reacts to a sexual assault that are simply not evidenced in fact. That needs to be approached on many fronts, and one is a social, educative approach. I think that there is a place for jury directions. My concern is not with the jury directions on the two specific points but with them appearing in statute.

Gil Paterson: I see. Thank you.

The Convener: I have a list of people who want to speak, but I just want to check whether we are still on jury directions. Christian Allard, is your question on jury directions?

Christian Allard: It was.

The Convener: Was or is?

Christian Allard: It was. I can pass.

The Convener: Okay; it is gone. Rod Campbell, is your question on jury directions?

Roderick Campbell: It is. In the previous question and answer session, we heard some evidence from the Faculty of Advocates in relation to the absence of physical resistance or force. The witnesses questioned the need for the provision to be in directions, given the current definition of consent and the requirement for any belief in consent to be reasonable under the Sexual Offences (Scotland) Act 2009. What do panel members think of the specific point about physical restraint? Professor Munro, the Law Society—wrongly, I think—suggested that you had not considered that in your work.

Vanessa Munro: On one hand, it is true that, definitionally, there is no requirement for someone's will to be overcome for there to be a lack of consent, so the relevance of that phrase in particular is questionable—in a sense, it is redundant.

We can extrapolate from our research in England and Wales, where there is a similar definitional position, in that there is no need for force. Even in a context in which, in our jury studies, the juries were clearly directed by the judge on the definitional requirement, the issue of the need for force, the lack of resistance and the lack of evidence of injury continued to come out extremely strongly in all the jury deliberations. It strikes me that, notwithstanding the fact that it is not required definitionally, it continues to be extremely dominant in jurors' preconceptions, understandings and expectations. To that extent, it is an important myth to target.

The Convener: I do not want to be picky, but you are talking about juries but, of course, they were not juries.

Vanessa Munro: They were mock juries.

The Convener: It is important to make that clear because someone reading the *Official Report* might say, "Oh, I didn't know we can ask juries questions like that." Of course, we cannot.

Vanessa Munro: The people were members of the public who observed a trial reconstruction.

Roderick Campbell: Does anyone else want to comment on the issue?

The Convener: Apparently not.

Margaret Mitchell: I want to ask about the fairness of introducing for the first time a mandatory jury direction. Could a legal expert cover any misconceptions on the part of the jury about the delay factor and the absence of physical resistance?

Gerard Maher: I did not quite get the second part of your question.

The Convener: It concerned the expert witnesses.

Margaret Mitchell: I said that without opening my mouth.

Gerard Maher: There is, of course, provision already in the law for expert evidence on matters concerning the reaction to an attack and the possibility of delay. My understanding is that that might not be enough, by itself. Of course, if expert evidence were given, that would place a duty on the judge to direct on it, in any case.

James Chalmers: As Professor Maher says, there is a provision in section 275C of the Criminal Procedure (Scotland) Act 1995 on expert evidence on delayed disclosure or reporting. I do not think that there is a basis in law for leading expert evidence on the absence of physical resistance during the act itself. Therefore, at least without reform, expert evidence could not be a solution there.

Where the matters concerned are non-contentious—one of the witnesses in the earlier panel referred to the possibility of using a statement of uncontroversial evidence in this situation—it seems unnecessarily cumbersome and expensive to deal with that through expert evidence rather than through a direction to the jury, unless there were a reason for thinking that expert evidence would be more effective.

Margaret Mitchell: Is there not a concern that, by giving mandatory expert evidence, the jury would put too much weight on it?

The Convener: I think that you mean mandatory directions from the judge rather than expert evidence.

Margaret Mitchell: Yes, sorry—I meant from the judge.

I ask Professor Maher to pick up on his point about forensic disadvantage that might arise.

Gerard Maher: I mentioned that simply because I am concerned that the way in which the bill addresses the issue of jury directions is isolated from more general questions about the whole nature of jury directions and whether they should be statutory. I simply want to bring to the attention of the committee the controversies in other countries where jury directions are statutory and mandatory in that sense. On this particular issue, jury directions have to be balanced between explaining the position of the complainer and protecting the interests of the accused.

In any case in which there has been a long delay in prosecuting a crime, the accused is often at a disadvantage. There might be appropriate types of cases—sexual assault cases may be one—in which the jury has to be explicitly reminded of that fact by jury direction.

John Finnie: I have a question for the two law professors about the Law Society's evidence. [*Interruption*.] Sorry, it is for the two gentlemen.

The Convener: We believe in gender balance. We have achieved it at last.

John Finnie: I am sorry if I unwittingly caused offence.

The Law Society refers to the proposal on jury directions as a "major departure" and mentions its desire to have that evidenced. It states:

> "On the basis that Lord Bonomy's Post Corroboration Safeguards Review Report recommended research into how juries deliberate and form views on evidence, we believe that, prior to imposition of this provision, Scottish Government should at least carry out or commission a literature review of the relevant research before making this change, or consider whether it may be incorporated into any programme of jury research to be carried out following Lord Bonomy's Review."

The Convener: I just add that the Scottish Government has committed to undertaking research into decision making in criminal trials. It has undertaken to pick that up.

John Finnie: Okay—thank you for that point.

I confirm that all the witnesses are indeed law professors, but I was meaning the two gentlemen.

James Chalmers: As the convener says, the Government has committed to research in the area, although it has not at this stage set out the precise terms of that research.

The measure is being spoken of as a major departure, and of course it is the first time that mandatory directions would be required by statute. However, they will certainly not be the only mandatory directions. The judge in a sexual offence trial must tell the jury about the presumption of innocence, the standard of proof and the requirement for corroboration, so actually there are already a great many mandatory directions. Directions under the bill would be the first to come in statutory form, but that will not make a difference to the effect on the jury, who will not be concerned whether they are required by statute or by common law.

John Finnie: Is the measure not premature, given the offer from the Government?

James Chalmers: There is a danger of delaying almost everything until after the research that the Government might carry out. That research will not tell us everything that we might want to know about juries. There is the research that Professor Munro and others have carried out that already gives us a basis for the proposals.

The Convener: Do all the professors agree with the proposition that we should not delay just because the Government has undertaken to carry out research? That is what Governments do—it is sometimes called the long grass. Do you all agree on that?

Vanessa Munro: There is an extensive body of research that attests to the existence of problematic assumptions and misconceptions in the population at large, and it is not unreasonable to assume that those would also be live issues in the jury room. Therefore, I am not sure that we need research to be confident that there is a problem that needs to be addressed.

John Finnie: Are directions to the jury the only way to resolve that?

Vanessa Munro: I would not say that they are the only way to resolve it. As we have heard, social education and other factors are obviously also important contributors. In the context of the courtroom, jury directions are in my view a powerful mechanism by which to do it.

John Finnie: Can I again apologise? I mixed up the professors with others from whom we have had evidence. I did not mean to cause any offence regarding the standing of any of our witnesses.

The Convener: His humility is endearing, isn't it?

Alison McInnes has a question—is it on a new issue or is it a supplementary, Alison?

Alison McInnes: It is on a new question, so put me to the bottom of the list.

The Convener: Right.

I want to ask one thing before we depart from the issue. Do you see any issues in principle with the proposal to extend directions to a jury only in sexual offence cases, given that there might be other offences that involve a sexual element but are not prosecuted as a sexual offence?

It might be a different kind of assault; there may be a sexual element but there would not be those directions to the jury because the provision would apply only to certain offences. In principle, if we are going to do it in relation to those offences, why would we not do it in other cases?

12:15

James Chalmers: It would always be open to a judge to give those directions in other cases, and I imagine that they probably would do so if the case were a sexual one—

The Convener: Sorry—what do you mean when you say that it would always be open to the judge? I think that we are expanding the system into judges saying, "Jurors, you look like nice people but you need to realise that sometimes people who claim that they've been raped or subject to a sexual assault don't look distressed—situations are not always the same and it doesn't mean that they're lying." Surely that is a wee bit different from the usual directions from the court.

James Chalmers: I will try to answer that point as well.

The reason for not giving such directions generally is that there is a general legal principle that jurors do not need help to interpret the behaviour of ordinary, normal human beings. However, we recognise that, in certain circumstances, jurors are not terribly good at doing that. There are exceptional cases—and sexual assault would appear to be one of those cases—in which jurors may need guidance.

It is not the only case of such directions being given. Another comparable example in a different context would be identification evidence, where we recognise that jurors are not very good at interpreting the accuracy or reliability of the identification so directions must be given. There is provision through a practice note or a memorandum from the Lord Justice General many years ago about the directions to be given in such cases. Such directions can be justified in certain categories of cases specifically because of that particular problem.

The Convener: But this direction is mandatory—the judge must advise. Is that not taking things a bit further?

James Chalmers: The provisions preserve the discretion of the judge not to give the direction if they think that appropriate, on the conditions laid out in the section. As I said before, these are not the only directions that judges must give. There are many directions that judges must give in all cases.

The Convener: I am looking at new section 288DA(2), which uses the word "must":

"In charging the jury, the judge must advise that ... there can be good reasons why a person against whom a sexual offence is committed may not tell others about it or report it to an investigating agency, or may delay".

There is no discretion there.

James Chalmers: If you look at subsection (3) in both new sections—288DA and 288DB—

The Convener: Subsection (3)—I am looking at that now. It states:

"Subsection (2) does not apply if the judge considers that, in the circumstances of the case, no reasonable jury could consider the evidence, question or statement by reason of which subsection (2) would otherwise apply to be material to the question of whether the alleged offence is proved."

I sit corrected. I should never take on a professor: that is my first lesson for today; I am sure that there will be others.

Elaine Murray: I turn to the disclosure of intimate photographs or films. In the previous evidence session, we heard that the legislation in

England does not go as far as the Scottish Government's legislation. The Law Society felt that disclosure by somebody who was reckless as to whether they were causing distress was a privacy issue rather than a sexual abuse issue. The Crown Agent argued that it was the effect on the victim that was important and the victim could still be distressed whether it was reckless or not.

Professor Chalmers, you seem to be reasonably content with what the Scottish Government is proposing whereas Professor McGlynn is suggesting that the bill should perhaps go further and cover distribution without consent.

Clare McGlynn (Durham University): My argument is that we need to focus as much on the harms to the victims as on the motives of the perpetrators. That is why I would suggest that we could follow a pattern such as in the US state of Illinois, where the intention is simply the intention to disclose an intimate image without consent. That is because there are all manner of reasons why those images could be distributed.

Revenge, as was talked about in the last evidence session, is one example and it is a very popular example, but I do not think that we should be blinded by that one paradigmatic example. In the last session, an example was given of hacked images. When someone is hacking a computer and then distributing images, they are not often doing it—perhaps they are rarely doing it—to cause direct distress to a particular victim. They do it for a whole range of other reasons, such as for financial gain, because they have been hacked, for sexual gratification or for a laugh. Often the images are distributed without the victim even knowing that they have been taken or distributed. That is why the restriction to an intention to cause alarm and distress limits the scope of the law and does not take account of the victims' experiences.

I also find it a problem because it means that we are focusing only on the revenge-type situation and are expecting victims only to feel distress or alarm. For example, sexual offences—and I would put this practice in such a category—are about protecting an individual's sexual autonomy, and this practice of distributing such images, which primarily affects women, limits their sexual autonomy and sexual expression. We have to recognise that as well as the distress that is caused.

James Chalmers: There is an important connection between the fault requirement for the offence of intention or recklessness and the type of images that are covered. Earlier, the committee heard evidence from Mr Meehan about the breadth of images that are covered. For example, under section 3, an image can be covered if it is one where a person's genitals, buttocks or breasts are exposed or covered only with underwear. The example was given of a picture of someone asleep in their boxer shorts in a flat, but someone wearing underwear could be someone at the beach or wearing a Halloween costume and be entirely innocent and non-sexual—the bill does not require that the image be sexual.

If you create an offence that simply disclosing that image without consent is a criminal offence, regardless of any issue of intent or recklessness as to distress, you have created an extremely broad offence, which carries a maximum penalty of five years' imprisonment. Therefore, if you were minded to widen the fault requirement and remove the requirement for intention or recklessness as to fear and distress, you would correspondingly have to have a rather narrower definition of the kind of images that the offence covers.

Clare McGlynn: The other way that the bill deals with the situation is the defence of a reasonable belief in the consent in relation to the sharing of the image. With a fault requirement of intention to disclose without consent, there is a defence that there is a reasonable belief in the consent of the image. That can then restrict the activity.

On the boxer shorts issue, I would say that it is very easy in the context of these discussions to get distracted by one sort of example that might seem ridiculous. The analogy is the concern in some of the papers about images of streakers and naked ramblers. We could spend a lot of time discussing those examples, but we need to be discussing the examples where real harm is caused to many victims—upskirting is an example of that.

We might be worried about the male student in his boxer shorts, but I think that we should be more worried about the prevalence of images being taken surreptitiously up women's skirts and then being distributed without their consent. At the moment, such activity would not be covered by the bill's provisions.

Elaine Murray: Upskirting is not a term that I have ever heard before—I rather wish I never had.

Clare McGlynn: There are whole websites dedicated to upskirting, and also to downblousing.

Elaine Murray: Goodness.

Gerard Maher: I understand the strength of the arguments saying that we should focus on consent—or the lack of it—but consent does not seem to be defined in the bill. Is it meant to be the same group of definitions of consent that are contained in the 2009 act, or is it consent in some other sense, such as in the law of assault? If consent is to play an important part, it must be absolutely clear what the definition of consent is for the purposes of the provision.

Elaine Murray: It is a difficult issue. A somewhat unflattering photograph of the current Prime Minister in his beachwear was published all over the papers, and I should not imagine that he consented to that. Would such images fall within the scope of the bill?

Clare McGlynn: The defence in the bill is that the image was taken in a public setting where members of the public were present, and so that image would not be covered. My understanding is that that defence is included because of the concern about naked ramblers and suchlike, but that precludes the bill from dealing with upskirting images.

There are other ways to deal with the issue. For example, one could just exclude voluntary exposure in public, which would mean that an image of a person on the beach would not be covered by the offence because they were voluntarily exposing themselves or in their underwear. There is therefore a more straightforward way of covering or excluding such situations.

That is why we need to be mindful of what the harms are and not get distracted by such examples.

James Chalmers: I do not think it would be helpful if any potential liability in that situation depended on whether the Prime Minister was on a private or public beach. I accept the difficulty of concentrating on the examples that are removed from the harm that the offence is designed to cover, but we need to ensure that those examples do not fall within the scope of the offence and that the offence only covers that which it is meant to tackle.

Elaine Murray: That is an argument for drawing the provision more tightly.

James Chalmers: Yes.

Clare McGlynn: It depends on what you mean by "tightly". Changing the language would mean that voluntary exposure in public would not be covered, but that is not what the legislation covers at the moment. If someone is in public and members of the public are present, images of them would not be covered by the bill, so it would not cover the upskirting distribution.

The Convener: Christian Allard has a supplementary.

Christian Allard: Professor McGlynn, I was very interested in your submission, and I asked this question of the first panel. I agree with you about upskirting; there was even a case of upkilting in Scotland. We might think that it is funny, but there have been experiences that were not funny at all; it is the same kind of abuse. The earlier witnesses were clear that they were concerned about teenagers, young people and people who might not have the same ability to understand the difference. How would you respond to that?

Clare McGlynn: I absolutely accept that we have to think about young people's common practices. As the provision is drafted, it could be that the young person would have a reasonable understanding or belief that there was consent to the disclosure of the image. The young person might not understand the harm that could result from disclosing images. The bill could cover the concerns about teenage boys distributing such images.

We need to remind ourselves about the teenage girls whose images are being distributed. Some research has been done with young people about the coercion that is felt by many young girls to share such images. Yes, we do not want to criminalise large numbers of young men. I have a 14-year-old boy myself so I am aware of that, but I also have a 12-year-old daughter, and we need to think about the experience of young girls and the harms that they might suffer.

When we talk about inadvertent sharing and the common practice of sharing such images, my argument is that that common practice is what we are challenging. Rather than accepting the practice as commonplace in our society, we need to counteract it. As long as there is an education campaign to go with it, the bill could be one of the ways of counteracting the practice.

Christian Allard: Much as I agree with you, I also agree with the earlier panel that the last thing we want to do is criminalise a lot of young people. Perhaps we are not there yet. Perhaps we can use the bill to work on educating people about the practice and make sure that changes are made out there, especially for young people of either gender. Other members of this panel might want to say something, but there was an argument from the first panel that the bill would be a step too far for young people.

The Convener: Thank you for the education point; that is very important. I want to go back to something that I think I heard Clare McGlynn say. You said that the bill has a way to deal with—protect is probably the wrong word—the silly or daft behaviour of some youngsters. What did you mean by that?

Clare McGlynn: For example, the perpetrator A has a defence that they reasonably believed that B consented to the photograph or film being disclosed.

The Convener: Let us park consent and imagine that they did not consent and the other person did it as a jape because they thought it would be fun, and they had no idea.

Clare McGlynn: The argument here would be that the 15-year-old boy who distributed the image has a reasonable belief that the person in that image consented to it being disclosed.

The Convener: What if they did not?

Clare McGlynn: What if they did not have a reasonable belief?

The Convener: Yes. They just thought it would be a funny picture.

Clare McGlynn: Then they are perpetrating a significant harm to another individual.

12:30

The Convener: I know where we want to get to with the provision, but what if the person just thought, "This will be a laugh," and had no idea of the impact that it would have? It might be a misdemeanour of youth, in a sense, to do something like that. There would be a protection in the bill under the provision that the person

"reasonably believed that"

the person whom they had photographed had

"consented to the photograph"—

they might have been sleeping or lying on the beach or something. However, it turned out wrong for them—let us put it like that. Would that fit in with disclosure of the image being reckless? You or I might say, "That was a stupid thing to do. How could you be so reckless?" However, to the 14 or 15-year-old it would have been just a laugh and they would not have thought of it as reckless. We will not be educating young people in advance of the bill's enactment, although education might go alongside that. Perhaps education will change things so that young people will have a different perspective and not think that such behaviour is a lark. Prior to such a change, if we pass the bill as it stands, we might criminalise people whom we would not wish to criminalise or even be charged by the police.

Clare McGlynn: Others will be able to comment more on the Scots law on recklessness, but in any case some of those individuals would not be covered, because they would not necessarily have been giving thought to the harm and distress that would be caused, and that is also a requirement.

James Chalmers: It is difficult to give a definitive answer on the issue because the Scots law of recklessness is itself slightly unclear. In English law one certainly could say that, in the situation that you describe, person A would not have been reckless with regard to causing fear and distress, because they concluded that sharing the image was a joke, that it was funny and that there was no question of anybody being distressed. It is arguable that, in Scots law, recklessness may only require that a reasonable person would have been aware of the risk. It is slightly embarrassing that, even at this stage, we have to say that the law is not quite clear on that point. In recent years, the courts have moved towards an approach similar to English law; it would certainly be open to them to hold that a person in that situation was not legally reckless and therefore not guilty.

Gerard Maher: I mentioned the lack of definition of consent. If the bill's use of "consent" is based on the consent model in the 2009 act, there is a specific provision about what constitutes reasonable belief in consent and therefore what constitutes recklessness. I am not sure whether the bill is meant to be divorced from the consent model of the 2009 act. If it is, that would give rise to the problems that James Chalmers mentions, because recklessness is not well defined in Scots law.

The Convener: Right. I will leave it there. Does Margaret McDougall have a supplementary on the same issue?

Margaret McDougall: Yes. Professor McGlynn mentioned that she has concerns about the scope and drafting of the specific offences. In particular, should the offences be extended to include text messages and letters?

Clare McGlynn: If I was drafting the bill, I would not include them, because I see the phenomenon—if you like—in the context of sexual abuse and sexual violence. It is the images that are shared widely, go on to the porn sites and upskirting sites and go viral. It is also the images that are used to cause distress and alarm, because they are used to shame women. I would therefore limit the criminal law, because I recognise that it is a very coercive tool, to images of a sexual nature that are disclosed without consent. When we get into text messages and suchlike, the definitions around what would come within that sort of criminal law would be much more difficult to design and we would lose the clear message that the bill could send to individuals about a particular area of behaviour. I would therefore not extend the offences to include text messages.

Margaret McDougall: Does that include sexting?

Clare McGlynn: I would not recommend that the law covers sexting that is just text—the written word—but if you mean sexting in terms of sharing an intimate image of someone, the provision only covers situations when the image is passed on without consent, because that is what is problematic.

My view is that we must ensure that we do not criminalise one form of sexual expression that is

not problematic in and of itself—taking and sharing intimate images, which is very common. I would also be concerned about sending a message that the way to stop that practice is just not to take the images or share them, because that gets us into a victim-blaming situation.

Margaret McDougall: So, what we are talking about is the use of images on Facebook and Twitter.

Clare McGlynn: Yes. That keeps the role of the criminal law clearer, more distinct and focused on where the real harm is.

The Convener: I did not know that you could use images on Twitter, but then, I am Twitterless.

Margaret McDougall: You mentioned criminal law just now, and your submission mentions that civil law should be considered. Would you like to say more about that?

Clare McGlynn: A good example is the Protection from Harassment Act 1997, which is generally known to cover stalking and which introduced a statutory civil claim that could be brought in relation to stalking. I am not the expert on Scots delict but, broadly speaking, there are civil offences that can cover some of this conduct. However, just as a new criminal offence can add clarity for victims, police and perpetrators, a statutory civil offence relating to that conduct could also help. It would give victims another option if they wanted to make a claim. If the police did not pursue a claim, there would be a clearly set out civil option for victims to follow.

The Convener: Does anyone else want to comment?

James Chalmers: I cannot add anything to what Professor McGlynn has said.

Margaret McDougall: I have a final question. Is the offence of threatening to disclose an intimate photograph or film already covered by section 38 of the Criminal Justice and Licensing (Scotland) Act 2010?

Clare McGlynn: I had a quick look at that section after you talked about it. I do not know about the practice in Scots law and how that provision is being interpreted. From my perspective, adding in "threatening" is an important and significant advance on the English law, particularly in the context of domestic abuse, where such threats are used quite extensively.

James Chalmers: One difference is that the section 38 offence is defined only with reference to fear and alarm. The new offence is also defined with reference to distress. There would be a considerable overlap, but there is something slightly broader about the offence in the bill.

Alison McInnes: I have a quick follow-up to the issue that Margaret McDougall was pursuing. Sometimes images are circulated that have been photoshopped to make them appear intimate. Should the bill cover that and are you comfortable that it does in fact allow us to pursue such images?

Clare McGlynn: Measures in that field should cover such photoshopped images, because they are the images that can go viral and cause real harm. My reading of the bill is that, unlike the English law, it covers photoshopped images, which I welcome.

Margaret McDougall: I want to ask another question about upskirting and downblousing. Are those things not an offence at the moment?

The Convener: Let us not forget upkilting while we are at it.

Clare McGlynn: My understanding is that it is a criminal offence in Scots law to take upskirted images, but distribution of those images is not currently covered. That is an interesting example of where there is a legislative response to one or two examples here and there, because an upskirting offence was provided for by an amendment to a previous act. It is helpful for us to step back and ask about the real harms. It is image-based sexual abuse and there are a whole variety of ways in which that is perpetrated, so let us ensure that we are covering each of them. Taking those images is actually an offence, but their distribution is not yet covered.

The Convener: I turn to my little pet problem, which is section 26, on sexual risk orders. Apart from the fact that I do not like the word "done" and I do not like the use of the term "sexual nature"—as opposed to "sexual harm"—in section 26(2), I have concerns that the civil orders that can be imposed, not when someone has committed or even been charged with anything but just when they have apparently "done" something of a sexual nature, are quite draconian. Are my concerns misplaced? I look to Professor Munro and Professor Chalmers, whom I know will tell me the truth, the whole truth and nothing but the truth. Do you share any of my concerns?

James Chalmers: I do, up to a point at least.

On the use of the word "done", I suspect that what the drafter has done—that was not deliberate or rehearsed—has been to follow similar language that is found, for example, in section 55 of the 1995 act, which deals with people who are unfit to plead. In such cases, there is an examination of facts and the court makes a finding as to whether the person did something.

It is a useful formulation in circumstances in which the drafter wishes to indicate the

commission of something that might be a crime—although that is not a requirement—where criminal liability has not been proved. That is important, because the process is a civil one. The civil courts should not declare someone guilty of a criminal offence.

There are different reasons why one might want the provision to be of such breadth. For example, it might be desirable to apply for such an order in cases in which it is not possible to convict someone because the act that they have done was outside the jurisdiction and they cannot be prosecuted, but there is a reasonable basis for concluding that they pose a risk of harm. That is legitimate.

What is not legitimate is the case that the convener was perhaps hinting at earlier, in which the chief constable indicates that what a person did was not a crime at all but that they still want to take coercive measures over something entirely lawful. That is more problematic and is permitted under the section as it stands.

The Convener: Can it be remedied?

James Chalmers: The provision could be drafted in such a way as to indicate that the act of a sexual nature would have to be one that amounted to a criminal offence. That runs into the other problem highlighted: that it could look as if the court were declaring someone guilty of a crime. The advantage in the provision's current drafting is that a civil court would not declare what looked to be a criminal conviction. I am not sure that there is a perfect solution to the problem.

The Convener: As I said, if the civil order were made public, it would be called a sexual risk order, which would sound to everyone like a criminal offence. Are there issues even with calling the orders that? Could something be done that would hit the mark, as it were, and provide the protection intended without losing the balance with the rights of the individual?

James Chalmers: One safeguard is that, if the act of a sexual nature is not criminal, it is unlikely that the sheriff could conclude that it would be necessary to make an order under section 26.

I am not sure that much could be done over the naming of the order because, in a situation in which the order has to be communicated to the public for the purposes of public protection, the public would have to be made aware of its nature. Anything that obscured what the order was about would be unlikely to be helpful.

The Convener: Do panel members have any other comments?

Clare McGlynn: I have a general comment about the balance between the civil and the criminal law.

We are familiar with civil cases that deal with rape and other forms of sexual assault. Someone can have a civil case brought against them and have to pay damages to an individual for what purportedly is a rape but is in the civil courts. It is not unusual for there to be a civil order that in practice says that, on the balance of probabilities, a form of sexual harm took place.

The Convener: It would then be a civil order for compensation, for example.

Clare McGlynn: It would still be a public—

The Convener: I understand that, but there is a big difference between saying that a person is ordered to pay such and such, and saying that a person now has a sexual risk order against them. There is a big difference in the language. Perhaps I should leave that alone now. I have probably worked the issue to death.

Does Roderick Campbell have any concerns on that point?

Roderick Campbell: My point is on something different.

The Convener: I am going to stick to my guns.

John Finnie: I am with you on that, convener.

The Convener: I do not know that that is a happy position to be in—I joke.

John Finnie: Well, there you go. I am happy to be in agreement with you.

The Convener: A happy position for you, I meant.

John Finnie: Is the appeals process for sexual risk orders in section 31 robust enough? Should there be some provision of anonymity pending appeal? I asked the Police Scotland witness in the previous panel about the protection of the individual, which is also a requirement for the police. The witnesses will be aware of the propensity for vigilante groups to act as judge and jury.

12:45

The Convener: There are two bits to that question: whether the appeals provisions are robust enough and whether there should be anonymity, which would sort of defeat the order.

James Chalmers: On the first question, the provisions are the normal rules that govern appeals in civil proceedings. They are robust enough.

On the question of anonymity, I do not know what provision exists, if any, to allow anonymity in a civil process that is being appealed, so I am not certain that I can answer that question. I am sorry.

The Convener: The difficulty arises with the term "sexual risk order", which looks like a criminal order of the court rather than a civil order. I do not know how we would go about introducing provisions for anonymity.

Margaret Mitchell: Section 5 extends the law to allow a non-harassment order to be imposed on an individual who has been found unfit to plead. The Law Society and the Mental Welfare Commission for Scotland have some difficulty in understanding how that unfitness would not negate the individual's ability to understand the non-harassment order.

James Chalmers: That provision is likely to be of use extremely rarely but I can imagine how it could be appropriate. The case that gave rise to the provision might be an example. In a situation in which somebody is unfit to stand trial because they cannot cope with the trial process, which, over time, leads to them being unfit to plead and the trial having to be halted, it may be possible for the sheriff to conclude that, although the trial could not take place, the person is nevertheless capable of understanding and complying with an order. If they were not capable of understanding and complying with an order, there would be no point in it being made.

The category of case in which the provision could be used is very narrow and exceptional and I imagine that very few orders would ever be made on that basis.

Gerard Maher: I share the concern. Most of the criminal law provisions that deal with persons with a mental disorder at the time of trial or at the time that the offence is committed are concerned with the welfare of such persons and section 5 seems to cut against that grain. However, the existing sexual offences prevention orders would apply to a person who has a mental disorder so, to some extent, the precedent is already set.

James Chalmers: There is some difficulty with the matter but we must remember that, if the person has been found to have committed the act concerned, as well as having a vulnerable person who cannot be tried, we also have a victim. It might be more appropriate to protect that victim through making an order at the trial, rather than requiring them to go through a civil process that is likely to be equally distressing for that vulnerable person, who will have already gone through the examination of facts. Therefore, section 5 might be a neater solution than requiring the civil process to kick in separately afterwards, which not many people would have the resources to implement in any case.

Roderick Campbell: I was going to refer to the matter that Margaret Mitchell just raised but I will turn to a different subject: extraterritorial jurisdiction being limited to sexual offences cases. I ask Professor Chalmers to give a few general comments on that.

James Chalmers: The only point that I will make in addition to what was mentioned earlier is that the consultation paper that gave rise to the bill identified two separate problems. One is when the prosecution wishes to prosecute for a chain of offences some of which took place in Scotland and some of which took place in England, particularly where it wishes to allege that they are mutually corroborative. Subject to the rather technical point about retrospectivity that I made, the bill deals well with that.

The consultation also mentioned the less likely but certainly possible situation in which a victim of a sexual offence cannot identify where that offence took place. For example, it may have taken place in a vehicle that was travelling between Scotland and England. If the victim did not know the exact location, there would be uncertainty as to locus.

If there was uncertainty as to the location of an offence anywhere outside the United Kingdom, there would be no problem because we take extraterritorial jurisdiction over sexual offences. It would not matter whether an offence took place in France or Germany, for example, but it would matter whether the offence took place in Scotland or England. As it stands, the bill does not give prosecutors a route to deal adequately with the situation in which the locus of the offence is uncertain. That would require to be drafted rather differently.

Roderick Campbell: Again, it is a matter for the draftsmen.

James Chalmers: Yes.

The Convener: Before the witnesses go, is there something that we have not asked them but ought to have? Are they are sitting thinking, "Why on earth didn't they ask me this? This is the thing I'm itching to tell them."?

James Chalmers: You have not asked us about section 4 and the position of websites that host the images that are covered by the section 2 offence, and I would probably prefer it if you did not. I draw the committee's attention to the fact that it will shortly receive written evidence from Professor Lilian Edwards that deals with that point. She is the professor of internet law at the University of Strathclyde. I draw that to the committee's attention because it is an important point that I suspect that we would not feel qualified to comment on, but she will.

Clare McGlynn: Anonymity for complainers of sexual offences in Scotland is a matter of convention rather than legislation. In England, we

do not have anonymity for people who report image-based sexual abuse, which is problematic, so I urge the committee to ensure that any new offence ensures that there is anonymity for people who wish to report it.

James Chalmers: There might be some benefit in reviewing the position relating to anonymity in Scotland more generally. I say that because, as Professor McGlynn mentioned, it is a matter of convention. As a matter of convention, media organisations behave responsibly if they feel that there are questions about the boundaries of justified anonymity. The practical use of the criminal law relating to anonymity south of the border has been not in relation to news organisations but in relation to high-profile cases in which friends or supporters of a victim make their name widely known on social media and are prosecuted for it.

I suspect that it is only a matter of time before a similar case arises in Scotland. We may find that there is no offence for which the person who breaches anonymity can be prosecuted, so legislation will promptly be introduced to the Parliament and there will be something of a scandal about dealing with it promptly. There might be some advantage to the Government in pre-empting that happening because it is only a matter of time before we have a case of that nature.

Gerard Maher: I have nothing to add.

The Convener: I am not looking for any more.

That concludes this evidence-taking session. I thank the witnesses very much for attending. It was interesting.

The next meeting of the committee will be on 24 November, when we will continue to take evidence on the bill.

Meeting closed at 12:52.

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