The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

JUSTICE COMMITTEE

Tuesday 24 November 2015

Session 4

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JUSTICE COMMITTEE
33rd 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:

Tam Baillie (Children and Young People's Commissioner Scotland)
Sandy Brindley (Rape Crisis Scotland)
Gavin Brown (Lothian) (Con) (Committee Substitute)
Eleanor Deeming (Scottish Human Rights Commission)
Louise Johnson (Scottish Women's Aid)
Nicola Merrin (Victim Support Scotland)
Nick Smithers (Abused Men in Scotland)

CLERK TO THE COMMITTEE

Peter McGrath

LOCATION

The Robert Burns Room (CR1)

Scottish Parliament

Justice Committee

Tuesday 24 November 2015

[The Convener opened the meeting at 10:46]

Decision on Taking Business in Private

The Convener (Christine Grahame): Welcome to the 33rd meeting of the Justice Committee in 2015. I ask everyone to switch off their mobile phones and other electronic devices as they interfere with broadcasting, even when they are switched to silent. I have received an apology from Margaret Mitchell and I welcome Gavin Brown to the meeting as the Conservative Party substitute.

I invite the committee to agree to consider two items in private: item 3, which concerns our approach to our remaining scrutiny of the Abusive Behaviour and Sexual Harm (Scotland) Bill at stage 1; and item 4, which concerns our approach to scrutiny of the Criminal Verdicts (Scotland) Bill at stage 1. Do we agree to do that?

Members *indicated agreement.*

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

10:47

The Convener: The main item of business today is our second evidence session on the Abusive Behaviour and Sexual Harm (Scotland) Bill. I welcome Nick Smithers, the national development officer for Abused Men in Scotland; Sandy Brindley, the national co-ordinator of Rape Crisis Scotland, who has appeared before us on a previous occasion; Louise Johnson, a national worker on legal issues in Scottish Women's Aid, whom we have also met before; and Nicola Merrin, a policy officer in Victim Support Scotland, who was in the public gallery during our earlier informal session.

We will go straight to questions from members.

Gil Paterson (Clydebank and Milngavie) (SNP): I would like to hear panel members' views on the prospect of the judge having some discretion in these matters and the ability to direct the jury by describing at the outset how people might or might not react in these circumstances. How might that affect the trial? How might it affect people?

Sandy Brindley (Rape Crisis Scotland): Rape Crisis Scotland welcomes the proposals to introduce judicial directions in sexual offence cases. The case is well made, particularly through mock-jury research, that there are issues with jury members not having information about, for example, counterintuitive reactions to rape. Our concern is that that might mean that a barrier to justice is created by jury members having commonsense notions about how someone should react to a rape that do not correspond with the victim's behaviour. Our worry is that attitudes that jury members might hold could lead to a lack of justice. Because of that, we welcome the proposal to give judges the ability to give judicial directions. If the justice system is about justice and getting to the truth, I do not see why there would be an issue with giving people factual information that would assist them in interpreting the evidence that they are hearing.

Nicola Merrin (Victim Support Scotland): Victim Support Scotland also welcomes the provisions and would support Rape Crisis Scotland's view that there is benefit in providing factual information. Having such information helps juries in their decision making and negates the very common misconceptions that juries and the general public may have.

Louise Johnson (Scottish Women's Aid): Scottish Women's Aid also welcomes the

proposal, particularly in relation to delays in reporting. There are very valid reasons in historical domestic abuse cases why women may not have reported sexual assault and why physical resistance may not have taken place, such as the fear of consequences from perpetrators and others, how rape is viewed by the public, and historical prosecution practices. The proposal is a very positive development and is predicated on an evidence base.

Nick Smithers (Abused Men in Scotland): On behalf of Abused Men in Scotland, I back up what my colleagues have said. A point that is much misunderstood about male victimisation is that men also suffer sexual assault within coercive and controlling relationships. Similarly to women, when it is within a long-term abusive relationship, men may not perceive it as sexual assault. That is a pattern that we have seen. It is important that such information should be relayed to the jury, to aid justice.

Gil Paterson: Louise Johnson mentioned that those views are not just opinions but are backed up by evidence. Without mentioning specifics, will the other panel members say whether it is just that they think that people have preconceived ideas about how folk should react in certain circumstances, or whether they have evidence for that view from the work that they are engaged in?

Louise Johnson: From the work that we do with Rape Crisis Scotland and the research by Professors Munro and Ellison, we are aware that such issues have been raised and we are also aware that juries seem to have perceptions about what a normal response should be, which is not helped by how rape cases are reported or presented through the media.

Sandy Brindley: There is significant and concerning evidence in general about the Scottish public's attitudes to rape. If a significant minority of the Scottish public blame women in particular for rape, that will also be the case among jury members in a rape trial. There is a general worry about the attitudes that jury members may be bringing to bear. There are also specific concerns about notions that jury members might have over normal reactions to rape or trauma. Those concerns are strongly backed up by a substantial research base. For example, research by Professor Ellison and Professor Munro, from whom you heard last week, shows conclusively that judicial directions could have a positive impact in closing what we know is a significant issue over access to justice in rape cases.

Nicola Merrin: The point has been made that misconceptions exist among the general public. Victims themselves, as members of the general public, also have misconceptions about how victims do or should react and about why the sexual assault has happened in the first place. That in itself quite often leads them to delay reporting. It becomes a cycle. The provisions would definitely go some way toward tackling those issues, especially in relation to the jury.

Things have been and continue to be done. There have been publicity campaigns, and the police, Rape Crisis and Women's Aid do a lot of work in educating the public about the reactions of victims and on facts such as that someone does not deserve to be raped just because they are wearing a short skirt. I want to make the point that victims themselves can also feel that way. It does sometimes take a lot to work through their feelings and get them to realise that it is not them but the person who assaulted them who is in the wrong.

Gil Paterson: Are you content that the judge would not automatically come in with directions but would take into account what is developing before directions may or may not apply, or should the provision on that be strengthened in some way?

Sandy Brindley: It would be helpful if there was a consistent approach that allowed the judiciary to adapt it where necessary for specific cases. Two elements in the bill have been focused on: delayed reporting and lack of physical resistance. It could help to broaden that out to look also at demeanour, because it has been highlighted in research that members of the public, and hence juries, might make assumptions about how somebody should portray themselves or come across when they are giving evidence. As we said in our written submission, what survivors often say to us is, "I'm going to try and hold it together and not let them see how upset I am." That can mean that they come across in the opposite way to what jury members are expecting, and it affects their credibility. There is scope to broaden the issues that are looked at in judicial directions, but most rape cases will include elements that are covered by the judicial directions for which the bill provides, so I would expect them to be used in almost all sexual offence trials, because they are such common factors.

Gil Paterson: Does anyone else want to comment?

The Convener: I am chairing the meeting, Gil. I have such a humble role that it gets snatched from me from all sides.

Gil Paterson: I am sorry, convener. I am just getting carried away.

The Convener: Yes, you are.

Nicola Merrin: It may be a good approach to ensure that, regardless of whether it is alluded to during a trial or whether a question has been asked about a delay in reporting—generally, such questions are asked—a jury direction should still

take place. Just because it is not being talked about, the misconception could still be in a person's mind and they could be asking themselves why the victim did not report it earlier. Sandy Brindley is right to say that, in every case where that may be an issue, it should be brought up.

The Convener: I was just thinking that Margaret Mitchell is becoming contagious, because it is usually Margaret who interrupts me, not Gil Paterson.

Gil Paterson: Can I just make an observation?

The Convener: I have got people waiting to speak but, even though you misbehaved, I will let you go ahead.

Gil Paterson: I am involved in the motor trade and I can tell you that different people react in so many different ways. Today there will be somebody crying when they present their car at a garage to get it repaired. Most folk do not do that.

The Convener: I do.

Gil Paterson: Folk react to different things in different ways. Some people are very emotional and others are not.

The Convener: You are giving evidence, not asking questions. I cry when I see the bill, actually. That is when I cry.

Gil Paterson: I just wanted to put on the record my own experience of how people react.

The Convener: Is John Finnie's question a supplementary?

John Finnie (Highlands and Islands) (Ind): Yes, it is.

The Convener: I want to keep to judicial directions if we can, and there are a number of points to tease out. Does Gavin Brown want to come in on this subject?

Gavin Brown (Lothian) (Con): No, mine is a different point.

The Convener: Members can be quite pushy; you have got to get ahead of them.

John Finnie: We have heard that the Crown can lead an expert witness to speak to the points that you have alluded to on which the judge can give direction. What is your view on that? If it happened in every case, or every relevant case, would that not be an alternative to the judge giving directions?

Sandy Brindley: Expert testimony is used at present—helpfully, I think. It is most often used in historical child abuse cases rather than in cases of adult rape. I would say that there is room for both. If it is a simple, factual statement that needs to be put across to jury members, it may be disproportionate to bring in an expert to do that, if it could be usefully and quickly conveyed by a judge, but there may still be particularly complex cases where the Crown might, and should, lead expert evidence. One does not rule out the need for the other.

Nicola Merrin: We agree with that. It comes down to presenting factual information at the stage of directing the jury versus, or in addition to, evidence from an expert witness. We doubt that the Crown Office would be able to lead an expert witness in every case in which we think that such information would be relevant, so I reiterate Sandy Brindley's point.

Louise Johnson: I agree with my colleagues. The Crown pointed out that there could be a cost to that, but I think that Professor Chalmers also mentioned that the judge would still have to direct on expert evidence in relation to delays in reporting and reactions to a lack of force. The two are not mutually exclusive, but we would support whatever Rape Crisis Scotland's view is.

11:00

The Convener: You would accept that the defence counsel would also make a pre-emptive strike and that that would be a natural progression from judicial directions. They might say, "It may be that you will be asked to consider why there was a delay in reporting"—or this, that and the other—"but I ask you to put that to one side." I am not in court. Do you accept, however, that that might happen in any event? The defence counsel might make a pre-emptive strike on any judicial directions.

Louise Johnson: The defence regularly carries out pre-emptive strikes on a variety of things. I do not think that it would be any particular surprise to us. The direction to the jury about how it should consider that would be important regardless of what had gone before.

The Convener: Elaine Murray is going to take a different tack.

Elaine Murray (Dumfriesshire) (Lab): I want to ask about the aggravated offence because the bill does not create an offence; it creates an aggravator. Crimes that are committed in the course of domestic abuse will be aggravated offences, but the bill does not create a specific offence of domestic abuse or coercive control. Last week, we heard evidence that it would be difficult to define such an offence. What is your view?

Louise Johnson: A statutory aggravation is necessary and welcome and it should be complementary to any coercive control offence

that is developed in due course—if and when such an offence is developed.

A statutory aggravation is important because currently a conviction does not indicate that the offence or crime was carried out in the context of domestic abuse. It is important that the perpetrator knows that their behaviour is being taken seriously in that context; that is also important for the victim who experienced the crime, for the public, for the sentencer, and in identifying repeat and serial offenders, whose convictions will be disclosed. The statutory aggravation will indicate the nature of the offence and it will give clarity to sentencing by reflecting the seriousness of the behaviour.

We most definitely think that a coercive control offence should be created because it would cover behaviour that is not covered by existing offences and it would be a vital weapon in the armoury of the Crown and the justice system as a whole in addressing this particular aspect of violence against women—

The Convener: —or violence generally, because there are cases of violence against men as well.

Louise Johnson: Yes, but in our case, we are talking about violence against women.

The Convener: I think that we recognise that there is also an issue with violence against men.

Louise Johnson: Indeed.

Nick Smithers: I back up what Louise Johnson said. We are talking about any type of coercive control. We have learned that, in the most severe cases, domestic abuse is characterised by a pattern of controlling behaviour. The men whom we work with and support, and the large body of evidence that I have read and heard from other experts, tell us that such behaviour is particularly damaging.

We support the idea of a bespoke offence. We also support the aggravation. There are two sides to this. First, in sentencing, the offence could be treated as a more serious offence than something more common, such as vandalism, breach of the peace or assault, which stand alone and in cases of which the conviction does not give the full context around the breach of trust that happened.

Secondly, it is important that a variety of different disposals are available in different cases. For me, a lot of what we are dealing with in abusive relationships is discernment; we need to find out exactly what is going on. Some people should be put on a perpetrator programme by the court, for example.

One of the key problems that abused men in Scotland have at the moment is that there are no such programmes for women; they are all exclusively gendered and it is quite difficult for women who have problems with committing violence to get appropriate help. There are still huge barriers to that, the law being one of them. As far as we are concerned, access to justice and support is still far off.

Sandy Brindley: The coercive control offence was first proposed when we thought that we would be in a post-corroboration landscape. I support the development of a coercive control offence, but there is an issue about how it will be prosecuted if we retain the requirement for corroboration.

The Convener: Do not mention that—we are not debating it today. We had a wee stooshie about it before you came in.

Nicola Merrin: Victim Support Scotland welcomes both the proposed statutory aggravation and the coercive control offence, which we hope will be forthcoming. We think that the law can be further strengthened by both those measures.

Domestic abuse is often characterised by controlling and coercive behaviour. In the informal session that we had earlier we talked about the incremental stages to abuse. What was said is very true: it can start off with controlling behaviour that is very subtle. As a victim, you might not even realise that that is what it is until you are out of the relationship.

I hope that educational measures will go along with the bill. We would be looking for education on what a healthy relationship is and on what is and is not appropriate within a relationship. The creation of a coercive control offence would help to do that; it would also help to raise with people the possibility that their relationship is unhealthy and, hopefully, get them help before the situation escalates to the point of violence or more overt abusive behaviour.

Elaine Murray: You could see that more as an education matter—it could maybe even be made part of sex education or something like that, in order to make people aware.

Nicola Merrin: It is part and parcel. When we criminalise something, we send a strong message about what is harmful behaviour. That message is not only for offenders; it also helps victims to realise what is harmful within their relationship, for which they can then seek help. If something is not a criminal offence it can be difficult for victims to realise that it is harmful. It is helpful if a behaviour is a criminal offence because a victim can point to it and say, “Look, it’s out there. What you’re doing to me is against the law.” At the moment there is a lot of uncertainty. When you are in that kind of abusive relationship, the person whom you trust the most is the person who is abusing you. Uncertainty does not go very far towards helping you.

Nick Smithers: It is about not just education but policy. We could have a good, fit-for-purpose law for prosecuting domestic abuse and coercive control but, as things stand, there are severe barriers to men getting access to that. That is because of what we would call the public story that domestic abuse is something that men do to women. A lot of people hold that view—I certainly used to. The story does not just sit alone; it is perpetuated, partly by the Government. I understand why—there is a policy. The policy memorandum refers to "Equally Safe: Scotland's strategy for preventing and eradicating violence against women and girls". Boys are excluded from that policy.

I am funded by the Government's equalities unit to improve access to support and services and improve awareness of male victimisation. I am doing that alone. The trouble is that, on the other side, there is—for good reason, as there should be—a well-funded policy and strategy for women and girls. That is then manifested in local authorities, where all the services are targeted at women and girls. What we absolutely require is a complementary policy and strategy for men and boys. Otherwise, as far as men are concerned, the bill will not make any difference.

Louise Johnson: Our position in relation to the coercive control offence has been set out extensively, particularly in relation to the consultation paper that preceded the bill. We would be happy to send the committee any information that members were interested in.

There is certainly a need for an offence to bridge the gap when we are looking at controlling behaviours, because although coercion and threats of force to compel in order to get a particular response are important aspects of domestic abuse, they are often overlooked. The justice system focuses on discrete incidents of physical abuse or damage to property, so that pernicious, long-term and well-documented—

The Convener: I can assure you that the committee does not have such a narrow view.

Louise Johnson: Absolutely. On how it would work, in addition to the offence, there would need to be public education—almost from nursery schools all the way up the school system. We need to look at respectful relationships, as well as at equalities, because any such offence could not be created without that education being in place. We also need to continue the wider public education about the role that violence against women plays and to make it clear that it is a cause and an effect of gender inequality. Until we get that right a lot of the work that we are doing here will be essentially supplementary. Awareness raising and attitudinal change are needed, not just among the public but across the judicial and policing systems.

Very good work is going on, but it must go a lot further to dispel myths about, for example, rape, sexual assault, domestic abuse and the place of women and even children.

The Convener: And men.

Louise Johnson: And men.

The Convener: Progress has been made through this Parliament in recognising that, although they are not the majority, men are victims of domestic violence, too.

Nick Smithers: That is the thing. In a way, we deal with unintended consequences. Men suffer a two-pronged barrier to getting help and having their issue recognised. One barrier is internal. We have talked about gender analysis. Men are brought up to have masculine traits, such as stoicism. In general, they tend to keep things inside and are more likely to externalise trauma, perhaps through alcohol or substance misuse, for example.

The other barrier relates to the barren service landscape for men. I have been mapping services recently in every local authority—[*Interruption*.] Can you hear me?

The Convener: Yes, I am just mumbling.

Nick Smithers: I have looked at every local authority and have found that there are no targeted services for men apart from our own. We got Big Lottery funding, but what we can provide is limited. The issue needs to have a campaign and to be backed up with a policy.

The Convener: I have let you put all that on the record because those issues are not in the bill, so fair dos for saying it.

Elaine Murray: In the earlier informal session that we had with victims, someone said that the bill did not do enough to protect victims and that more could be in it in that regard. Do you agree? Should that be done through, for example, creating an entitlement to support services, rather than through the court system?

Louise Johnson: Was there indication about what in particular—

Elaine Murray: No, the comment was—

The Convener: No.

Louise Johnson: Right. The Victims and Witnesses (Scotland) Act 2014 was passed—

The Convener: Yes, this committee did that.

Louise Johnson: Yes, you did it. The victims' code of practice is still being consulted on, which is a further move to implement the related

European Union directive. We will need to allow that to bed in a bit. However, a lot more can be done to protect victims. That includes considering how they get to court and how they give evidence, allowing them to look at their statements and considering what happens afterwards. Some of those issues are covered by the Victims and Witnesses (Scotland) Act 2014 and the victims' code.

Elaine Murray: I think that the issues that the individual raised earlier applied even before the court stage. For example, where people were being victimised, there was not enough support or help for them to get out of that situation.

Louise Johnson: Is that in relation to support services or the police response?

Elaine Murray: It perhaps related to an entitlement to support. I think that that was what the individual meant.

Louise Johnson: Women do not want to have to go into a refuge. Any woman can seek help from one of our services. They can go as many times as they like and ask for whatever support they need. With their consent, we can refer them on to other organisations. We have links to many other organisations. Perhaps people just need to understand what is out there and what can happen. However, the important thing to stress is that getting support does not mean that a person has to have experienced a crime.

The Convener: I want to move on. I am not saying that support before a police investigation is not important, but I want to focus on the facets of the bill.

11:15

Margaret McDougall (West Scotland) (Lab): What are the views of the panel on the section of the bill that deals with non-consensual posting of images? There is an argument that the offences should be extended to include other forms of communication, such as text messages and letters.

Nicola Merrin: Restricting the criminal offence to sharing only images or films would exclude a number of situations in which the same kind of behaviour and intent are present. It should not matter what the media is, given that what is important to victims is the non-consensual sharing of the material. That is where the harm is caused. An example that has been brought up in the written evidence is sexting. We are not saying that sexting should be criminalised, because that is neither desirable nor possible. However, it should be an offence when anything from that kind of intimate communication is shared without the consent of the person. Nowadays, we have mobile phones, tablets and computers that can capture screen shots of private messages, such as intimate texts, which could be just as embarrassing or humiliating as an intimate image could be. The sharing of such messages should be covered in the bill.

There was talk about other types of images, such as photoshopped or digitally altered images. I am looking for some clarity on the position in that respect, because we think that such images should also be included.

Louise Johnson: We specifically referred to the issue in our evidence. We support the position put forward by Police Scotland that the offence should not refer only to photographs or films but should specifically include abuse that can be perpetrated by the sharing of texts and so on. We need to look at the impact and the harm, which will be the same no matter what is shared. It might cause extreme harm and distress in some cases.

The exposure or the threat of sharing has the same outcome—it is designed to humiliate, control and abuse the victim. If the offence covers only photographic digital images, what will happen to people who are abused through the other medium? Sometimes, text and images can be sent at the same time. Would we criminalise the image but not the abusive and threatening text?

We do not want a two-tier criminal justice response. Perpetrators will just shift their behaviour—they will see where the loophole is and then tailor their behaviour to facilitate that.

The Convener: As I understand it, threatening someone is already an offence.

Louise Johnson: Section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 deals with threatening or abusive behaviour. There is also an offence under the Communications Act 2003. However, they do not go far enough. We need an offence that names the behaviour so that there is clarity for everyone, including those who investigate offences.

One of the issues that came to our attention from a survey filled out by women is that the police want to do something, but they are not always sure what they can do. Having a specific offence that covers such behaviour and names it would not only bring clarity to the victims but tell those who are intent on sharing something, or are reckless and just do it, that there will be consequences.

Sandy Brindley: We have a prevention project where we work in schools with young people to look at issues such as consent and sexting. What we have heard from the young people is that it can be absolutely devastating when their images are

shared in that way. It can ruin lives. We welcome legislation on the issue.

Having read last week's evidence, I have a concern about how recklessness will be defined. I know that the police gave examples of really awful hacking situations and one of the law professors who gave evidence last week was concerned that that would not be covered by the bill as drafted because it would depend on how recklessness is defined. It would be helpful to look at that definition to ensure that the bill covers the kind of situations that you intend that it should.

Nick Smithers: In a way, our position is similar. In looking at that area, we would consider a couple of issues. For example, people are using apps such as Snapchat, and the bill needs to cover those different aspects. For the young men whom we work with, the issue seems to be threats or coercive control. That should be a crime, and the bill should cover a whole range of different scenarios.

I have an example that relates to texting and language. We worked with a man who was bisexual; he was married and in an abusive relationship, and a text exchange had been uncovered and was being used coercively against him. We need to think about possible permutations. Perhaps some of them are already covered by the law; I am not sure. However, it is important to bear in mind that, if the bill covers images alone, that may not be enough to enable it to do what you want it to do.

Margaret McDougall: With regard to texting, a screenshot can now be taken—I will explain that to you later, convener.

The Convener: Thank you very much—you will need a week.

Margaret McDougall: A text could then become an image, although it is not a photograph—or perhaps it is, as it is certainly an image. We need to be clearer on that, and I thank the witnesses for their contributions.

We heard evidence last week on upskirting and downblousing. Should those also be included?

The Convener: I do not know whether I approve of those terms. They are a bit—well, you know. I am old-fashioned, but there we are. I realise that such terms have currency these days.

Sandy Brindley: It would seem odd to me if that aspect was not covered. If the whole purpose of the legislation is to provide protection in this area from those kinds of images, it would seem an unintended consequence if that aspect was not covered.

Louise Johnson: Just to really traumatise you, convener, such photos used to be referred to as creep shots. I do not know whether the definition referred to the person who took them or the way in which the person was crept up on.

It was interesting to see from the evidence that has been submitted to the committee that such photos might not be covered. The original offence was voyeurism; it was amended in the Sexual Offences (Scotland) Act 2009, which might cover the taking but not necessarily the distribution.

We want to ensure that all angles are covered. It would be terrible to get this far with the bill and then find out that there is a gap. I think that Police Scotland has a view on the matter—Detective Chief Superintendent Lesley Boal talked about it—and the Crown Office does, too. We must ensure that the bill catches all that it possibly can, within reason and as long as it is enforceable.

The Convener: I have a supplementary from Christian Allard on this particular section.

Christian Allard (North East Scotland) (SNP): Yes—it is on the taking of images in public. I thank the witnesses for informing us of their views. Is there a danger, with technology becoming more widespread and more images being taken in public, that young people may end up being prosecuted?

Louise Johnson: I think that we need to look at the harm that is caused—sorry, convener.

The Convener: No, that is fine. You are allowed to usurp, but the members of the committee must be kept in their place a little.

Louise Johnson: I will behave myself.

We must remember that young people—we are talking about young men as well as young women—can be coerced or feel obliged to share images, or think that it is something that they have to do to remain popular or simply as part of their everyday existence as young people.

We must think about the harm that they will experience and change common perceptions about what is acceptable. We do not want to normalise behaviour that is essentially offensive. It is worth remembering that the Crown already has a policy on the prosecution of children with regard to what it calls intimate images, and there is a public interest test, so we would not be automatically criminalising young people. The discretion of the Crown would still apply. However, we should not forget that there could be a situation where a young person shares an image or texts and behaves in such a way as to cause extreme distress. We know that this was the case in a situation where a young man committed suicide. We want to avoid that. We have to have an option, bearing in mind the Crown's policy.

Christian Allard: If we close every loophole and ensure that the offence is extended to include images taken in public, should we put something in the bill to remind the courts that we have to protect young people against automatic prosecution?

Louise Johnson: For a case to come to court in the first place, the Crown would have to want to prosecute it. It might be prosecuted and then the judge could decide what it is appropriate to do.

It is important to focus on the impact on the victim and the harm that has been caused. We are talking about the harm done to the person. Reckless behaviour, where something is done for a laugh, has consequences and people need to understand those consequences for the victim. Something might seem to have been done innocently or without any consideration but could have really appalling consequences for the person in the photograph. That is why we need to look at the harm that is being caused.

Nick Smithers: I back that up. We know that bullying is rife among groups of young people and can be a big problem. The technology in relation to photographs can really amplify that. That is why there is concern about suicides. By the same token, we would expect discretion to be used. We have the children's hearing system and the principle of needs not deeds in relation to young people. I have seen schools getting involved, bringing in the parents and so on, after an image was shared and the police had been informed. That means that the issue is starting to be dealt with, because it is symptomatic of other problems. The fact that the images are almost a permanent record on the internet means that what would have already been traumatic in the past is now more serious. It requires an approach that reflects that.

Nicola Merrin: There is importance in criminalising such behaviour, for the general public and particularly for young people. We understand the concern about criminalising children but, at the same time, if such an offence does not apply to children, we would lose out on the ability to intervene and make it clear that it is harmful behaviour. It would not necessarily criminalise the young people, but could suggest other ways to say, "This is not what you want to be doing." If you were to exclude children, it would almost exclude them from education around the bill and the offence. That would make it more dangerous when they reached the age when they could be prosecuted.

Louise Johnson: There has been a lot of talk about prevention, education and promoting equality and respectful relationships. If we try to keep children completely out of this, by which I mean the children's hearing system or otherwise, we run the risk of normalising abusive behaviour and negating all the work that we are doing in prevention and education. The children's hearing system exists because of the sort of concern that Mr Allard has raised.

Christian Allard: Perhaps other people, such as social media operators, and those who have invented the new technology that allows our young people to take and send new forms of pictures and texts, should take some responsibility. Should the bill be strengthened on that point?

11:30

Louise Johnson: We have spoken to Professor Lilian Edwards on that. Schedule 1 to the bill gives defences for information society service providers and so on, but it does not seem to include an offence criminalising their behaviour. The bill talks about a person threatening to disclose an image or causing fear, alarm and distress to another person, but that does not seem to create an offence against the hosts—the ISSPs and so on. I agree with Lilian Edwards that something in that regard must be stated in the bill. At the moment, there seems to be a defence but, without an offence, there is nothing to defend against. The bill must be strengthened in that regard.

We want a specific offence to be included, as well as a time limit for an image being taken down. What is a reasonable time? That could go on forever. It is incredibly important to set a specific time by when that must be done otherwise an offence will be committed.

Christian Allard: Is there a responsibility on the manufacturers? Should there be guidance on how people should use mobile phones?

Louise Johnson: That would be good, if we could get it. Perhaps we could have a responsibility clause in the bill. However, the manufacturers would say that they are not responsible for the use of—

The Convener: No. My deputy says hardly anyone reads instructions.

Louise Johnson: Nobody reads instructions.

The Convener: I have found out—by mistake—that my car takes six CDs. I did not know that, because I did not read any instructions. I wondered what all the buttons were for.

Louise Johnson: The manufacturers could certainly be involved in campaigns. Perhaps we could get them to pay for some of the material.

The Convener: I know that those issues are important, but I want us to move back to matters that are pertinent to the bill.

Gavin Brown: As we have heard, section 2 is on the disclosure of an intimate photograph or film.

I am sure that we are all keen to avoid gaps in the legislation. The witnesses have specifically said that audio files and text messages should be included in the bill. Should any other format be included?

Nicola Merrin: I am not sure whether text messaging would cover all written communications, including private messaging, emails and anything else that is in a textual form, but all such media should be covered.

Louise Johnson: What about Facebook and Twitter? I do not know whether text messaging would cover those. The bill should have a catch-all phrase such as "written or textual correspondence"—that would cover the gamut.

Gavin Brown: That is helpful. Such matters are easier to talk about than they are to draft, but it is important to have on the record what we think should be included.

Technology will always move faster than the law. Do we need a catch-all provision in the bill or an ability for regulations to be produced quickly? By the time that the ink on the bill is dry, there will be a new technology of some description that could probably be used to abuse or bully. Should the bill give quicker powers to ministers and Parliament to outlaw behaviour without the need for primary legislation? I am not usually in favour of that. In this circumstance, should the bill include a regulatory power, so that we can move faster if a new technology comes forward?

Sandy Brindley: If there is a way to draft that, that would be helpful. I agree that every new technology seems to provide another platform for abuse to be carried out. It would be welcome if the Government and the Parliament could respond quickly, but that is a question of how the bill is drafted.

Louise Johnson: I do not know whether this answers the question, but I direct you to section 40, which is called "Ancillary provision" and which says that

"Scottish Ministers may by regulations make any incidental, supplementary"

or other provision, and that regulations may "modify" or "make" different provisions. I do not know whether that would be the empowerment that you seek. It would be interesting to explore the use of regulations in that regard. I do not know what form they would take, but I would be open to discussing that.

The Victims and Witnesses (Scotland) Act 2014 is being amended via a statutory instrument that deals with the victims code. It is always open for ministers to produce and put before committees such as this one negative or affirmative statutory instruments. It would be interesting to see whether section 40 covers the eventuality that you are talking about.

The Convener: Section 2 does not specify the technological means that are used—it simply refers to a "photograph or film". I do not know whether that satisfies the requirements that we are discussing in respect of any new form of technology. I take on board what the witnesses have said about texting and other forms of written communication, but section 2 does not specify the technology that is used—it refers to the images and the purposes behind them.

Louise Johnson: It could cover that aspect. The only reference to technology is to "providers of information society services", such as hosts, and all the other stuff in schedule 1. If there is a concern about technology moving on—as it will do, very quickly—it would be interesting to explore with the Scottish Government whether it could lay a statutory instrument as and when required to add to the provisions in the bill once it is passed. If a particular medium is not covered in the bill and is subsequently invented, it could be inserted in the bill in that way. That may be possible—the Government would be able to tell you.

Gavin Brown: We have discussed audio files and text messaging as forms of abuse. Is there a big risk that, if we do not include them in the bill, we will unwittingly send to people who may use them a signal that says, "Look, these things were discussed openly, and the Government, Parliament and so on decided specifically not to include them"? If we do not include them, will we see a huge increase in abuse via the sharing of audio files, texting and so on?

Louise Johnson: Yes, because people who wish to perpetrate that type of offending will look for ways to do it. We need only look at the way in which that type of offending has developed—it has become very creative and widespread. There is no doubt that if someone cannot do A but they can do B, C and D, they will do those things. That is the risk if those aspects are not covered in the bill, as that avenue in particular will have been highlighted and behaviour will be tailored to facilitate their use.

The Convener: I have been given to understand that existing legislation would cover some aspects, such as threatening messages.

Louise Johnson: The Communications Act 2003—is that it?

The Convener: The Criminal Justice and Licensing (Scotland) Act 2010 and some other pieces of legislation deal with those elements. You are the legal lady, though.

Louise Johnson: No pressure there, convener. The problem with the offence in section 127 of the 2003 act is that, first of all, it can be tried only

under summary procedure with a maximum sentence of six months, whereas the bill proposes 12 months under summary procedure and five years under solemn procedure. In addition, there is a time limit in relation to the offence in section 127.

If the specific offence is not covered in the bill, you would create a loophole. In addition, you would have to add a caveat to section 38 of the 2010 act to clarify the definition of threatening behaviour. That section refers to threatening behaviour that causes "fear or alarm", but the offence in the bill allows distress—which is not present in section 38 of the 2010 act—to be one of the elements.

The Convener: Excellent—we can raise all those points with the minister.

Alison McInnes (North East Scotland) (LD): Can I follow up on that, convener?

The Convener: Yes, of course.

Alison McInnes: We heard evidence last week from Professor McGlynn, who said that the requirement to show

"intention to cause fear, alarm or distress"

should be removed, as it focuses too much on the motives of the perpetrator and not enough on the harm that is done. Do you agree with that point of view?

Nicola Merrin: I read that evidence, and I found that an interesting point that got me thinking. With the inclusion of the recklessness element, as long as it is adequately defined, used and implemented, it should be okay.

Louise Johnson: That would create a strict liability offence. I am interested in the point, but I am not completely convinced by it. As James Chalmers said, if intention or recklessness was removed from the bill, would that mean that we would have to narrow the definition of the offence and would therefore be providing more defences for people? We would be producing unintended consequences.

I do not have a particular view on the matter, but I would be nervous about the unintended consequences of trying to do much, too soon, if that makes sense.

Nicola Merrin: We should look at the policy intention as well. The bill started from the need to address revenge pornography—which, quite rightly, is not the term that we use any longer. The person's intention is quite important, in that either they want to control, manipulate or try to cause harm or distress, or they are reckless with regard to harm or distress.

Sandy Brindley: My concern is that the bill should be used not only in intimate situations but to cover hackers. The police gave the example of hackers, who really do not care about the distress that they cause, although their actions cause enormous distress to individuals.

My only caveat to the comments that have been made is that we want to ensure that Professor Clare McGlynn's concern that the dangers of recklessness might not be covered by the bill is addressed. We want to make sure the bill does not have the unintended consequence that, because of how it is drawn up and its focus on intent or recklessness, it does not cover situations that it would be terrible not to cover.

The Convener: I have a question for Ms Merrin. Victim Support Scotland's written submission says:

"it has been challenging or impossible to prosecute an accused for a specific offence because the child victim has been unable to specify where the abuse took place."

Nicola Merrin: Yes, that is about sexual offences that are committed outside the United Kingdom—sorry; I mean elsewhere in the UK.

The Convener: Outside Scotland.

Nicola Merrin: Outside Scotland, yes. Quite a few years ago, we supported a lady whose daughter had disclosed sexual abuse over a period of years—since an early age—by her stepfather. The stepfather had a truck, and some of the abuse happened on the truck, which was travelling between Scotland and England. The offender was prosecuted for the abuse and was sentenced and imprisoned. However, because the girl—who was by then an adult—could not disclose where the incident on the truck happened because she did not know where she was, the procurator fiscal said that although they could look at everything else, they could not prosecute that specific offence. That was quite distressing to and confusing for the mother and her daughter.

The Convener: Does the bill assist in those circumstances? Will section 8 assist?

Nicola Merrin: That was our understanding, although I have read the written evidence from Professor James Chalmers, which says that he does not think that section 8 does

"satisfactorily . . . address the issue of uncertainty".

We would like the committee to ensure that such circumstances would be addressed in the bill. We would like you to make sure that, regardless of where the abuse happens, it can be prosecuted.

The Convener: I think that we got on to the residence argument around that issue last week. We got into a tangle and then it was explained, and I do not want to tangle it up again for myself.

Do you think that the provisions in section 8 cure that issue?

Nicola Merrin: Going on Professor Chalmers's academic evidence, I would say no, although our original understanding was that the bill would cure it. We hope that you will consider definitely closing that loophole.

The Convener: We will. Thank you for that.

That concludes this evidence session.

11:43

Meeting suspended.

11:48

On resuming—

The Convener: I welcome our second panel of witnesses: Tam Baillie is the Children and Young People's Commissioner for Scotland; and Eleanor Deeming is legal officer with the Scottish Human Rights Commission.

We will go straight to questions from members.

John Finnie: Good morning. Mr Baillie, you will have heard the concern raised in previous evidence about the bill unintentionally criminalising young people, because of the different cultural approaches to new technology. Do you have a view on that?

Tam Baillie (Children and Young People's Commissioner for Scotland): We all share concerns about unnecessarily criminalising children and young people. However, we have to go back to the reason for the bill, which is to improve our responses to sexual offences and a certain type of abusive behaviour, so I am not looking for any exemption for children or young people. It has already been noted that the Crown has discretion as to whether to press charges. We also have the children's hearing system, which I would expect to deal with any charges that are brought as a result of the bill's passage.

However, the one big thing that I would say is that people have already emphasised the importance of education for children and young people—of giving them knowledge and understanding. The policy memorandum talks about relationships, sexual health, parenthood and education, but I checked and there is only one mention of sexting. In addition, the financial memorandum makes no provision for what could be a quite substantial education programme. If we are really serious about ensuring that our children and young people are fully aware, we have to be confident that the structures are in place to address that.

That is my main point; I am less concerned about whether young people are included in the new offences. It is about changing behaviour at as early an age as possible and thinking about what else should accompany the creation of the offences to ensure that we can be confident that our children and young people are aware of both the legislation and the impact of the behaviour that it defines as inappropriate.

John Finnie: Of course, the bill will also protect children and young people, who could potentially be the victims of such behaviour.

Tam Baillie: We have some concerns in that area. It is difficult to put figures on the prevalence of sexting among children and young people, but it affects somewhere between 10 and 20 per cent of them, depending on what research you read—the number tends to increase as they move towards adolescence. The level of abusive behaviour experienced by young people in intimate relationships is unquantified and the seeds of some of the experience of domestic abuse in adulthood are sown in childhood. For those reasons, I welcome the legislation including children and young people. However, I come back to education and the promotion of respectful behaviours among young people.

John Finnie: Do you see a role for an advertising campaign? By education, do you mean not just in school?

Tam Baillie: Yes. Public campaigns to raise people's awareness have already been mentioned. In Scotland, we really want to tackle equal safety and that is why we have the policy, "Equally Safe: Scotland's strategy for preventing and eradicating violence against women and girls". Although the title says "women and girls", the detail of the policy includes children. There is an opportunity for us to consider that document and how comprehensively it addresses the impact of domestic abuse on children, which is a subject that I have a particularly keen interest in.

Elaine Murray: One or two concerns have been raised about human rights issues, including around sexual harm prevention orders and sexual risk orders, which, if breached, could result in significant criminal sanctions. Does the SHRC have any concerns about that?

Eleanor Deeming (Scottish Human Rights Commission): Article 8 of the European convention on human rights protects an individual's right to respect for his or her private and family life, home and correspondence. It is clear that the scope of the article is very wide and that the restrictions that would be put in place under SHPOs and SROs would interfere with that right. The question is whether the balance between the rights of victims and the wider public

and the rights of the individual who is subject to the order is correct.

Interferences with article 8 by such orders are acceptable in certain circumstances: where they are

"in accordance with the law"

in pursuit of a legitimate aim, and are

"necessary in a democratic society".

One such legitimate aim is the protection of the rights and freedoms of others.

It is also worth noting that not only are states under a duty to avoid perpetrating abuses of human rights themselves, but they have a positive obligation to protect their citizens from harm from other private citizens.

Whether something is

"necessary in a democratic society"

is really a question of proportionality. That means that where a measure interferes with a right it must go no further than is necessary. An important aspect of that is whether less intrusive measures should be used if they would achieve the same aim.

Here, the real issue in terms of compliance with human rights law is how the orders are imposed in practice. In each case, the proportionality of imposing such an order would have to be assessed. To that end, it is helpful to remember that, under the Human Rights Act 1998, it is unlawful for public authorities, including the courts, to act in a way that is not compliant with convention rights. There is therefore a safeguard, in that the orders would be imposed by a court, and a sheriff considering whether to impose an order would be bound to consider convention rights and to act proportionately. There is nothing in human rights law that prevents the orders, and compliance with human rights law would be determined on a case-by-case basis, looking at the individual facts and circumstances of each case. It is a question of proportionality in each case.

One concern that we have is that the bill is currently silent on a person's right to make representations to the court before a sexual risk order is made. Article 6 guarantees the right to a fair trial and a public hearing, and unless there are exceptional circumstances the right to a public hearing under article 6 would generally include the right to an oral hearing. We have to remember that the civil orders have the potential to have a significant impact on a person's freedoms—perhaps rightly so. The Scottish Human Rights Commission is of the view that, before such orders are made, a person should be entitled to be heard before a court and that that should be reflected in the bill.

Elaine Murray: Your view is that it should be in the bill.

The Convener: Section 26(2) states:

"An appropriate sheriff may make a sexual risk order only if satisfied that the respondent has"

committed a relevant act. Could not the sheriff have discretion within the current rules of court to say that he or she wants representations before proceeding, whether those are representations in writing or representations on behalf of the party? Would that not be enough?

Eleanor Deeming: My experience of civil court procedure is that in such circumstances the sheriff would usually ask for representations from both parties, but although it is a civil order, a sexual risk order will have a significant impact on a person—

The Convener: I appreciate that, but—I am sorry to keep banging on about this—I just wonder whether we need to write something into the bill about process or whether a process is already in place that the sheriff can utilise before making an order.

Eleanor Deeming: Just now, the sheriff is definitely able to call for representations, but I would perhaps want to strengthen that. I do not think that there would be any harm in putting a provision in the bill stating that a person should be represented at a hearing.

Elaine Murray: Another issue was around the harassment orders. There was a question about people whose mental state was such that it might be difficult for them to adhere to an order and whether there were any human rights implications or concerns about that.

Eleanor Deeming: We have not considered that aspect—

Elaine Murray: That has not come to your attention.

Eleanor Deeming: No, that certainly did not stand out to us as an issue. However, we would be happy to go away and look at that if you would like us to.

12:00

Alison McInnes: I have a supplementary on sexual risk orders. We have had written evidence from academics at the University of Edinburgh law school, who say:

"the definition of 'harm' ... should be the same as that used for ... SHPOs ... in s 9"—

section 9—

"of the Bill."

They argue that the definition of "harm", which is defined in relation to SROs in section 25, is:

> "absurdly broad ... Therefore, SROs could in theory be used to threaten criminal sanctions against people who are not deemed to pose any risk of criminal behaviour."

Surely that will impact on human rights?

Eleanor Deeming: The courts are used to dealing with definitions of that type. I would not be against strengthening and making the definition more robust, but it is certain enough that a person would be able to understand when such orders would be imposed. However, I would not say that you could not have a tighter definition.

Alison McInnes: As it is drafted, SROs could be imposed for behaviour that is not criminal but, if a person were to breach the order, that would be criminal behaviour. Is that correct?

The Convener: Yes—it is like an interdict.

Alison McInnes: That would seem to be slightly perverse.

Eleanor Deeming: My understanding from reading the submissions from the Crown Office and Procurator Fiscal Service and the police is that the orders would be imposed where perhaps there might not be the requisite evidence to prosecute a criminal offence.

Tam Baillie: I did not come here to speak on this issue, but very few risk of sexual harm orders, which the orders in the bill are meant to replace, have been made. Those were always going to hit a narrow band of behaviour, where someone was deemed to be a risk to children—which is what the risk of sexual harm orders were about—but the evidence was insufficient to be able to take that to court. That might have been because of the child's capacity, or their willingness to be involved. Only 20 risk of sexual harm orders have been made for that narrow group of people. The purpose of changing to a sexual risk order is, I think, to increase the number of orders that are made. It is right that the committee wants to worry away at that, but a lot of safeguards are in place and they will continue.

The Convener: Are there hearings under the existing system? The concern is that quite a heavy-duty civil order could be imposed apparently without any hearing on behalf of the party that was to have it imposed on them.

Tam Baillie: The matter had to go before a sheriff.

The Convener: Was there representation on behalf of the parties?

Tam Baillie: I do not know.

The Convener: I do not know either.

Gil Paterson: My question on human rights is for Eleanor Deeming. When it comes to judicial directions, does the bill strike the right balance? It would seem that some members of the public have preconceived ideas about what should happen, how people should behave and what expectations should be placed on them. Is it the judge who should inform in that regard or should it be just for the prosecution to do that?

Eleanor Deeming: Perhaps if I put jury directions into the context of human rights law—

Gil Paterson: That is what I meant.

Eleanor Deeming: Article 6 of the ECHR, which I have mentioned, protects the right to a fair trial. Article 6.1 sets out a number of general aspects for a fair trial and articles 6.2 and 6.3 set out the minimum rights to be afforded to a person accused of a criminal offence.

The commission understands that the proposal is being introduced to address a particular issue. As you have said, the perception is that a number of people hold misconceptions about the conduct of victims of sexual offences. We do not believe that jury directions of that type would prejudice an accused person's article 6 rights, as long as the directions are essentially factual, uncontroversial statements. From our reading of the bill, they would appear to be factual statements. I agree with the witnesses who gave evidence on that. It is common for a judge to give directions on the evidence that has been heard. As long as such directions remain of the factual nature envisaged by the bill, they would not impact on impartiality or undermine the principle of equality of arms, which is an important aspect of a fair trial. Here, we must also consider the rights of victims to effective redress. Sometimes, directing juries in such a way could strengthen the rights of victims to effective redress.

I am unaware of any case law from the European courts on the topic, but they have looked at jury directions generally and as long as they are uncontroversial they are seen to aid the process of a fair trial.

Gil Paterson: I will reverse the question. If we believe that people have preconceived ideas and the trial does not address that—in other words, if the judge did not inform everyone in the court that such attitudes are misconceptions and that people behave in different ways—would that be a breach of the victim's human rights?

Eleanor Deeming: It would be a question of severity and would have to be backed up by evidence on what people's perceptions are. The way that the European courts looked at it was in the context of an accused's right to silence and a safeguard to that being that a jury direction should remind the jury not to draw adverse inferences

from that silence. The European courts' view is that a judge should step in and give a jury direction where there is a danger that the jury may draw inferences.

The Convener: I am a wee bit surprised that you are so sanguine about the issue of jury direction. Is it not the case that the prosecution could say all that stuff and lead evidence to say that people could behave in different ways if they have been sexually assaulted and so on? That is the role of the prosecution and expert witnesses.

I am surprised that you are now letting the judge, who should really just be telling the jury that the evidence is for them and whether it complies with the requirements of law, step further. You say that it is just a general statement of fact, but it is given in context. The judge will only make that statement if someone looks as though they have not been affected by the events. Although you say that it is just a statement of fact, if you are an ordinary punter on the jury, you will assume that the judge is talking about the woman or man in front of you who says that they have been sexually assaulted.

Perhaps I am being more difficult than I ought to be, but do you really have no concerns and think that it will just be fine and dandy?

Eleanor Deeming: I can assure you that we have thought the issue through.

The Convener: Do you not think that the context in which the directions are given matters?

Eleanor Deeming: I understand what you are saying, but as long as the judge is limited to factual statements, it will not have an impact on an accused person's article 6 rights. That is also guided by the case that we mentioned in our written submission, which was heard at the English court of appeal, where a judge went further than we would accept as appropriate. In that case the convictions were still considered safe. From a legal perspective on article 6, as long as the statements are factual, are backed up by evidence, and are proportionate and necessary—that is a matter of policy—the commission will be happy.

The Convener: I accept that—I just think that there might be appeals, with people saying that a judge has gone too far. That is a personal view; perhaps I have more concerns about the matter than you do.

Gil Paterson: Convener, I want to ask Tam Baillie if he has any comment to make on the general principles—

The Convener: Just a wee minute—you did not indicate to come in, but you can do so.

Tam Baillie: I am quite happy to answer if asked.

I do not have concerns about judicial direction being given on the matter. It has been stated that expert witnesses could be called to give context, but that would not be the most efficient way to proceed, as expert witnesses would end up being called in every single instance.

In the fullness of time, as a result of public education and greater awareness, judicial direction may not be needed. For the time being, however, I think that it is required. The committee heard evidence from Professor Vanessa Munro on what little we know about the dynamics of decision making by juries—

The Convener: Should we not find that out first, before we go ahead?

Tam Baillie: Well, the committee already has the evidence from Professor Munro—

The Convener: I think that the Government is instructing a review of how juries come to decisions. Would it not be better to wait for that?

Tam Baillie: We already know as much as we can about people's misconceptions, as they have been described. That is partly the reason why there has been a great deal of representation about public awareness. Until such time as people realise the dynamics of what is happening in those instances, judicial direction will add to the administration of justice.

The Convener: We also heard evidence to suggest that there has not really been a detailed examination of how juries come to their decisions, because of the discretion outwith the jury room. Perhaps that should be looked at more thoroughly, not just in sexual offence cases but more generally, in cases in which there is an abstruse or vexatious decision by a jury that seems to fly in the face of the evidence.

I am just putting that out there, but you think that it is not necessary for us to wait to find out—we can proceed with the discretion of the judge to give directions only in this particular category of case.

Tam Baillie: I will give you another instance. I am heavily involved in child contact cases in which there are instances of domestic abuse, and it is possible to discern differences in the judgments that are made about whether or not the child stays or has contact with—in the instances that we looked at—the abusive father.

When the child's views are given to the court, a decision is made in 60 per cent of those cases that the child will not have contact with the father. When the views are not given to the court, the opposite outcome tends to occur, with 60:40 in

favour of the father maintaining contact with the child. Those cases involve some of our youngest children. Our judges and sheriffs would say that every case should be decided on the basis of the facts before them, but I think that the decisions betray a bias towards contact for the child with the father, even in such traumatising instances.

That is just one example of the tendencies that people bring to judgments—some of the most difficult judgments that sheriffs may have to make—in determining whether or not a child has contact with a parent.

The Convener: That is a sheriff, not a jury.

Tam Baillie: No, but—

The Convener: That is the difference.

Tam Baillie: Yes—well, there may be an argument for the public campaign to cover all elements of the system.

Margaret McDougall: My question is on what happens when a sexual offence happens elsewhere in the UK rather than in Scotland. Are you aware of any evidence that shows that those who seek to abuse children regularly move around the country?

Tam Baillie: The answer is yes. Abusive families move frequently, and a family that moves frequently often does so quite deliberately.

The circumstances that the provision is trying to cover are those created by a loophole in the Sexual Offences (Scotland) Act 2009, which was worded to refer to offences outside the UK. I thought that Police Scotland had a rather neat suggestion in its written evidence to amend the primary legislation so that the:

"Part 1 and Part 2 headings of Schedule 4 of the Sexual Offences (Scotland) Act 2009, which currently read 'Incitement to commit certain sexual acts outside the UK' and 'Offences committed outside the UK' should be amended to read 'Incitement to commit certain sexual acts outside Scotland' and 'Offences committed outside Scotland' respectively."

That would resolve a lot of the anxiety that has already been expressed in the committee with regard to sections 54, 55 and 56—and, please, I do not want to go there.

12:15

Alison McInnes: Mr Baillie, you said earlier that you had a particular interest in the impact that domestic abuse has on children and young people. Will the bill's provisions on statutory aggravation in relation to domestic abuse improve the situation?

Tam Baillie: It is an improvement as far as it goes.

I would have much preferred that an offence of coercive and controlling behaviour were created. The crux is to be able to take into account the context of abusive behaviour in which particular offences take place. The statutory aggravation provisions help, but should be in addition to measures about coercive and controlling behaviour. I welcome the fact that the Government will look at that. I note that, because of the representations that have been made, the Government plans to publish something.

The Convener: Do not look at me. I am the last to know what the Government is doing. I am told that the Government is planning to publish something, but I did not know that until now.

Tam Baillie: There will be time to look at the wording, which will be quite challenging. It is the nub of what we are trying to get at—behaviour over a period of time that is not just about the single incident that comes to the attention of the courts.

It is worth repeating that, regardless of the provisions in the bill, people who are intent on that kind of behaviour will find many inventive ways of being able to exert that control.

Christian Allard: I go back to section 2 on disclosing, or threatening to disclose, an intimate photograph or film and would like your thoughts on the Police Scotland view that the offence should take cognisance of all forms of communication and distribution, meaning text, audio and the resources of the internet. I would also like your views on the definition of consent.

Tam Baillie: On the first point, I repeat the final part of my last answer. The issue is about coercive and controlling behaviour, not just about images being transferred or passed on without consent. The provisions are about images: they are useful to an extent, but we need to look much wider.

The technology moves at pace; that is challenging for the committee and for those drafting the bill. In order to ensure that we have the scope that we want, it is inevitable that there will have to be some kind of catch-all, which will not please the legal profession.

Christian Allard: Should the provisions be stronger in relation to social media providers?

Tam Baillie: Yes, and I note the comments on that issue in the first consultation on the bill. Providers do not have nearly enough responsibility placed on them for the net impact on the victims.

The legislation should certainly look at behaviour because, as a society, we want to promote respectful and dignified behaviour. It is, however, also worth looking at the responsibilities that we could expect of intermediaries such as

information society service providers and hosts to curtail coercive and controlling behaviour.

Elaine Murray: Section 2 refers to the disclosure of information rather than whether coercion has been used in obtaining the photograph. Young people are quite often exposed to coercive behaviour over releasing an image. That is not covered in the bill, is it?

Tam Baillie: When I referred to coercive behaviour, I meant coercive and controlling behaviour over a period of time.

Elaine Murray: That would be covered by section 1.

Tam Baillie: Yes.

The Convener: Perhaps such behaviour is covered in section 2 by

"discloses, or threatens to disclose".

By threatening, someone coerces someone else to do things.

Tam Baillie: I do not think that we are expecting the bill to cover all examples of coercion.

The Convener: No.

Tam Baillie: For that reason, I welcome the work that has been done outside the Parliament on what is required. Statutory aggravation and coercive and controlling behaviour, whatever that might look like, should both be covered.

The Convener: I think we have exhausted—I beg your pardon, Ms Deeming.

Eleanor Deeming: The Scottish Human Rights Commission had a concern about one aspect of section 2.

Section 2(5) provides that person A has a defence if person B was in an intimate situation in a place to which members of the public had access, and members of the public were present. I know from the policy memorandum that the provision was intended to exclude things such as taking a photograph of a streaker at a football match.

The case law of the European court on article 8 of the European convention on human rights, however, suggests that the issue is not where the photograph or image is taken but what effect it has on a person's private sphere.

There could be unintended consequences from such a defence. It may not be appropriate as a general defence: there could be situations in which a person was in an intimate situation and would not want the photograph to be disclosed but there were people present. Perhaps it should be considered on a case by case basis and not as a general defence.

The Convener: All questions have been exhausted. Thank you to the panel members for their attendance and evidence.

12:23

Meeting continued in private until 12:35.

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