



OFFICIAL REPORT
AITHISG OIFIGEIL

DRAFT

Criminal Justice Committee

Wednesday 21 May 2025

Session 6



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CRIMINAL JUSTICE COMMITTEE

16th Meeting 2025, Session 6

CONVENER

*Audrey Nicoll (Aberdeen South and North Kincardine) (SNP)

DEPUTY CONVENER

*Liam Kerr (North East Scotland) (Con)

COMMITTEE MEMBERS

*Katy Clark (West Scotland) (Lab)

*Sharon Dowey (South Scotland) (Con)

*Fulton MacGregor (Coatbridge and Chryston) (SNP)

*Rona Mackay (Strathkelvin and Bearsden) (SNP)

*Ben Macpherson (Edinburgh Northern and Leith) (SNP)

*Pauline McNeill (Glasgow) (Lab)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Detective Superintendent Adam Brown (Police Scotland)

Fiona Drouet (EmilyTest)

Detective Superintendent Lindsay Fisher (Police Service of Northern Ireland)

Dr Emma Forbes (Crown Office and Procurator Fiscal Service)

Fiona McMullen (Advocacy Support Safety Information Services Together)

Liliana Torres Jiménez (Law Society of Scotland)

Professor Cath White (Institute for Addressing Strangulation)

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Criminal Justice Committee

Wednesday 21 May 2025

[The Convener opened the meeting at 10:02]

Decision on Taking Business in Private

The Convener (Audrey Nicoll): Good morning, and welcome to the 16th meeting in 2025 of the Criminal Justice Committee. We have received no apologies this morning.

Under our first item of business, do we agree to take item 3 in private?

Members *indicated agreement.*

Non-fatal Strangulation

10:02

The Convener: Our main item of business is an evidence session on non-fatal strangulation, which includes consideration of the issues raised by petition PE2136, in the name of Fiona Drouet, who joins us today. The petition calls on the Scottish Parliament to urge the Scottish Government to make non-fatal strangulation a stand-alone criminal offence in Scotland.

Non-fatal strangulation is not currently a stand-alone offence in Scotland. Instead, it is prosecuted under a range of criminal offences. As a result, data on the number of offences that have included an element of non-fatal strangulation in Scotland is not readily available.

Since June 2022, non-fatal strangulation has been a stand-alone offence in England and Wales, and legislation creating a new offence of non-fatal strangulation came into effect in Northern Ireland in June 2023.

As members are aware, the Scottish Government's 2025-26 programme for government commits to carrying out

"a comprehensive assessment of the law in relation to non-fatal strangulation to determine if there is further action that needs to be taken beyond existing provisions in law that could be used to tackle this issue."

We have two panels of witnesses with us this morning. First, I warmly welcome Fiona Drouet, who lodged the petition and is the chief executive officer and founder of EmilyTest; Fiona McMullen, the operations manager for Advocacy Support Safety Information Services Together; and Professor Cath White, the medical director at the Institute for Addressing Strangulation.

I refer members to papers 1 and 2, and I thank those who provided us with written evidence in advance of today's session. I intend to allow an hour or so for this panel.

I will begin with a general opening question to get us started. Can you explain to the committee what the mental and physical impacts of non-fatal strangulation can be on victims in the short term and the longer term?

Fiona Drouet (EmilyTest): Good morning, convener and members. The harms of non-fatal strangulation are significant in the immediate term and in the long term. We are looking at brain damage, Alzheimer's, impacts on cognitive function, organ failure and, potentially, death. The psychological impacts are also extensive. It is like a near-death experience. When someone has the oxygen to their brain restricted, their automatic response is to literally fight for their life. It is hugely

traumatic, and we are sure that it can have immediate and long-term impacts. It is the ultimate act of control, and you know that whether you live or die is down to the perpetrator. In that moment, he—more often than not, it is a he—will decide whether he lets go or not, and it ends in only two different ways.

If you do not mind, I will quote some texts from my daughter's case. Members will know that my daughter is no longer with us after being subjected to horrendous abuse. Knowing that she was subjected to those harms and fears impacts us all heavily. Indeed, you can see that through a couple of texts that she sent to friends. In relation to non-fatal strangulation, she said:

"I was so scared that I thought I was going to die".

She then sent another one saying:

"I am so scared that I think I want to die".

We can never underestimate the harms of such abuse. The perpetrator got 180 hours of community service.

Fiona McMullen (Advocacy Support Safety Information Services Together): It is a privilege for me to amplify the voices of ASSIST victims and victims on the SafeLives authentic voice panel in relation to this issue.

I would like to read out some quotes that, I hope, amplify the impact of this tactic of control:

"I have been assaulted, raped and strangled. All of these were terrifying, but it's the strangulation that I feared I would not survive."

"He says he knows when to stop, but what if the next time he doesn't?"

"I was breastfeeding my six-week-old baby. I was scared that my weight on the baby would suffocate him."

"I wet myself. I thought I was going to die."

"He strangled me and my thyroid went bad. I still have issues with my thyroid."

"I would take medication to get to sleep and escape the abuse. I would wake up with bruises on my body and marks on my neck."

"The first time it happened, I was driving home from my mum's funeral. I managed to stop the car. Another time, he straddled me on the bed, knees on either side. He had me at arm's length. I couldn't stop it."

Professor Cath White (Institute for Addressing Strangulation): Thank you for asking me to come and speak to the committee. I could probably talk all day about the impacts of strangulation, but I will not. I agree completely with what has already been said.

We would break the subject down into several issues. One is the immediate medical issue, and death is one end of the spectrum. The neck is a very vulnerable part of the body—major blood vessels and nerves, and the windpipe, are there,

so it is very prone to injury. Death could occur just because of a lack of oxygen to the brain. Someone could have a stroke later on because the arteries in the neck got damaged. Like in any part of the body that gets damaged, a blood clot forms, and then bits of blood clot can break off, so the person could have a stroke weeks or months after the event. There could be nerve damage—we have had people come in who have paralysis on one side of their face and have problems with speech and swallowing.

With domestic abuse in particular, and with some strangulation during consensual sex, there can be repeated strangulation and repeated episodes of lack of oxygen to the brain, which I think most people would agree is not a healthy situation. There is a cumulative effect from lack of oxygen to the brain, and someone might, down the line, have cognitive problems and difficulties with executive function, in making decisions and so on.

The psychological impact cannot be underestimated. When we have done research—and when I am examining someone who gives a history of strangulation—one of the questions that we ask is, "What were you thinking?" When we did our research on adults, more than a third said that they thought that they were about to die. That is a very rational thought, because you are about to die if the strangulation continues. That research mainly covered women, but, even when we asked men, although the overall numbers are much lower for men, about 40 per cent thought that they were about to die.

That has an impact on the recovery from that event, and it also feeds into the controlling behaviour—the next time, the person might just have to put their hand on the neck and give it a gentle squeeze. Most strangulation is face to face, eye to eye, and there is a mutual shared understanding, as Fiona Drouet said, that your life is in their hands. It is, therefore, a very powerful way of controlling somebody and what they do.

We also know that there is an increased rate of suicide among survivors of strangulation, because they sometimes feel that there is no other way out.

I will leave it there for now.

The Convener: Thank you. Before I bring in other members, I have a follow-on question for Professor White. You have described some of the impacts very powerfully. Would there be some value in considering aspects of that as part of more consistent and more effective data recording on non-fatal strangulation? We are aware that there is currently an issue with a lack of data and data recording, and I think that we all agree that improvements are needed in that area. How important is it to incorporate into that data

collection process some of the impacts of non-fatal strangulation that you have described?

Professor White: It is vital because, unless we have the data, we do not know what we are dealing with. First, the public have to have an awareness of the issues. If I see someone who has been strangled, I think about the medical side and the criminal justice side—I wear two hats.

From a medical perspective, improved data collection is important because, if someone does not have a history of strangulation, or if that history does not follow the person through their medical journey, there might be no appreciation of why they have particular symptoms or signs and why they are reacting in the way that they are. With strokes, psychological issues or swallowing issues, for example, we need to know whether the person has been strangled. There is not enough awareness among professionals, but we are trying to change that.

10:15

On the criminal justice side, everyone in the chain needs to have an awareness of strangulation and an appreciation of its dangers, because that might affect bail conditions. I said in my written submission that strangulation should be seen as a

“red flag for future lethality”.

That must be appreciated. We cannot lump it together with a slap, kick or punch, because it is a different beast and must be treated as such.

Everyone who is making decisions must have an awareness of who has been strangled and who has strangled someone, and they must know what that could mean.

The Convener: Before I hand over to Liam Kerr, I give the usual reminder to keep questions and answers succinct, because there is a great deal of interest in the issue.

Liam Kerr (North East Scotland) (Con): I thank all the witnesses for coming to help us today. What we have heard already has been very powerful. I will turn to Professor White first but invite other panel members to indicate if they want to come in.

You sent a very helpful submission, Professor White, in which you said that there is a

“standalone offence in England and Wales”

and that having that

“has helped elevate awareness of the crime and improved the professional and public response”.

In Scotland, non-fatal strangulation can be dealt with under other offences. From reading around the subject and looking at the various

submissions, it seems that Scotland could be thought of as leading on this issue. For example, I believe that the prosecution of non-fatal strangulation in Scotland is not contingent on there being an injury or any harm. What is the legislative gap that needs to be filled by having a stand-alone offence in Scotland? Might there be quicker and more effective ways that would achieve the outcomes but would not require a legislative fix, such as raising awareness, the suggestion that you made about bail conditions or having a better public response?

Professor White: I am not sure that I am best placed to answer that question because I do not have expertise in Scottish law.

There does not have to be an injury in England and Wales, which is important because we know from research that fewer than 50 per cent of victims will have an externally visible injury. It is really important that the law covers that aspect.

Even if that is incorporated into current law, the main thing would be counting the instances of strangulation and having a handle on the numbers, because it seems really hard to get data and numbers and, if you do not have data, it is hard to know whether anything is making a difference. I do not know whether you can track strangulation cases through the criminal justice process in Scotland to see whether what you have is working.

Liam Kerr: The point about data is an important one. My question, which I will throw open to Fiona Drouet, is, do we require a legislative fix or is there something that we could do that would be quicker and more effective?

Fiona Drouet: My concern about looking for potentially quicker alternatives is whether they would be as effective. For example, if strangulation was an aggravator, would that minimise the harms? We are looking at an exceptionally serious crime that merits a law in itself so that it is recognised as exceptionally high risk. You are seven or eight times more likely to be murdered later by someone who has strangled you. As Cath White said earlier, strangulation is different to other forms of abuse. The outcomes are severe and cannot get worse, because it can result in death. Strangulation is the strongest predictor of that.

I would also be concerned about how that looks to a victim/survivor. Does it minimise what they have been through? We want to make sure that outcomes are proportionate to the crime. Having a stand-alone crime rather than an aggravator offers legal clarity and precision in the process, and victims/survivors recognise that, too.

I had a discussion the other day about the issue. We have the disclosure scheme for domestic

abuse Scotland. If you are concerned about a partner, and they have an abusive past, that is disclosed to you and you can see that they have a conviction for domestic abuse. We know that it is usually minimised or trivialised by them—they say that it was just a slap, or just this or that. A stand-alone crime of non-fatal strangulation could act as a stronger deterrent and send out a stronger message. It could, I hope, prevent somebody from going into a relationship that is exceptionally high risk.

In short, I am worried that any other approach minimises the severity and risk of the crime and does not give victims/survivors the justice that they absolutely deserve.

Fiona McMullen: That links to domestic abuse legislation and whether we think that it goes far enough to capture non-fatal strangulation. We welcomed that legislation—it is gold standard. We were heavily involved in the crafting of the offence, but although the DASA charges are rising, the incident-based response still makes up the majority of reported domestic abuse crimes.

In 2023-24, only 1,552 reported domestic abuse crimes were DASA offences. That is only 5 per cent of the 63,867 domestic abuse crimes that were reported. The reality is that we are not allowing the time or providing the resources to fully investigate that tactic of control, which leaves us with incident-based responses that do not capture that terrifying experience, and perpetrators are not robustly sentenced. Particularly in summary court cases, the sentencing can be woeful at times, and victims, like never before, are saying, “I will not report again. That did not validate my experience, and it did not offer me any protection.”

Liam Kerr: I am very grateful. For the record, and for anyone watching, when you talked about DASA, you were talking about the Domestic Abuse (Scotland) Act 2018.

I will stay with you, Fiona McMullen, but I suspect that Fiona Drouet will want to come back in on this.

You talked, in your very persuasive evidence, about things being treated as incident based. Police Scotland’s concern in its evidence is that, if a stand-alone offence is created, it might lead to a detriment in so far as an incident might be treated as an isolated incident rather than as a course of conduct under the 2018 act. It also suggests that that could shift prosecution to a specific incident-based approach, which could lead to evidential issues. How do you respond to that? That would be of concern to the committee, were that to happen.

Fiona McMullen: It is a complex issue. We have largely incident-based reporting at the moment. We are not capturing non-fatal

strangulation in those reports. I feel that we could have both. If we consider how serious rape is, and that it is a stand-alone offence that sits outwith DASA because of its severity, I believe that it could be both.

I am not a lawyer or a police officer, so I get to say what I would like to see. I believe that, where we can prosecute a case under DASA, we should, but there would be a merit to having non-fatal strangulation as a stand-alone offence. We are failing victims who are not disclosing because they do not understand the severity of it. We have had victims say, “What would I show them? There are no marks,” or “I wore polo necks to cover it up.” There is something that we are absolutely not getting to.

We looked at cases in our service. We are supporting 1,250 victims through multiple court cases. We apply a risk assessment to them, because the totality of the risk in the relationship is often very different to what is going through court. We might have a section 38 offence for causing fear and alarm, but when we ask the victim a whole load of questions about what happened to them, we pull out strangulation.

In 2023-24, we completed 1,201 risk assessments and found that 596 victims said they had been strangled. It is not clear how many of them had that in their charges of assault or how many cases were made under DASA. We do not have that information, but we know that the court case would not have captured that information from 596 victims. That tactic is increasing in prevalence. We see it more and more. Strangling is the most terrifying thing that happens to someone. When I think about how a victim understands an aggravator or a quicker way to do something, I think that we are failing them.

Liam Kerr: I understand.

Fiona Drouet: Fiona McMullen articulated that very well. We are failing victims if strangulation is seen as an add-on—for example, a common assault with strangulation. However, for some people, that was the most terrifying event of their lives, so there is justification for having it stand as a crime on its own.

Fiona McMullen: I will briefly add that 223 of those victims were aged under 30.

Pauline McNeill (Glasgow) (Lab): I was first alerted to this issue at a cross-party evening meeting. Some of the other committee members were also in attendance. I learned things that I knew nothing about. Professor White, you talked about the physical impact. I remember a statistic that I heard that night: after six seconds of strangulation, a person can lose control, become incontinent and experience lots of other physical issues, which can be permanent. You have

mentioned lots of other physical issues. It is serious.

I want to ask you about something that concerns me. Both Fionas have outlined the impact that strangulation has on victims, and Fiona McMullen mentioned it being a red flag for domestic abuse. More alarming to me is that it was found in a recent survey that

“Over a third ... of 16-34 years reported being strangled/choked at least once during consensual sex”

and that half of those young people said they had consented to it. All the data from that age group is showing that they do not see themselves as victims, because it has been consensual. I think that 27 per cent said that it was “sometimes agreed” in advance.

That means that there is another dimension to the issue. As you will know, in Scots law, you cannot consent to an assault. If there is an assault, whether there is consent, it is against the law. Is there anything that you would like to tell the committee about that? Are we dealing with a wider issue? That is not exclusive to that age group. We have much smaller figures for the 55-plus age group, but it is happening there, too. Do you agree that we have a wider problem?

Fiona Drouet: I absolutely agree. I think that it is influenced heavily by pornography and many other social factors. We talk about consensual sex, but I always call it so-called consensual sex, because they are not consenting to—as you just said—loss of consciousness, bladder incontinence or bowel incontinence. They are not consenting to death. They are not consenting to the long-term harms that we have spoken about. That is why we have to raise public awareness and ensure that people can make informed decisions. At the moment, I do not think that they are giving informed consent.

Fiona McMullen: I will add briefly to that. As I said, we did 1,201 risk assessments. Only 18 of the 596 victims who had experienced strangulation said that it was during sex. Two of them said that it was consensual—but we have to take on board where consent lies in a coercively controlling relationship—and 16 said that it was non-consensual. I am not saying that we do not have an issue with strangulation during sex, but, understandably, given that I work with domestic abuse victims, I am talking from a domestic abuse perspective. We found that the vast majority experienced it in the context of coercive control.

10:30

Professor White: My background is in sexual violence, and there is, of course, a big overlap between domestic abuse and sexual violence. That goes back to some of the earlier discussion

about DASA because, although that would cover the domestic abuse, a lot of strangulation happens outside domestic abuse.

The rise in, and prevalence of, strangulation in so-called consensual sex is certainly an issue. The figures that Fiona McMullen quoted are from the IFAS survey, which included people from Scotland; we are just about to do a much more in-depth survey. We have just had a paper accepted on child strangulation—that research involved 91 children who had disclosed rape or sexual assault and had given a history of strangulation as part of that. More than a third of the alleged perpetrators were children themselves, so the issue is certainly creeping into more areas rather than just being in settings that involve adults and domestic abuse.

Pauline McNeill: Thank you. I will explore that issue further. Any anecdotal evidence would suggest that it is not even specific to men or women, but I have not seen the data for that. I agree with Fiona Drouet that a deeper issue is the impact of pornography, but I am not certain that it is gender specific; I just do not know. Even though women are agreeing to it, we do not know why they think that it is okay. I am clear that public awareness is really important, and I thank you for the work that you have done on it.

I turn to the question of legislation, which Liam Kerr also asked about. It seems to me, from a cursory look at the English legislation, that it is flawed. If there is a defence of consent, one can see that the cases will fall. I would have thought that it would be more important, initially, to do a lot of high-profile campaigning around the idea that, whether or not someone consents, harm is caused. Putting to one side whether you think that strangulation should be a stand-alone offence, it is currently against the law, but clearly many people do not think that it already is.

I see flaws in the English legislation, and I wonder if you agree. If we were going to create a new offence, before we made any decisions about passing a law, we would have to deal with people who think that it is currently lawful to do it. Anything that you want to say in response is fine.

Fiona Drouet: I am happy to come in. I always think that it puts us in a more fortunate position that we can look at other jurisdictions and the weaknesses in their existing laws, and we can learn from them and ensure that we do better. I absolutely agree that we cannot just lift something off the shelf from another jurisdiction and put it in place here, because the laws are different, but I do not believe that that is a reason not to legislate.

I think that we should seek the solutions to that. Discussions such as this, and discussions with colleagues, the Crown Office and Procurator Fiscal Service, Police Scotland and legal experts

are essential so that we get it right and do not unintentionally dilute any of the existing laws.

Professor White: With regard to consent, I am not a lawyer, but my understanding is that, in England and Wales, you cannot consent to something that does you serious harm. There is a defence of consent, but if somebody was reckless, that would not stand.

However, I think that you are absolutely right that, regardless of the legislation, the public are out there doing things, and there is a big need for education about strangulation and the risks of it so that people can make informed decisions. Baroness Gabby Bertin carried out a review into pornography, and we had some input into that regarding the banning of strangulation in pornography. Other measures need to run in parallel, whether you change the law or not.

Fiona McMullen: I am here to think about domestic abuse, and it is a repeat crime: domestic abuse is unique and quite distinct in its nature.

Campaigning is really important but, if a perpetrator of domestic abuse feels absolutely entitled to take someone to the brink of death, and to let them go or not, that needs to come with consequences.

If we consider successful campaigns not related to domestic abuse—such as campaigns on wearing seat belts or driving under the influence—we note that doing those things came with consequences.

Rona Mackay (Strathkelvin and Bearsden) (SNP): Good morning. Fiona Drouet, I want to ask you something aside from our discussion about whether there should be a stand-alone offence. Do you think that, during domestic abuse prosecution, a standard, stand-alone question should be asked as part of the prosecution? Would that be helpful?

Fiona Drouet: It would absolutely be helpful, and at all levels. When the Crown discloses that the matter relates to domestic abuse, the question should be asked. Indeed, it is in some of the specialised risk assessments. The police should be asking about it, and that would carry on to a court case. Is the question always asked? I am not too sure. There is no conclusive evidence that it is not being asked, but there is a suggestion that it is asked inconsistently. Could the proposed law bring clarity? If it is going to be mentioned, how will victims/survivors feel that it is relevant, as an aggravator or add-on, if they do not know that something like that has happened to them? It is about raising awareness so that it comes up in such cases.

Rona Mackay: My thinking was that it would at least raise awareness, during the prosecution, that that had happened.

Fiona McMullen: That should be happening just now. When the police go to a domestic abuse incident, they will offer every victim the same risk assessment, which I have spoken about. At a time of stress and distress, they might not always complete it, but question 15 asks whether they have ever been strangled, choked, suffocated or drowned. That question is asked way before prosecution, but what are we doing with the “yes” answers? We need the resources, the knowledge, the skill and the experience to probe that question. In our service, a “yes” response would mean asking how often, what happens, where it happens and what is used—a belt or hands.

Safety planning against non-fatal strangulation is completely different from safety planning against an assault. We tell people during an assault to stay away from the kitchen, with its knives and sharp objects, and from the bathroom, with its water and hard surfaces. Ultimately, if the person cannot get out, they should get themselves to a bed or a couch—somewhere soft, because that will absorb the hits and punches. However, you cannot effectively safety-plan against non-fatal strangulation.

Rona Mackay: I was interested in what you said in your opening comments about the case in which someone was in a car, coming home from their mother’s funeral. You just do not imagine that that would be the setting for it. That is so random and horrifying.

Fiona McMullen: There was another quote from a victim who said that it happened on the night of her honeymoon. If someone is straddling you and is at arm’s length, you have no way of escaping. It is quick, it is silent, and it is terrifying.

Rona Mackay: It is effectively like attempted murder.

I am not sure whether you will know the answer to this, but has there been an increase in reporting by the prosecution following the introduction of stand-alone legislation in England and Wales in, I think, 2022? What have the figures been like following the introduction of that legislation?

Fiona Drouet: It was shown that, in the first six months, from June to December, 8,375 non-fatal strangulation offences were reported and there were 971 charges. The conviction rate for non-fatal strangulation is slightly higher than the conviction rate for domestic abuse. We should take that into consideration. Other witnesses may have more information on that.

Professor White: IFAS has submitted several freedom of information requests, and we are about to publish another on it. Fiona Drouet gave the figures for the first six months. In the first year, there were roughly 23,000 police reports; in the past year, that number jumped to 39,000. We

have to be careful with those figures, because more police forces started to report the data, so we have also broken the numbers down in relation to population sizes. There are big disparities in the rates of reporting between different police forces.

There is still a lot of work to do. In the latest data, roughly 70 per cent of reports do not progress because of evidential difficulties. What does that mean? There is a lot of work to be done.

Rona Mackay: It seems as though, in the numbers that Fiona McMullen quoted, a lot of cases were not proven, for want of a better term, or did not result in charges. Is there a problem with identifying non-fatal strangulation and proving it?

Professor White: There definitely is, although there has been an improvement and increased awareness. Sometimes, the strangulation charge gets lost because of an accounting issue or because there are higher charges, such as attempted murder. We have done a few exercises with different police forces to look at strangulation cases, and there are still some times when police officers go into a home and report that there are no injuries.

There is a lot more work to be done on the issue, but at least we have some of the numbers and we know what to aim for.

Rona Mackay: It sounds as though there needs to be training—and awareness, that is a given—for police.

Professor White: There are a lot of issues. As well as the provision of training, complainants must be supported through the criminal justice process. You know about the delays in criminal justice cases; there are a myriad of reasons why people withdraw from the process.

Fiona Drouet: Providing evidence is a challenge in lots of cases of gender-based violence, because there may not be any marks. That is why the response must be right. We need to make sure that, if it is possible for them to do so, the victim/survivor can go to accident and emergency afterwards and get their oxygen levels tested—Cath White can explain that better than I can—so that evidence can be gathered in that way.

Also, because most of these things happen behind closed doors, we should never forget hearsay evidence. In our daughter's case, she had told someone—that was hearsay evidence, even though she was no longer here to speak for herself. Perhaps colleagues in the second panel could expand on that. It is not impossible to use it.

Rona Mackay: That is interesting. Thank you.

Sharon Dowey (South Scotland) (Con): Good morning. I, too, went to the round table on non-

fatal strangulation. One question that I asked was: do we currently have legislation to prosecute it? The impression that I got from the answer was that we do, but it is not highlighted often enough. Do you think that the Scottish criminal justice system is able to adequately investigate and prosecute such behaviour under current laws? If not, what would be the benefits of creating a stand-alone offence?

Fiona McMullen: That takes me back to what was said about the vast majority of reports being incident based. You would hope that there would be more exploration of whether the resources, skills and knowledge are there to support investigation.

We are a criminal court and domestic abuse advocacy service, and we often work with victims who have reported to the police. We redo the risk assessment that they might have done with the police, and we will often get additional disclosures, which we encourage them to go back to the police with, particularly when they talk about strangulation and other criminality. We also talk to them about the worsening conditions that we have heard about that might not have been apparent at the start.

Do I think that, with the rising number of DASA offences that are coming through, we are capturing assaults with non-fatal strangulation in them? No, I do not.

10:45

Fiona Drouet: How are people identifying that strangulation has happened to them and the severity of it? There is little public awareness, and people sometimes will not say that what happened was strangulation. Sometimes, they will say, "I just pushed my hand against their collarbone." The majority of strangulations are one handed, so people do not think that it was strangulation, because there were not two hands around the neck. A stand-alone crime could help in relation to the way that people perceive and interpret it. It could start to educate the public, educate victims as survivors and, I hope, deter perpetrators.

Sharon Dowey: I am still trying to get to whether we would need a stand-alone offence. As Liam Kerr said, Scots law is already further ahead on this issue, and we have ways in which we can prosecute non-fatal strangulation. There are also concerns that the current laws could be diluted if we brought in a stand-alone offence. Would more education for the public and the police help, or do you still think that there definitely needs to be a stand-alone offence?

Fiona Drouet: More education would help, but it would not go far enough—it is as simple as that. If non-fatal strangulation was seen as an add-on—if

it was an aggravator, or however it would be prosecuted—that would feel to victim/survivors as though they had just had a near-death experience minimised. It would also leave the perpetrator to carry out significantly more harm, as we have seen with some of the sentencing. We would be educating the public but saying, “It’s not a stand-alone crime”—and there is a big message in that alone, which would be concerning.

Fiona McMullen: Interestingly, one of the victims I spoke to this week, from the authentic voice panel, said to me that he did not see strangulation as a crime. He would not punch or kick me, but he did not believe that strangling me would be a crime. It absolutely is—all day long—but his view was that it is not. We can change internal policy and procedures and raise awareness, but we need to capture this at the front line. Things are not working to the extent that we need them to, for many complex reasons.

Sharon Dowey: In their written evidence about the potential detrimental effects of introducing a stand-alone offence of NFS, Police Scotland and the COPFS raised concerns that it would be treated as an isolated incident rather than as part of a course of conduct under the Domestic Abuse (Scotland) Act 2018. What are your views on that? As I said before, they thought that it might dilute what is already in law.

Fiona McMullen: It goes back to what I said about whether we can have both. Can we still have the opportunity to go with the DASA? I am not a lawyer or a police officer, but I know that we are not capturing strangulation in DASA reports—there are 12,000-odd reports of DASA offences versus 63,000-odd domestic abuse crimes.

Fiona Drouet: I return to the point that Fiona McMullen made earlier about why we would not do that with rape. It is because we know the severity of the crime. Does that suggestion show a lack of knowledge of the severity and the risks that come with this crime?

Professor White: The other thing to remember is that not all strangulation happens in a domestic abuse context. However good domestic abuse laws are, they will not help people when strangulation happens in a different context.

Sharon Dowey: Okay. Thank you.

The Convener: Fulton MacGregor, do you want to come in with a follow-up to Sharon’s first question?

Fulton MacGregor (Coatbridge and Chryston) (SNP): I do not want to stand on anybody’s toes. If Katy Clark goes before me, that will be fine. I just have a general question.

The Convener: I will bring in Katy and then come back to you, Fulton, if you still want to ask a question.

Katy Clark (West Scotland) (Lab): From our consideration of other issues, we know that just because certain behaviours might constitute criminal offences does not necessarily mean that they will be fully investigated or that they will lead to prosecutions or convictions. Are you satisfied that, in Scotland, whenever cases of the nature that you describe are raised with the justice authorities—the police, usually—serious attempts are made to prioritise them, to investigate and to bring charges where possible? We have heard about evidential problems in securing convictions, or even in getting cases as far as court. For example, there have been several legal developments in the type of evidence that is needed to secure a rape conviction, such as changes to the law on corroboration.

In that context, we might decide to keep the existing law, or we might create a new offence. In the latter event, the framing of such an offence would be important, so that people would know what evidence would be required to prove it. Have you thought about improvements in the law that you might seek, which could lead to prosecutions and convictions, whether that is within the range of current offences, including attempted murder, or a stand-alone offence? What would the charge for a stand-alone offence look like? What should the committee push for as regards the content of such an offence?

Fiona McMullen: I do not think that there are currently enough police resources to explore the issue fully. That does not always happen when someone says yes to question 15 in the risk assessment that I have mentioned.

I highlight the fact that victims often come into the criminal justice system after managing such situations by themselves for a long time. The criminal justice system aspects, and the outcomes at court, are not the only factors. Again, the totality of the risk can look very different. A victim might be going through a summary court case, for example, but that still does not capture the totality of the risk.

However, we should bear in mind that a report to the police brings other measures into force. For example, it brings a co-ordinated community response through our multi-agency risk assessment conferences, or MARACs. It also brings in support from organisations such as mine, which support victims to increase their safety and wellbeing. For me, it is important to note how what has happened to a victim then follows them into other processes. If, at a MARAC, we discuss the case of a victim who has been non-fatally strangled, that will be very different from the safety

planning work that we would do for a victim who is being assaulted. I do not know whether that makes sense.

My point is that there is more to such a situation than what the criminal justice system and all the other components involved provide. There is more to it than the court case. Many victims end up with criminal and civil court cases running alongside each other. If they take what has happened to them because of a criminal offence into a civil court, where decisions are made on child contact and personal safety, there is a distinction to be made about what someone has experienced and how seriously we view that.

Fiona Drouet: I do not think that I have anything to add to that. I am aware of the complexities through the conversations that we have had. We do not want to dilute anything that is in existence. It is just really important to show that our country fully understands the severity of this crime and the risks that it carries.

Katy Clark: You will know that we have created other stand-alone offences that are not used as often as we might have expected. There are reasons for that. Therefore, how an offence is framed and scoped is really important. Our second panel of witnesses might focus on those aspects, but I wonder whether any of you has a view on them. My point is that we could create a stand-alone offence, but it might not make the difference that you are expecting.

Fiona McMullen: That links to the work that I do. It might not make the difference in every court case, but it might make the difference in how we proceed with supporting a victim and holding a perpetrator to account through the criminal justice system.

One successful stand-alone offence that we have seen being created is that of stalking, under section 39 of the Criminal Justice and Licensing (Scotland) Act 2010. The introduction of that offence absolutely has increased people's awareness of the issue, and it carries criminal consequences for perpetrators and validation for victims of that horrific experience.

Fiona Drouet: I agree with Fiona McMullen. As I have said throughout, the evidence shows that raising public awareness is key to educating people; such awareness should then act as a deterrent. I understand Katy Clark's point about certain stand-alone charges potentially not securing successful convictions. However, we should not let that deter us from trying to make improvements and, as we go forward, tweaking them for maximum efficacy.

Professor White: One issue that we have seen in England and Wales is the lack of services for complainants. Someone who has been sexually

assaulted can go to a sexual assault referral centre, have a forensic medical examination and be provided with follow-on support through the criminal justice process. However, for someone who has been strangled in the context of domestic abuse, there is no specialist service. They might be sent to A and E or to their general practitioner, but neither of those resources has the time or capacity that a SARC has. I do not know what the position is in Scotland or whether you have domestic abuse referral centres that operate in the same way.

We are concentrating our focus on the complainant, but it is important that this crime should follow the perpetrator. Their actions should be marked. Non-fatal strangulation is different from other types of abuse, and its perpetrators should be seen as posing a higher risk. I do not know whether that aspect is covered in Scotland at the moment.

The Convener: Fulton MacGregor, do you want to come in or are you happy with what you have heard?

Fulton MacGregor: I will come in, convener, if that is all right. All our witnesses have spoken about raising public awareness, which strikes me as really important. What are your views on how we might do that? Rather than repeating what you said earlier, perhaps you could tell us how you think the message can be put out there. I feel that it should be put particularly to young boys and men, who are clearly the target group, instead of placing responsibility for not engaging in such behaviour on women and girls, although they need to know about it, too. Everybody needs to know about it, as a point of public awareness.

Fiona Drouet: It is all about providing education, and at as early an age as possible. At EmilyTest, we go into schools and speak to pupils, who are usually aged 16 and above. We tell them Emily's story and then talk about non-fatal strangulation, its normalisation in our society and the pressures placed on young people to conform. Helping them to understand the harms and the risks that we have discussed today is essential. I would find it quite uncomfortable if I were to go in to educate young people but then have to say that non-fatal strangulation is not a stand-alone crime in our country when it is in every other country in the United Kingdom. That could be problematic for us if we are trying to assert that it is an exceptionally dangerous crime.

Fiona McMullen: I absolutely agree about the need for education, which should target young people, in particular. However, I was really interested to see that, of our 586 clients who responded yes to the question about having been strangled, 197 of them were aged 31 to 40, nine were aged 61 to 70 and one was aged over 71.

Therefore, although I appreciate the need to target young people, we must not lose sight of the fact that this is happening to people of all ages.

Fulton MacGregor: That is a fair point.

I have a follow-up question to Professor White's final comment that an offence involving strangulation, and the risk that it poses, should follow the perpetrator. I found that very interesting. Before I became an MSP, I was a criminal justice social worker. That was a while back now—around nine years ago. When I think back to that time, I do not remember such behaviour being a particular issue that we took into account when making risk assessments. Things might have changed now—I am willing to say that, in case I am wrong—but perhaps there is work to be done with such services to ensure that they recognise such behaviour, or even allegations of it, as a risk factor for future offending. Criminal justice social work would usually take other types of behaviour into account in planning against possible future offending. I do not think that I came across that to any great extent, though, so I just wanted to say that we could possibly do some work in that area.

11:00

Fiona McMullen: I completely agree. We should think about it in the context of every aspect of our criminal justice system. For example, if someone is serving a prison sentence and they are not released under the 50 per cent rule but are entitled to apply for release under home detention curfew, the governor will note that that person has been convicted of an assault on a woman. To me, that should sit quite differently in a decision on a case in which the complainant has been the victim of a non-fatal strangulation attempt. The governor should consider whether it would be more dangerous to release that prisoner under HDC.

There is a lot to be done in every aspect of our criminal justice system. We see the same perpetrators going up in front of a sheriff again and again—sometimes for assaulting different victims—and robust sentencing is happening. However, we have to wait until the point when five or six victims have suffered nine, 10 or 12 years of abuse before their cases attract significant sentences. I am not for a minute saying that I want every offender to get a custodial sentence, but a previous conviction for assault versus one for non-fatal strangulation of another woman might sit differently with a sheriff who was considering them.

Fulton MacGregor: That is a fair point.

The Convener: That brings us up to time. I thank our witnesses for their contributions, which have given us a really helpful insight into the issue.

It goes without saying that people who have been watching this evidence session might be affected by what has been discussed. I remind everyone that the EmilyTest website, which can be found at www.emilytest.org, includes guidance and training material and is a very useful resource for people to access.

I again thank our panel members. We will have a short suspension for around 10 minutes for a comfort break and a changeover of witnesses.

11:02

Meeting suspended.

11:11

On resuming—

The Convener: I am pleased to welcome our second panel of witnesses. Dr Emma Forbes is national lead for domestic abuse at the Crown Office and Procurator Fiscal Service; Liliana Torres Jiménez is criminal policy executive and secretary of the criminal law committee of the Law Society of Scotland; and Detective Superintendent Adam Brown is from Police Scotland. We also have Detective Superintendent Lindsay Fisher, of the public protection branch of the Police Service of Northern Ireland, who joins us remotely from Belfast. I extend a warm welcome to you all and thank you very much for your time this morning. I intend to allow about 75 minutes for this panel, although we may have to make it slightly shorter.

I am aware that we have one or two technical issues so, to answer my first question, I will bring in Detective Superintendent Fisher first and then come back to the witnesses in the room. I open with the same question that I asked the first panel. How should we best tackle non-fatal strangulation in Scotland? Are the legal framework and the powers that are available to the police adequate?

Detective Superintendent Lindsay Fisher (Police Service of Northern Ireland): I listened to the first panel and heard that there was a lot of discussion about stand-alone offences. When the non-fatal strangulation offence was introduced in Northern Ireland almost two years ago, it was as a stand-alone offence. The offence that the PSNI previously used was quite complicated and complex in nature, as we had to show not only the strangulation, choking or asphyxiation aspect but the intent to commit a further indictable crime.

For the Northern Ireland legislative landscape and for the PSNI, having the stand-alone offence has been an immense improvement. We have seen, and continue to see, an increase in our operational figures; I am sure that we will touch on those a little later. To set the context, within three days of the legislation going live, we had not only

already used the new stand-alone offence but had somebody appearing in court having been charged with it. That in itself shows the need that there was for the new offence, the understanding of it, and the drive that there is to use it to the best of our ability.

11:15

There remain challenges, as were discussed in the previous session, and I am sure that we will also discuss those further. I think that the offence is important, not only for outcomes in a criminal justice sense but for our understanding, because victims, survivors and advocacy groups that we have listened to highlight the importance of non-fatal strangulation and, sadly, how it translates into future domestic homicides. That is why it is key that we look at the legislative landscape. Initially, such an offence might not be used as much as anticipated but, with public awareness and the media attention around convictions, I think that use of it will steadily increase.

Dr Emma Forbes (Crown Office and Procurator Fiscal Service): It has been a privilege this morning to listen to Fiona Drouet and the other witnesses in the first panel. It is very important that we humanise what we are doing and that we remember the impact that non-fatal strangulation has on people's lives and just how terrifying it is. In the Crown Office and Procurator Fiscal Service, we are worried about the evidence that we are hearing—although it is anecdotal at the moment—of the increased prevalence in society, particularly among young people, but across all age groups, as Fiona McMullen said. We want to respond to that situation.

My role here is to try to explain how we prosecute at the moment. Strangulation can be lethal, and it is a crime that we take very seriously. We can use a range of offences to prosecute and, unlike what Detective Superintendent Fisher said about the landscape in Northern Ireland, in Scotland that is not complicated. If strangulation is not in a domestic abuse setting, it is open to us to use a range of offences, such as attempted murder and murder. We would be using common-law offences, such as assault. It is an assault, and a person cannot consent to an assault in Scotland. There is no defence of consent—there is no legal wrangling or discussion about whether the victim consented. That is crucial to this debate.

My understanding from reading some of the helpful research that has come out of the Institute for Addressing Strangulation is that around 86 per cent of strangulations occur in a domestic context. In those cases, we would seek to prosecute under section 1 of the Domestic Abuse (Scotland) Act 2018. That legislation was passed in 2018 in this Parliament building, with all MSPs giving a

standing ovation to the third sector, and it came into force in April 2019. It is established in our law now, but it is still relatively new legislation, mainly because of Covid-19 restrictions that led to people being literally locked into relationships and prevented from reporting. We have seen an incremental increase in the act's use year on year.

I acknowledge that, as Fiona McMullen said in the earlier evidence session, a large proportion of domestic abuse is still reported in an incident-focused way. We are working hard with our third sector partners and Police Scotland to mitigate that, and that commitment is echoed by Police Scotland in its written submission.

Section 1 of the Domestic Abuse (Scotland) Act 2018 is world-leading legislation and completely unique. No other country in the world has legislation like it. It allows us to prosecute a single offence of a course of conduct, which recognises the way that domestic abuse is perpetrated. It acknowledges what Fiona McMullen noted this morning is the unique dynamic of offending in domestic violence.

Fiona McMullen mentioned the fact that we can prosecute a section 1 DASA course of conduct offence and separately prosecute a rape charge, which is true. Sometimes, we would include the rape in the body of the DASA charge and sometimes it would be a stand-alone offence. That would depend on the way in which the offences took place.

However, non-fatal strangulation is different again. It is something that we know to have lethal consequences. As prosecutors, we are keen to be able to tell the court the whole story of what has happened to an individual victim. If the consequences are the absolute worst, we want to be able to present all that evidence as showing one course of conduct—as being all domestic abuse. It all stems from domestic abuse, and we want to be able to prosecute all of it as one single offence.

We are trying to move away from incident-focused policing. In preparation for coming to the committee today, I looked at the Domestic Abuse (Scotland) Act 2018 cases that were reported to us from Police Scotland in March. Forgive me, as I am better with words than numbers, but I can say that we received 155 section 1 reports during March. We have marked 136 of them and are still conducting further inquiries in relation to 19. Of the 136 DASA cases that we have marked, none has been marked as having insufficient evidence. The committee heard evidence earlier about 70 per cent of cases for the specific offence in England and Wales not proceeding because of a lack of evidence. We have marked all those cases for prosecution.

Thirty-eight per cent of the cases—so just shy of 40 per cent—featured non-fatal strangulation. Forty-nine of the perpetrators were male and, in the two cases where perpetrators were female, the victims were also female. All the victims were female.

I hope that that is at least a small illustration of the fact that we have effective legislation. I definitely think that we could do more, but what you must decide today is whether the foundations that we have are fit for purpose or whether they need to change.

There are compelling reasons to create a specific offence of non-fatal strangulation. Overnight, that would raise public awareness, which urgently needs to be done, and it would make it easier to count the incidents. We need to count and we need to raise awareness, and this is a public harm, but we have a very strong foundation in our law in Scotland. I would worry about the unintended consequences of having a specific offence, not least that it would be more difficult evidentially to prove.

The Convener: Thank you for that comprehensive overview, which was very helpful.

Liliana Torres Jiménez (Law Society of Scotland): Good morning to all. I echo many of the comments that Dr Forbes has made. She made a very good and comprehensive comment about the available offences for non-fatal strangulation incidents.

I will mention some international evidence that we found regarding non-fatal strangulation legislation in other jurisdictions. After its implementation in some American states, at least three positive impacts were reported. First, such legislation addressed a gap that existed in other legislation. Secondly, there was education of the community on the impact of non-fatal strangulation incidents, which is an effect that was mentioned by members of the previous panel. Thirdly, there was, of course, a positive impact on the safety of victims. Therefore, we think that there could be merit in introducing legislation for a statutory offence of non-fatal strangulation. Also, as others have mentioned, that will improve the number of cases that are recorded and the statistics that are available.

However, to see all those benefits, appropriate resources would have to be allocated to the implementation of any legislation. We heard earlier, in relation to DASA, comments about the resources needed for appropriate investigations and risk assessments for victims. We also heard about the experience in England and Wales, where resources are very important with regard to awareness and training of the police and prosecutors and, of course, to support

complainers. Although there could be merit in creating a statutory offence, thoughtful consideration should be given to the level of resources required for future implementation and the resources that are available for the current legislation, and whether those would be divided to go towards the new offence or used only for the current legislation.

Detective Superintendent Adam Brown (Police Scotland): Good morning, and thank you for having me. With regard to Police Scotland's view, I do not think that I could articulate it much better than Dr Forbes did. I would like to start by talking about the prevalence of this behaviour. We have talked about the difficulty of extracting data, which is a fair point. However, having been a detective specialising in dealing with domestic abuse in Edinburgh before taking up my current post, and having been a MARAC chair, I think that it is fair to acknowledge that this type of behaviour is prevalent in abusive relationships and that we need to take the accounts of our partners in good faith.

We have long recognised the harm of non-fatal strangulation in our risk assessments with victims of domestic abuse. Fiona McMullen mentioned question 15 incidents. Regardless of whether a victim is reporting a crime or not, incidents in which someone references non-fatal strangulation will be subject to a review by a specialist officer and potential follow-up with regard to what needs to be reported or what safety planning needs to be completed. Therefore, we have long recognised the serious harm and consequences that have been articulated by witnesses this morning.

Any concerns that we have about a stand-alone offence are, very much as Dr Forbes articulated, from the perspective of practical implementation and the potential unintended consequences in relation to our overall response to domestic abuse. We have to acknowledge that, despite having been frustrated by Covid, there has been progress in how we have addressed domestic abuse over the past five or six years. It is important to recognise the efforts that we, as an organisation, along with our partners, have put into training and development in the area. However, when the police do not get it right, a prevailing theme is that we are reverting to an incident-based approach, which will be reflected in our inspection report from His Majesty's Inspectorate of Constabulary in Scotland. It is also reflected in our own victim/survivor feedback function through our website and in feedback from partner agencies.

On the occasions when we are not getting it right—Fiona McMullen referenced this—it is the focus on an incident-based approach that causes concern, and we are concerned that a stand-alone offence would remove non-fatal strangulation from

inclusion in investigations into offences under the Domestic Abuse (Scotland) Act 2018 and make the investigations and the charges that come as a consequence less robust. Focusing on incident-based reporting and risking a backward step in our approach in that respect has the potential to be very frustrating for victims when they are engaging with the police, and we would be concerned about potential disengagement, too.

Having said that, we absolutely welcome this opportunity, and we thank Fiona Drouet for putting the issue in the spotlight, because we fully recognise the harm that it causes, we are committed to working with our partners on education and awareness raising and we would welcome measures in law that fully recognise the issue when it comes to the consequences for perpetrators.

The Convener: Detective Superintendent Brown, we have spoken about DASH, the risk-assessment process that front-line officers complete. Early gathering of accurate and robust information about the circumstances of an incident is crucial, and we have spoken about question 15, which relates to strangulation, choking or suffocation. From a Police Scotland perspective, regardless of whether we ultimately create a stand-alone offence, given the significance of that particular act, is there scope for that question to be expanded or developed so that it is more effective?

11:30

Detective Superintendent Brown: It is about who is using the tools rather than the tools that we have. The ability to expand on that question and to probe it sensitively with victims comes with training and experience, which is where we would like to focus our attention. It is one of a series of questions that we ask in the risk assessment, and it is not done in isolation from other considerations. Typically, it would be done by our front-line officers, but it would potentially be revisited by specialist officers. It would also be reflected in reports to the Crown Office and Procurator Fiscal Service as well as in referrals to our partners. Therefore, the expansion of that question comes through a combination of those different processes; it is not about expanding the stand-alone question that front-line officers ask.

The Convener: Thank you. That is really helpful.

Liam Kerr: Good morning. Detective Superintendent Brown, can you explain briefly for the committee's understanding how an offence that is either solely of non-fatal strangulation or an offence that involves that behaviour would currently be investigated and prosecuted? I ask at

least in part because of your earlier answer. Do you not already investigate all possible crimes, regardless of what will ultimately appear on the indictment?

Detective Superintendent Brown: Yes, of course. The starting point is the account of the victim that has been provided to the police, so it is a case of exploring the circumstances. In relation to which officers will pick that up, there can be a range of outcomes. Cases that involve non-fatal strangulation, particularly domestic abuse cases, invariably come to the attention of specialist domestic abuse units, with specialist detectives going out to take statements from those victims. Those cases tend to be more complex and long term, so they would be reported to the Crown Office and Procurator Fiscal Service accordingly, drawing on all the additional resources that we might need. An acute report of non-fatal strangulation can include forensic medical examination and the documenting of injuries—as we heard this morning, injuries are not always apparent. That information can be included in a report on a DASA-related offence in particular, but it does not require specific evidence of those injuries or specific corroboration of that act on that particular occasion, which makes it a particularly useful tool when it is used well.

Liam Kerr: Why would a stand-alone offence preclude the taking of all that evidence at the investigation stage?

Detective Superintendent Brown: Well, it would not; we would still investigate in much the same way. However, in the broader context of the abuse, it is possibly not helpful to focus on an incident-based approach. Regardless of what offence we are investigating, these investigative tools are always available to us.

Liam Kerr: Dr Forbes, you heard the evidence this morning that there is at least the argument that the current system fails victims. We have a charge of common assault with a kind of add-on of non-fatal strangulation, and the optics of that, for both the victim and the alleged perpetrator, are not good, because it downgrades the non-fatal strangulation aspect of the assault. The suggestion was that it would be better if the charge was common assault with non-fatal strangulation but to also have a stand-alone offence of non-fatal strangulation. Would that not be a better way to proceed? If not, why not?

Dr Forbes: One way to proceed is to create a stand-alone specific offence. The advantage to the prosecution of that in court, is, as you have said, that it sends a strong public message about wrongdoing and the seriousness of the offence. Given everyone's shared concern, that is a compelling reason.

However, if we have a stand-alone, specific offence, we need corroborated evidence to prove the act of strangulation. We seldom see a single strangulation with no other offending—that is relatively rare. Given that, in the vast majority of the cases that are reported to us, non-fatal strangulation is part of a course of conduct of offending behaviour, by prosecuting it as a course of conduct offence, we have to corroborate just the course of conduct, not each aspect of it. Does that make sense?

Liam Kerr: It does. We heard this morning that having a separate charge of rape shows the severity of the offence, but having that does not preclude other charges being prosecuted. Am I right that you could indict both a stand-alone offence of non-fatal strangulation and the common assault charge? You do not preclude one by having the other—or do you?

Dr Forbes: If it was a common assault charge, and the narrative of the offending was the non-fatal strangulation, you could not prosecute both, because you would be prosecuting the same thing twice.

What Fiona McMullen was describing this morning was a section 1 DASA offence, in which all of the coercive, controlling behaviour was narrated within the body of a DASA charge. Her suggestion was that we pull the non-fatal strangulation from that and do not include it, even though we all know that it was part of that course of conduct, and that we prosecute it as a separate offence. I understand why she suggested that, and I understand the declaratory power of doing that—the public statement of saying just how wrong non-fatal strangulation is—but the unintended consequence is that it is much harder for us to prove.

We have seen statistics from America, and a study as recent as 2020 in Florida—which has had its legislation in place since 2007—showed that the vast majority of cases were not taken forward due to lack of evidence. The committee has also heard evidence this morning about the fact that, in England and Wales, evidence is an issue.

We also heard that there was a slightly higher conviction rate for non-fatal strangulation in England and Wales than in other domestic abuse cases. However, our conviction rates in Scotland and the way that we prosecute domestic abuse have already been recognised—by English academics, I hasten to add—as being the global leader, and as being far superior and a much more effective way to investigate and prosecute domestic abuse.

If we are to put the victims at the centre of this, one of the other key issues is that, as soon as you create a stand-alone offence and look at it in

isolation, you will probably have to consider defences to that offence, and you will probably come face to face with the issue of consent. That means that the whole trial is about the victim and their behaviour. We know that from rape trials; we know that it is a battle in the High Court every day to ensure that rape trials do not focus just on the victim's behaviour and what they did beforehand and afterwards. The beauty of the domestic abuse legislation is that it focuses very much on the perpetrator. It is perpetrator-focused legislation with victim-centred outcomes, and that is the difference.

Liam Kerr: The key point that I am getting is that you could not prosecute both. If there was a stand-alone offence, you could not indict both, because that would be prosecuting the same thing twice.

Dr Forbes: That would be double jeopardy—prosecuting the same crime twice. You could prosecute all of the other aspects of the coercion and control within that abusive relationship and separately prosecute the non-fatal strangulation. However, if it was not a domestic abuse case, and someone reported non-fatal strangulation and nothing else, you could not prosecute an assault and a new offence.

Liam Kerr: I understand.

In your evidence, another reason that you gave for why we might not want to bring in a stand-alone offence relates to sentencing. That would be at the far end, of course, once the offence had been established. You suggested that the maximum sentence under the common law or DASA is significantly higher than it is in England and Wales.

Dr Forbes: Yes—although the DASA maximum sentence is actually the same as Ireland's, which I did not appreciate when I wrote the submission.

Liam Kerr: The common-law sentence is unlimited, and the DASA sentence is up to 14 years.

Dr Forbes: On indictment, yes, and the majority of cases are prosecuted on indictment.

Liam Kerr: That begs a question. We heard earlier about a case in which the sentence was nowhere near either of those limits, although, obviously, that case will have turned on its own facts. Does the COPFS have any data on the typical sentence where non-fatal strangulation is proved or is part of the assault? If the data does not exist currently, can it be collated so that we, as a Parliament, can understand whether a new offence is needed in terms of sentencing ability?

Dr Forbes: Sentencing is very much for the judiciary. As I understand it, the Scottish Sentencing Council is drafting guidelines that are

specific to domestic abuse at the moment, so that would be something for it to consider.

At the moment, we do not have a way of counting non-fatal strangulation cases through the justice system, and that is causing shared concern. As your colleague, Ms Clark, said earlier, sometimes there is a specific offence but, for good reason, other charges are still used. We would still have our common-law powers and DASA would still be available. You would need to find a more effective way of counting all the cases. One way to do that might be to add a marker to police reports where there is evidence of non-fatal strangulation, and that marker could be reviewed by the prosecutor. If further evidence came to light and the marker was not on the police report, but we believed that there was reason to add it, we could do that. The Scottish Courts and Tribunals Service could also amend the record if, for example, there was a plea negotiation, or two cases were rolled together and further charges came to light.

Liam Kerr: I am very grateful. I have one final, very small question on that. I presume that adding a marker does not require legislation.

Dr Forbes: No, it does not—just a lot of admin.

Liam Kerr: On whom would the onus be to make that improvement?

Dr Forbes: I confess that I do not know the answer to that. Give me one moment.

Detective Superintendent Brown: Updating police systems and adding markers to our crime recording and reporting systems is a well-trodden path, so I could certainly look into that and provide you with the information.

Liam Kerr: Is that something that the police could do of their own volition?

Detective Superintendent Brown: Do you mean flagging non-fatal strangulation through the use of a marker in police reports?

Liam Kerr: Yes—in order to collate the data.

Detective Superintendent Brown: I expect that it could be done.

Liam Kerr: I am very grateful.

Pauline McNeill: Good morning. Dr Forbes explained that very well, so I understand the dilemma. There might be some public awareness-raising around a new offence, but you want to get prosecutions and make sure that, if you prosecute, you get convictions, so the content of the law is really important.

We have read in our papers that section 70 of the Domestic Abuse Act 2021 in England and Wales amended section 75A of the Serious Crime

Act 2015 to set out a specific offence. It includes a defence for consensual strangulation and states:

“It is a defence ... for A to show that B consented to the strangulation or other act.”

Obviously, that section also has a caveat about recklessness.

Dr Forbes, if consent is not a defence to assault, as was recently confirmed in the case of *Kirkup v His Majesty’s Advocate*—and, previously, in the case of *Smart v HMA*—does that seem odd to you, or would it not really work like that in Scotland? If we were to legislate in the same way, what would that mean for the issue of consent?

11:45

Dr Forbes: We have a concern that, if you are considering a specific offence, that would become a discussion point. We felt that it was important to highlight that, so that, if you are considering a specific offence, really careful consideration is given to any defences. A defence of consent is potentially a significant dilution of the current law in Scotland. Given the prevalence of non-fatal strangulation in relationships where there is domestic abuse, we are worried that there would be a lot of what we might call constructive consent—Fiona Drouet called it “so-called consent”. We absolutely agree with her on that, because we are really worried that there are cases in which people are ostensibly consenting, but they are not in a relationship in which they are able to consent.

Fiona Drouet and I went to the University of Glasgow and spoke to Kate Tonkin from the *Glasgow Guardian*, which is the university’s newspaper. One of the reasons that we did so was because we wanted to raise awareness of the issue among students. To explain the consent point, in her article, Kate wrote about what a University of Glasgow, Megan—not her real name—said about going on a date. She said:

“We went to a river—it was public, a Saturday night. He started kissing me, which I was fine with. But suddenly, he had me against a wall with his hand around my throat.”

She described feeling trapped:

“I was like, I cannot say no, and I cannot fight this. You could squeeze harder, and I could be dead. I need to do what you want because you literally have my life in your hands.”

The journalist went on to say that Megan did not realise that it was assault. She said:

“I covered up the marks with makeup and pretended everything was fine”.

If our young people are scared to go on a date, that is really a pressing issue for this Parliament. However, a defence of consent is potentially

problematic when you start to think about what that really means.

Pauline McNeill: Liliana, I know that you will be interested in the legal point around consent. Do you want to add to that?

Liliana Torres Jiménez: There are two further arguments to consider in relation to consent. One of them would be proportionality. As things stand now, it is not possible to consent to any type of assault. If non-fatal strangulation is captured as a stand-alone offence with a potential defence of consent, it is valid to ask whether it is proportionate that it is possible to consent to non-fatal strangulation—considering the serious impact that it has on the mental and physical health of the victim—but it is not possible to consent to other, less serious types of assault. I do not have the answer to that, but it is worth considering.

The second point, which other witnesses in this evidence session have mentioned, is about the circumstances in which the consent is provided. In the petitioner's written submission, she mentioned a 2020 BBC survey that showed that 40 per cent of UK women aged between 18 and 39 reported experiencing choking, strangulation or gagging during sex, with 42 per cent feeling pressured into those acts.

For me, that creates a question about the circumstances in which that potential consent is given, and whether that can be captured by legislation. I do not have the answer to that, but there are some useful questions and, if new legislation is to be introduced, thoughtful consideration should be given to them.

Pauline McNeill: Detective Superintendent Fisher, do you know whether the Northern Irish legislation deals with the question of consent in the same way as the English legislation?

Detective Superintendent Fisher: When we introduced the legislation in June 2023, we specifically removed what had, sadly, been colloquially referred to as the rough sex defence. Its removal meant that it could not be used as part of the defence for that type of behaviour. Previously, we had relied on stated cases such as *R v Brown*, which is of some vintage as it goes back to 1993, when there were no statutory provisions. The Justice (Sexual Offences and Trafficking Victims) Act (Northern Ireland) 2022 strengthened our opportunity to move away from that, because the rough sex defence—or the consent defence—had been used even in homicide cases where strangulation was the mode of homicide. It is very important that the 2022 act is part of our legislative provisions.

Pauline McNeill: Thank you—that is really helpful.

There is a conundrum around the context of domestic violence. I mentioned earlier a survey that found that

“Over a third ... of 16-34 years reported being strangled/choked at least once during consensual sex”.

Half of those young people said that they had consented to that. We have to assume from that that the context is not domestic violence. That gives me cause for concern. I suppose that, technically, both of the people who are involved in the consensual sex act would already be breaking the law, because you do not have to show injury or harm.

Would you agree that, before we consider any changes to the law, a great deal of thought should be given to public awareness, not just about the impact of strangulation, which a lot of people might not be aware of, but about whether they are potentially breaking the law? Do you have any other thoughts on how we should deal with that?

Dr Forbes: Was the question for me?

Pauline McNeill: Yes.

Dr Forbes: In the scenario that you have just described, only the person doing the strangling has committed an offence, and not the other party.

Given what we know and the evidence that you have heard this morning about the potential lethality of non-fatal strangulation and just how dangerous it is, there is an urgent need for public awareness. We have certainly galvanised our prosecutor training. Strangulation has always been a focus of domestic abuse training and other training that prosecutors receive, but we are now rolling out specific training on non-fatal strangulation, so that cases without injury are still recognised and the dangers fully appreciated, to ensure that cases go to the correct forum and are dealt with seriously.

However, we are really worried about the apparent lack of awareness of prevalence. I think that I mentioned in my written submission that the Scottish crime and justice survey has never asked a question about this subject, although I understand that your next survey will do so. That is definitely a welcome step and it will give you more information about prevalence. The young journalist from the University of Glasgow said that, to do long-term damage to somebody when strangling them requires less pressure than is used to open a can of Coke, which is terrifying. It is really important to raise awareness among young people of just how risky this behaviour is.

Liliana Torres Jiménez: I agree 100 per cent with Dr Forbes. I am not sure whether all the people who consent to that type of act are aware of the serious consequences that it may have for their health or its potential long-term

consequences. This may not be the only approach, but one of the more effective ways to address the problem is to raise public awareness about it. Again, it is crucial that there is appropriate allocation of resources to such a campaign.

Detective Superintendent Brown: I fully echo that. It is important to have robust legislation and consequences for perpetrators, which we already do. However, as we have discussed, we cannot necessarily arrest and prosecute our way out of a problem. Education is really important.

Detective Superintendent Fisher: I absolutely agree with the comments that have been made. Public awareness is key across all age groups. That is reflected in the focus on school education, which future proofs safety and awareness.

While we are thinking about the ages and demographics, we also need to raise the awareness of those who are committing such crimes and those who are having such crimes perpetrated against them. We must consider the long-term implications and harm that can be caused. Would people still consent to the behaviour if they knew about that? In one of our first domestic homicide reviews that was published, it was disclosed that strangulation was talked about early on in the relationship and, sadly, that led to a domestic homicide. We need to raise awareness and make sure that everybody is aware of the implications, including the perpetrators.

The Convener: Thank you. We have about 25 minutes left, as we will have to close the session at 12.20. As a number of members still want to come in, I ask for succinct questions and answers so that everyone can ask their questions.

Ben Macpherson (Edinburgh Northern and Leith) (SNP): I will be as quick as I can be, convener. I remind members of my entry in the register of members' interests, which states that I am on the roll of Scottish solicitors.

Dr Forbes, you spoke about the unintended consequences that there might be in relation to the Domestic Abuse (Scotland) Act 2018 if there was a new stand-alone offence. You cited a discussion that you had with the University of Glasgow's newspaper and the example that you have just put on the record of someone who was on a date. In a situation like that, in which an incident is not connected with a relationship or a period of domestic abuse in a medium to long-term situation—in other words, in a short-term incident—do you think that the tools that are available to you as a prosecutor, such as being able to prosecute for assault, are enough? Is that situation more challenging?

Dr Forbes: The laws of evidence will apply whether it is a common law assault or a specific

offence. The burden of proof will be the same either way, so the evidential challenge of the fact that the situation was in private and intimate is one that we will face regardless. At present, we would be able to prosecute under the common law and, if it was established that there was a relationship—even if it was, as you say, a single, stand-alone event—we would add a domestic abuse aggravation to the offence.

One thing that we have perhaps made a mistake with today is that we have separated those two situations in the discussion. I would like to see further work and research on the impact of that and on how many of those young boys who are strangling on their first or second date then go on to have relationships in which they have normalised that behaviour. We know that that is a red flag and a danger for homicide, and we know how dangerous that behaviour is.

12:00

Ben Macpherson: It is very helpful to get that on the record. Thank you for setting that out for us.

You have spoken about the urgent need for greater public awareness—all the witnesses have spoken about that. I am conscious of the good work that EmilyTest does in raising awareness, particularly in education settings—in schools, universities and colleges—but are you aware of any plans for a much wider public awareness campaign, given the worryingly growing prevalence of this and the need to create an awareness that it is dangerous and unacceptable and that people could be prosecuted for it? I am not aware of a Police Scotland campaign or a Scottish Government campaign on it, but there seems to be a strong case that we need one. Detective Superintendent Fisher, have you done anything in Northern Ireland to raise public awareness through a specific campaign that we could learn from?

Detective Superintendent Brown: We routinely and regularly have campaigns on domestic abuse and sexual harm. We have the “that guy” campaign, and we have domestic abuse campaigns every year. They are constantly subject to refresh and discussion with our corporate communications department—

Ben Macpherson: I am sorry to interrupt you, but the “Don't be that guy” campaign has been very successful and impactful. Do we need something similarly powerful and creative on this issue?

Detective Superintendent Brown: It certainly could not hurt.

Ben Macpherson: I am sorry to have interrupted you. You were going on to say something else.

Detective Superintendent Brown: Such campaigns are planned well in advance—they take some planning and preparation—but it is definitely something that could be considered. We refresh those campaigns annually.

Ben Macpherson: Detective Superintendent Fisher, is there anything from Northern Ireland that you want to relate to us on any campaigns on the issue that you have undertaken?

Detective Superintendent Fisher: Whenever we have launched new legislation, we have provided partners with toolkits. As part of our toolkit for the non-fatal strangulation offence, we included some guidance and a short video from our SARC leader, Professor Hull. That was really helpful, because it showed not just the police and evidence side of the offending but also the medical and forensic aspects, and it was used by our partners as part of our toolkit.

Similarly to Scotland, we have recently launched our power to change campaign. It is only in its fourth month, but we have had more than 2 million hits across various sites. It has proved really successful and we will continue to build and reshape it depending on current trends and legislative changes.

It is really important that we have bespoke campaigns such as that, but we have not had a wide, Government-led media policy or campaign specifically on non-fatal strangulation. It would have been included within our domestic abuse offence campaign.

Sharon Dowey: In this morning's evidence, we have heard how serious non-fatal strangulation is. However, in the submissions from Police Scotland and COPFS, we see a lot of concerns about the possible detrimental impacts and unintended consequences of bringing in a stand-alone offence of NFS. If the Scottish Government decided not to introduce a stand-alone offence, are other options available that could ensure that the behaviour is adequately addressed by the criminal justice system? Police Scotland's submission mentions it being as an aggravating factor. What are your thoughts on adding an aggravating factor for existing offences?

Detective Superintendent Brown: Who is that question directed at?

Sharon Dowey: You can answer first if you would like to.

Detective Superintendent Brown: If it was feasible to include an aggravating factor—I appreciate that there are legal considerations around the competence of doing so—it would

highlight the severity of that type of behaviour in the criminal justice system. It is not really for the police to comment on sentencing guidelines, but anything that results in appropriate consequences for perpetrators would be welcome.

Sharon Dowey: Is there any other action that you think we should take?

Detective Superintendent Brown: As I have said, I do not think that the creation of a stand-alone offence would be particularly helpful. We have the DASA legislation, and we have a suite of other offences relating to those rare occasions in domestic abuse cases where non-fatal strangulation exists in the absence of other abusive behaviours. There is nothing else that I would like to raise specifically.

Dr Forbes: We have some aggravations at the moment. For example, we can use a domestic abuse aggravation on many common law offences, and we would add a child aggravation or a racial aggravation in different cases. When an assault is committed, it can be aggravated because it was an assault on a child or because the person was assaulted because of their race. Those are examples of circumstances where we add an aggravation.

The difficulty with adding an aggravation for non-fatal strangulation is that the strangulation itself is the offence, and so it would mean aggravating an offence. This is quite difficult to explain, but the offence is that somebody has been strangled and it would then be aggravated by strangulation. We are concerned about the competence of that, if that makes sense. Earlier in the meeting, Fiona Drouet also raised the concern that, were legislative steps to be taken, an aggravation would not have the same impact.

Sharon Dowey: Given your concerns about bringing in a stand-alone offence, is there something else that we should be doing legislatively, or do you think that the current legislation is fit for purpose and that, as everybody else has mentioned, we just need to improve public awareness or look at the training on domestic abuse that is given to police? Is there anything else that we can do?

Dr Forbes: To be honest, if the Parliament passed a law tomorrow on non-fatal strangulation, that would have an incredible impact on public awareness. I wish that I thought that that was the answer, because something needs to be done, and urgently. However, we are really concerned about the detrimental impacts that that would have, not only on the way that victims would have to give evidence and the difficulties in proving the offence, but on establishing links between non-fatal strangulation and a course of abusive behaviour that ultimately ends in a homicide. If we

are to be able to prove that the homicide was part of that course of conduct, we would not want to take non-fatal strangulation out of that charge.

Given all the other areas where we are trying to make progress and improve the way in which we address domestic abuse, such a step would make it feel like we were moving away from Scotland being the global leader in its understanding of the dynamic of this offending and in the toolkit, legislation and foundation that it has towards a situation that would create more obstacles. I wish that that was not the case, because it would be a neat solution.

Sharon Dowey: You are saying that such a law would have a huge impact in increasing public awareness, but—

Dr Forbes: Fiona Drouet has made a compelling petition today, which we all have a lot of empathy for.

Sharon Dowey: However, the one thing that we do not want is to decrease prosecutions.

Dr Forbes: Yes, and I am afraid that I cannot think of another legislative solution.

Sharon Dowey: I have a question for Liliana Torres Jiménez. Unlike the other two submissions that we have mentioned, yours says:

“We have a neutral view on the creation of a standalone offence of NFS.”

However, further on, it says:

“the allocation of appropriate resources is critical to ensure the enforcement of new provisions.”

Will you tell us a bit more about that? Is that comment made in the same vein as those that say that it will be harder to prove such an offence, which means that you will need a lot more resources—not just on the legal side but on the police side—to get a prosecution?

Liliana Torres Jiménez: That is the case. We said that we have a neutral view. We see the merits of creating a stand-alone offence because, as we have all said, it would have benefits, but we can also see that other offences in the current criminal law cover non-fatal strangulation. We also see the potential for unintended consequences in the introduction of new legislation.

If there were a decision to introduce new legislation, the resources required to achieve the purposes that the legislation aimed to achieve should be considered. We are not for or against the introduction of new legislation, but, if it happened, there should be careful consideration of resources.

Rona Mackay: I have a question for Detective Superintendent Lindsay Fisher and then Detective Superintendent Adam Brown.

DS Fisher, when your officers attend domestic abuse incidents, do they routinely ask whether the complainer is alleging non-fatal strangulation? Is that question asked?

Detective Superintendent Fisher: Yes, it is. We still use the DASH questions that are used in the rest of the UK, and we routinely ask that particular question. We look for a verbal response and, sometimes, also see an automatic response, such as a victim touching their neck. We think about their response and focus specifically on that question, either as part of the course of conduct for the domestic abuse offence or as a stand-alone offence.

Detective Superintendent Brown: My response is the same. That would happen at the front line, at the first point of contact with the victim.

Rona Mackay: My final question was going to be about awareness but I think that it has been answered. I was going to ask what the initiatives would be if the Scottish Government decides not to introduce legislation, but it has been covered in what has been said about awareness.

I have a personal comment. I have focused on the issue of domestic abuse since I was elected nine years ago. I am convener of the cross-party group on men's violence against women and children, but, until recently—in fact, until I became aware of Fiona Drouet's petition—I had not heard of non-fatal strangulation. I pay all credit to Fiona and the other campaigners for their work, because it is clearly a growing problem and what we have heard today shows that doing nothing is not an option. I pay credit to the campaigners for that.

Katy Clark: I echo Rona Mackay's comments about how the campaigning work is cutting through.

If a political decision was taken to go ahead with creating a stand-alone offence, how should that be framed? Based on what has been said about defences and consent, should it be a strict liability offence? If so, how would that operate, given what has been said about rough sex? Would intent to cause harm, negligence or recklessness be factors? If there were a decision to go ahead, what advice can you give about how the offence could be framed, beyond any concerns that you have already expressed?

I would be interested in hearing your thoughts, Dr Forbes, although you might feel that you have already expressed those fully.

Dr Forbes: Our observations about consent are now on record. The common law of assault deals with the intent to harm, so a specific offence would need to include intention but perhaps not recklessness.

Will you bear with me for a moment?

Katy Clark: Of course.

Dr Forbes: I am sorry.

Katy Clark: That is okay.

12:15

Dr Forbes: You would probably want to include intent and recklessness, because, whatever you do, you do not want to water down the law that we already have—that is the key thing to say. You want to mirror the common law definition of assault. Liliana's comments and observations on consent were helpful.

Katy Clark: If a political decision was taken to go down that path, do you suggest that there would have to be intent to cause harm or recklessness as to whether there would be harm?

Dr Forbes: I do not think that you want or need to include that injury or harm, because it is implicitly harmful.

Katy Clark: I understand what you are saying—thank you. Do witnesses want to add any comments?

Liliana Torres Jiménez: I have a comment, although it is perhaps more of a question for consideration. I am aware of evidence from Australia related to the engagement of non-fatal strangulation victims after the incident happened. In the majority of cases, the principal reason for not continuing prosecution was the disengagement of the victim with the case. If new legislation were to be introduced, and if the matter of consent was considered in that legislation, thoughtful consideration should be given to the impact that that would have on the complainer and, as such, the impact that it would have on the evidence for the case. As we can see from comparable jurisdictions with similar provisions, victims tend to disengage, and I am not sure whether the Parliament wants to pursue that. Having thoughtful consideration on that aspect would be crucial.

Detective Superintendent Brown: I do not think that I could articulate it better, if I am honest, so I echo those comments. Those challenges around prosecution and disengagement of victims would also come at the investigative stage.

Detective Superintendent Fisher: I echo the caution that I outlined in relation to Northern Ireland's previous offence, which was strangulation with intent to commit a further indictable offence. It should be given due consideration that that proved significantly problematic in securing convictions, which is why we moved to how we now prosecute under the non-fatal strangulation offence.

The Convener: I will bring in Liam Kerr to bring the evidence session to a close with a final question, but, before I do so, I note that I have to leave in a few minutes to attend another commitment. I do not want to curtail the evidence session, because this is a really important discussion, so I will hand over to Liam, our deputy convener, to convene the rest of the meeting.

The Deputy Convener (Liam Kerr): I am very grateful, convener.

I have a very small question for Liliana that arises from something that came up in response to Pauline McNeill's questioning. I am obviously putting this to you as a member of the Law Society of Scotland, and I remind members that I, too, am a member of the Law Society, although I have not practised criminal law for more than two decades.

We heard earlier, when Pauline McNeill was discussing consent, the suggestion that a stand-alone offence might be created, but I think that Dr Forbes said that consent could dilute the protections that are there already. What is the requirement of any stand-alone offence to include that defence of consent? Is there something that I am missing whereby we are obliged to put in a defence of consent to a stand-alone offence?

Liliana Torres Jiménez: I do not have an answer right now, but I can come back to the committee with one.

The Deputy Convener: No problem. I will throw the question to Dr Forbes.

Dr Forbes: I agree with Liliana Torres Jiménez. I am not 100 per cent sure, but I cannot think of a reason why you would have to have a defence of consent.

The Deputy Convener: In responding to Pauline McNeill's question, Dr Forbes, you were very clear that, if there was a defence of consent, it would dilute the current protections. It was implied that, by creating a stand-alone offence, you would have to have consent, but I think that we are not sure whether that is the case. Is that correct?

Dr Forbes: The scenario of consent will come up in the context of otherwise consensual sexual relations. I suppose that the reason why we thought that it was a live issue is that it is a defence in the Sexual Offences (Scotland) Act 2009. The Justice Committee discussed that at the time and specifically agreed that the so-called rough sex defence would not be part of the 2009 act and that, because non-fatal strangulation already comprised an offence in our law, bringing it within the 2009 act would make it subject to a defence of consent. It was deemed too dangerous to do that. With that background in mind, I thought

that it might be a live issue in this committee's minds and wanted to counsel against it.

The Deputy Convener: Pauline McNeill, do you want to come back in on that?

Pauline McNeill: Yes. It is the central question for lawmakers, which is why I have to think about it. Dr Forbes, you talked about getting this right. That is really important. As I said earlier, unless we have common law flexibility, rather than a statutory offence, the problem is about how to make a distinction between the domestic violence context and what we have been hearing about formal agreements between couples—consent between couples—on something that can cause harm. That will be a really tricky area of law. We have also heard about the English position, where consent in the law has led to fewer prosecutions. The Northern Ireland example is also quite interesting. There is a lot to think about.

Dr Forbes: The issue is that, as soon as you are not talking about a domestic abuse case and, instead, about predominantly young people dating, it is probably happening within the context of consensual intercourse, otherwise we would be prosecuting the whole thing as a rape. Let us assume that there are consensual relations between a couple and that what they consent to is to have intercourse. However, if a person does not consent to non-fatal strangulation, we try to prosecute that on its own. No matter what we do, we are going to have a conversation. If you try to legislate specifically for non-fatal strangulation, without using the common law, you will run back into a discussion on consent, because some of the behaviour was consensual.

The Deputy Convener: I understand.

Dr Forbes: There is a lot to unpick. It is complicated.

The Deputy Convener: No member wishes to come back in, so I will again commend what has been an extraordinarily difficult but fascinating session. There is an awful lot for us to discuss and think about. I thank all the witnesses for attending and for their evidence today. Our next meeting will be next Wednesday, 28 May, when we will begin taking oral evidence for our inquiry into the harm caused by substance misuse in Scottish prisons.

12:24

Meeting continued in private until 12:52.

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