JUSTICE 1 COMMITTEE

Tuesday 5 November 2002
(*Afternoon*)

Session 1

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JUSTICE 1 COMMITTEE
37th Meeting 2002, Session 1

CONVENER

*Christine Grahame (South of Scotland) (SNP)

DEPUTY CONVENER

*Maureen Macmillan (Highlands and Islands) (Lab)

COMMITTEE MEMBERS

*Ms Wendy Alexander (Paisley North) (Lab)
Lord James Douglas-Hamilton (Lothians) (Con)
*Donald Gorrie (Central Scotland) (LD)
*Paul Martin (Glasgow Springburn) (Lab)
*Michael Matheson (Central Scotland) (SNP)

COMMITTEE SUBSTITUTES

Bill Aitken (Glasgow) (Con)
Kate Maclean (Dundee West) (Lab)
Mrs Margaret Smith (Edinburgh West) (LD)
Kay Ullrich (West of Scotland) (SNP)

*attended

WITNESSES

Dr Alastair Brown (Crown Office and Procurator Fiscal Service)
Pat Christie (Enable)
Norman Dunning (Enable)
Nicola Smith (Enable)

CLERK TO THE COMMITTEE

Alison Taylor

SENIOR ASSISTANT CLERK

Claire Menzies Smith

ASSISTANT CLERK

Jenny Goldsmith

LOCATION

Committee Room 4

Scottish Parliament

Justice 1 Committee

Tuesday 5 November 2002

(*Afternoon*)

[THE CONVENER *opened the meeting at 13:36*]

Items in Private

The Convener (Christine Grahame): I convene the 37th meeting in 2002 of the Justice 1 Committee. I remind members to switch off their mobile phones and pagers. I had better do that myself. I have received apologies from Lord James Douglas-Hamilton.

I propose that we take agenda items 2 and 8 in private. Item 2 is consideration of lines of questioning for the witnesses who will provide evidence on the Mental Health (Scotland) Bill. I ask that, following our usual practice, we take that item in private so that we can consider a detailed approach to our questions. Are we agreed?

Members *indicated agreement*.

The Convener: Item 8 is consideration of witness expenses. Again following our usual practice, I ask that we discuss that in private, as it concerns expenses for individual witnesses, which it is not appropriate to discuss in public. Does the committee agree to take that item in private?

Members *indicated agreement*.

The Convener: Are members also prepared to consider our draft report on the Mental Health (Scotland) Bill in private at future meetings, as is the usual practice when we are considering draft reports?

Members *indicated agreement*.

The Convener: I ask that members of the public leave for the time being.

13:38

Meeting continued in private.

13:48

Meeting continued in public.

Convener's Report

The Convener: Item 3 is the convener's report. The first matter to raise concerns the Minister for Justice's response to questions on legal aid and the Protection from Abuse (Scotland) Act 2001 at the joint stock-taking meeting on 17 September. Unless members want to say something in particular, we could just note the response for now.

Michael Matheson (Central Scotland) (SNP): We should note it.

The Convener: We have been designated as the secondary committee to consider the Prostitution Tolerance Zones (Scotland) Bill. A paper relating to that matter will be circulated timeously to members for the next committee meeting. I presume that it will just be to do with policing and regulatory matters, not the substance of the bill.

Michael Matheson: I presume that we will be able to deal with that.

The Convener: We will have to discuss that next week.

The other issue that I want to raise, which is not on my note but which I was going to raise at some point, is ministerial responses to committee correspondence. We have received relatively prompt responses in relation to the petitions on dangerous driving, but I am advised that sometimes it takes quite a deal of pressure to get a response from a minister. Does the committee wish me to raise the matter with the Minister for Justice and ask for prompter responses than we get at the moment?

Members *indicated agreement.*

The Convener: I think that under pressure we get a response after four weeks. Sometimes that is not suitable. It is a different matter when a member of the committee asks for a response. I will write to the Minister for Justice in that regard. I was also going to raise it at the conveners liaison group to find out what experiences other committees have had.

Mental Health (Scotland) Bill: Stage 1

The Convener: Item 4 on the agenda is the Mental Health (Scotland) Bill. We have with us to give evidence Norman Dunning, who is the chief executive of Enable, and Pat Christie, who is also from Enable. Nicola Smith is a solicitor, but I take it that she is with Enable as well.

Nicola Smith (Enable): That is correct.

The Convener: Thank you for attending the committee. Can you explain a little bit about your organisation and the interests that it represents?

Pat Christie (Enable): Our organisation represents all people with learning disabilities in Scotland. It is a member organisation, but we hope in our work to represent everybody, regardless of whether they are members of Enable. We are interested in all matters, particularly legal ones, that concern people with learning disabilities, whom we try to support and help in their daily lives.

The Convener: You say that yours is a member organisation. Are your members other voluntary groups or are they individuals?

Pat Christie: They are individuals.

The Convener: Can you give me an idea of how many members you have?

Norman Dunning (Enable): There are about 4,000 members in local branches and about 500 national members. Two thirds of the national members are people with learning disabilities.

The Convener: How does your structure operate? Do branches put forward ideas or views?

Pat Christie: Branches put forward ideas. We have branches throughout Scotland. We also have individual members, as you heard. In particular, we have a committee known as the advisory committee of Enable, which is made up entirely of people with learning disabilities. Our advice comes from them. We take matters such as the bill to the committee and take the committee members' views.

The Convener: Is it appropriate to call yours a grass-roots-up organisation, rather than a top-down organisation?

Pat Christie: Exactly.

Norman Dunning: We would like to think so.

Ms Wendy Alexander (Paisley North) (Lab): I want to talk about general criminal law and specific statutory offences. The Millan committee and the Scottish Executive both considered whether sex offences found in the general criminal law were sufficient to protect people who suffer from a mental disorder, but they concluded that specific statutory offences were necessary. Before we get into the detail of what we are discussing, we want to get on the record Enable's view about whether the judgment by Millan and the Scottish Executive that specific statutory offences are required is correct.

Norman Dunning: Yes, we have taken that view, and not without a great deal of thought and consideration. The organisation has been talking about the issue for about 18 months. On balance, we feel that there needs to be a statutory offence, not least because of what we believe to be considerable under-reporting of sexual offences against children and adults with learning disabilities. We feel that the issue needs to be highlighted. The law helps us to do that.

We are aware that the provisions under sections 106 and 107 of the Mental Health (Scotland) Act 1984 were little used, but we think that that was partly because they were little known. Moreover, they were archaic and rather gender specific, so they were not likely to be used. We support the recommendation for specific statutory offences, because that highlights the vulnerability of children and adults with learning disabilities and puts the matter beyond doubt.

Michael Matheson: I think that to some extent my questions may have been answered. Section 106 of the Mental Health (Scotland) Act 1984, as Norman Dunning said, and section 13 of the Criminal Law (Consolidation) (Scotland) Act 1995 contain provisions in respect of sexual acts against someone with a mental disorder. Are the provisions within the bill sufficient?

Pat Christie: Yes. We are comfortable with the new legislation. We feel that it will cover the various aspects about which we are concerned. We will be happy to publicise the bill, if you like, so that it is better known than the 1984 act was.

Norman Dunning: We are pleased that the new statutory offence will carry the same penalties as under the common law. A problem with section 106 of the 1984 act is that someone convicted under it receives a much lesser penalty. As I said, not many cases have been brought under section 106, but we were involved in at least one in which the defence attempted to plea-bargain and to accept a guilty plea for a charge under the section in exchange for the charge of rape being dropped. The bill would remove that possibility. It would make it clear that an offence against a person with a learning disability would be every bit as serious as, for instance, rape. We think that, on that matter, the Executive framed the bill in the right way.

Paul Martin (Glasgow Springburn) (Lab): Under section 213 of the bill, it will be an offence for an individual to have a sexual relationship with someone who is incapable of consenting to the act by reason of their learning disability. That will mean that a category of people with learning disabilities of a certain severity will not be able to engage in sexual relations. Is that acceptable?

Nicola Smith: We are pleased by the way in which section 213 is drafted, as it makes an issue of whether somebody is able to consent. Under previous legislation, it was essentially an offence to have a sexual relationship with any woman with a learning disability, regardless of their capacity to consent. The new offence appears to us to recognise that some people will have the capacity to consent to a sexual relationship. Enable supports the right of people who are able to consent to engage in sexual activity.

Norman Dunning: The matter caused a lot of discussion in our organisation, because we are concerned not to infringe the rights of adults with learning disabilities who can consent to engage in sexual relationships. We feel that section 213 is framed in just about the right way.

Paul Martin: You will have noted that, under the bill, the maximum penalty that can be imposed for the main offence under section 213 is life imprisonment. Are you satisfied with that proposal?

Nicola Smith: That recognises the seriousness of the offence. It brings the penalty into line with that for rape and other offences, particularly sexual offences against children. We are happy to see the increased sentence.

The Convener: I am mindful of a television programme that was broadcast not so long ago about two people with learning disabilities who were engaged in a relationship. Are there difficulties when both parties have learning disabilities? We have tended to think of the issue in terms of someone without a learning disability imposing their will on someone who has a learning disability, but what about the question of whether a relationship is consensual when both parties have learning disabilities? Will that be tricky?

Pat Christie: That is a good point. In our groups of people who have learning disabilities, there is a strong element of some people dominating others. That can happen in any circumstance. You might say that it is similar to what can happen among children—somebody is the big boss and other children kowtow to them. Those who supervise people will have a feeling for that. The bully-boys may be well known and looked out for. That situation is bound to happen; it happens with normal people. We are talking about trying to let people who have learning disabilities lead normal lives. The weaker person—

The Convener: I did not necessarily mean the weaker person. I just meant someone with a learning disability engaging in something and misunderstanding or misreading consent.

14:00

Norman Dunning: We recognise that the law is a blunt instrument in personal relationships. We will not get the subtlety that we want through legislation. Enable is concerned about the general lack of education on relationships—particularly sexual relationships—for children and adults with learning disabilities. That is where the issue must be tackled. Part of the vulnerability comes from people not having the range of experiences or formal education that others have when they are growing up. Addressing that issue is the way to tackle the problem so that people engage in relationships that they understand and, for example, take the necessary family planning precautions that they would want to take as responsible citizens like anybody else.

Maureen Macmillan (Highlands and Islands) (Lab): How can you define whether somebody is able to give consent? Is the decision an objective or subjective one?

Nicola Smith: It is incredibly difficult to judge whether someone is able to give consent—or, in some circumstances, whether they have given consent. The bill goes some way towards addressing that, as section 213(4) gives some explanation of what "incapable of consenting" means. The issue is difficult. Perhaps it cannot be addressed through the law. It is difficult even to think of a practical test that could be applied to everyone, but I suppose that there must be some assessment of the person's level of understanding of the sexual act and its consequences.

Maureen Macmillan: Are you happy that the bill covers ability to consent as best it can?

Nicola Smith: It defines it as much as it can be defined. Every case will be different. It is difficult to set down in writing a test that someone could pass or fail.

The Convener: Your written submission mentions improving access to sex education programmes for people with learning disabilities. Is any funding provided for that?

Norman Dunning: We are running a modest programme with the aid of European money from the Daphne programme, which, I regret to say, comes to an end in December—we would like it to be extended. The nature of our programme is to train adults with learning disabilities so that they can offer the training to others—a sort of peer education. We think that that is the best way into the matter. With the best will in the world, it is

always difficult to put ideas across. Most people learn better from their peer group—those who share the same sort of experiences and understanding. That is our approach, but we would like a much more comprehensive approach. For instance, Enable is not touching the issue in schools. There is a big need to provide sex education to youngsters with learning disabilities in schools.

Maureen Macmillan: Section 213 creates a secondary offence of

"aiding, abetting, counselling, procuring or inciting"

the commission of the main offence. Concern was expressed to the Millan committee that, under the version of that offence in section 106 of the Mental Health (Scotland) Act 1984, care staff cannot offer people with learning disabilities sex education without theoretically falling foul of the offence. Are you content that that will not be the case with the new version of the offence in section 213?

Norman Dunning: Even though that was a theoretical danger with section 106 of the 1984 act, staff were never actually prevented from offering sex education. Some people had the concern that you mention, but my recollection is that the Lord Advocate of the time gave a direction that clarified matters and said that sex education could be offered. The legislation has not stopped us in the past and we believe that the wording of the bill is okay.

Maureen Macmillan: Do you want to say anything else about the provision of sex education?

Norman Dunning: I think that we have said all that we want to say. In a sense, the issue is more important than the narrow statute.

Maureen Macmillan: You said that you hoped that sex education could be dealt with in schools.

Norman Dunning: Very much so, but there should also be sex education for adults.

The Convener: Section 215 creates the offence of sexual abuse by formal carers and care staff. The offence will replace an existing offence under section 107 of the Mental Health (Scotland) Act 1984. Is the new offence an improvement on the existing offence? Are there any difficulties with it?

Norman Dunning: The provisions are an improvement, as they make it clear that they apply to anybody in that professional caring capacity. The 1984 act seemed much narrower.

Nicola Smith: That aside, the bill offers a fairly similar level of protection to what there was previously. One of our concerns about section 215 is the definition of "sexual act" in subsection (6). We think that the definition is a little unclear. We are not entirely sure what type of activity subsection (6)(a) refers to.

The Convener: Does the bill contain a definition of formal carer? Who would formal carers be?

Norman Dunning: I cannot find a reference to them, but I remember reading that the term refers to those who are paid to offer the service.

The Convener: Could that be a family member who gets money from the state for caring?

Pat Christie: We are aware that a lot of abuse can happen within the family. The matter is not mentioned, so I think that we must take it that a formal carer can be the family member who is the primary carer.

The Convener: You referred to professional carers, who are different from formal carers. I would expect one to be from an agency, for example.

Norman Dunning: I used the word "professional" in respect of someone who is paid to offer care.

The Convener: I see. So someone who is paid—even a family member—would fall within the remit of the section.

Norman Dunning: We must take that to be the case, particularly with the advent of direct payments through more informal arrangements to pay people to care. We would support such a definition.

The Convener: Section 217 creates the offence of ill-treatment and wilful neglect of a person suffering from a mental disorder. Are you satisfied with the provision as it is drafted?

Pat Christie: We are. Obviously, we are talking about a significant part of the bill, but section 217(2)(b) says it all. Ill-treatment and wilful neglect cover many things and we are comfortable with that.

Donald Gorrie (Central Scotland) (LD): I apologise for being late. Are you satisfied with the definitions of mental disorder? I ask as I have just read a play by W Somerset Maugham in which a chap is going to be locked up because he tries to apply practically what is in the New Testament. There are various views of mental disorder. Are you happy with the definitions in the bill?

Norman Dunning: Fundamentally, we are not, as we would not wish learning disability to be covered by a mental health act at all. We would prefer learning disability to be dealt with separately within the law; we would prefer the special protections that are given to people with learning disabilities in the bill to be dealt with differently. At the moment, the approach is necessary, as there is no alternative measure, but for a long time there has been huge confusion in the public mind in respect of people who have a learning disability and people who have a mental illness. The fact

that learning disability is covered by the bill and defined as a mental disorder perpetuates the confusion.

Donald Gorrie: Do you recommend that we rewrite the bill in the way that you have just suggested or that we go along with it and urge the Executive to introduce a different bill at another time?

Norman Dunning: We ask you to do the latter, Mr Gorrie. We noted that the Millan committee suggested that a learning disability bill should be considered. We will ask the Executive to do that, but, given the complexity of the task, such a bill would take at least two or three years to prepare. In the meantime, we would like the Mental Health (Scotland) Bill to offer protection and then, if necessary, to repeal the definition of learning disability as a mental disorder in a new act in future.

The Convener: I return to the subject of formal carers. Section 217(1)(d) refers to a person who

"is an individual who, otherwise than—

(i) by virtue of a contract of employment or other contract with any person; or

(ii) as a volunteer for a voluntary organisation,

provides care or treatment."

A volunteer could fall foul of that because they might not be paid. The definition encompasses a range of people.

Pat Christie: We noted that. We do not want to put volunteers off volunteering, but we must have that protection nevertheless.

The Convener: Absolutely.

Norman Dunning: Mrs Christie is right. We have many volunteers in our organisation and when we discussed the matter with them, they felt that, in some ways, they had closer and more intimate contact with clients than paid carers did. For the protection of the individual, volunteers have to be included.

The Convener: How does the bill interact with the Regulation of Care (Scotland) Act 2001? Would a register of approved carers mean that your volunteers would be screened?

Norman Dunning: As far as I am aware, such a register would not directly come within the meaning of the 2001 act, although some volunteers already undergo criminal screening. The Executive has made it easier for that to take place by setting up Disclosure Scotland. In addition, volunteers can be screened without fee.

The Convener: Perhaps I should not have gone down this track, but the notes on the bill say:

"The offence does not apply to informal carers. It applies to persons providing certain care services within the meaning of the Regulation of Care (Scotland) Act 2001, including care homes and support services."

The definition lurks in the notes. Perhaps we should consider the definition further to find out who is covered.

Norman Dunning: I do not think that we are helping you much at the moment.

The Convener: I am not helping myself either, but as I have opened the subject, perhaps we should be clear about it.

Norman Dunning: In a general sense, we believe that the protection of the bill should apply to relationships that exist between anybody who acts in a caring capacity and the individual, whether the carer is a volunteer or paid. I realise that we are getting confused about definitions.

The Convener: According to the explanatory notes, the offence does not apply to informal carers. I bring that to your attention.

Maureen Macmillan: The bill refers to people in a position of trust who will not abuse that trust, even with consent.

Norman Dunning: Yes, that is the issue. Thank you.

The Convener: Do members want to raise any other issues with the panel? Does the panel want to draw to our attention anything that we have not asked about?

Norman Dunning: No, not in part 17.

The Convener: As the secondary committee, we are concerned only about part 17, which deals with offences. Have you had the chance to address your other concerns with the lead committee—the Health and Community Care Committee?

Norman Dunning: No, not yet, but we will do so.

The Convener: Therefore, you do not need us to give you that opportunity.

We have no further questions. Thank you.

14:15

I welcome Alastair Brown, a senior procurator fiscal depute, and Amber Galbraith, a deputy in the policy group at the Crown Office and Procurator Fiscal Service.

Section 92 would create two new orders that procurators fiscal could apply for during a trial of accused persons who appear to be suffering from a mental disorder: the assessment order and the treatment order, which would replace orders that are available under the Criminal Procedure (Scotland) Act 1995. Would the switch to those

new orders present any difficulties for you in practice?

Dr Alastair Brown (Crown Office and Procurator Fiscal Service): We do not expect that to happen. The orders put more formally and clearly what ought to be happening. However, under section 52(1) of the 1995 act, which stays in force, the prosecutor will have a duty to bring before the court evidence as to the mental condition of a person who appears to be suffering from a mental disorder. We will have a different regime, but the impact on our work will be broadly neutral. With regard to resources, we hope that the change will make things easier for the courts by breaking the process down a little.

The Convener: From your words I glean that the change will be of assistance to you by consolidating the present position and making the procurator fiscal's role more comprehensively understandable.

Maureen Macmillan: In relation to protecting people who suffer from a mental disorder from sexual abuse, one of the issues that the Millan committee and the Scottish Executive had to consider was whether specific statutory offences were necessary or whether protection could be provided by the general criminal law. Has the Crown Office encountered any difficulties in bringing prosecutions under the general criminal law where the alleged victim was suffering from a mental disorder?

Dr Brown: There are difficulties with such cases, whether under common or statute law. Those difficulties have a lot less to do with the content of the law than with the problems that are inherent in sexual offences, which tend to happen in private. The situation is made more difficult if the victim has difficulty appreciating that they have been abused, understanding what to do about it or communicating what happened. We have had difficulties, but not with the content of the law.

Maureen Macmillan: How do you judge the issue of consent in a case that involves victims such as those whom you described?

Dr Brown: I listened to the previous witnesses in the hope of getting an answer to that question. There is an indication of a definition somewhere in the provisions but it does not tell us much at all.

The Convener: Is that in section 213, which deals with non-consensual sexual acts?

Dr Brown: Yes. Consent is always a difficult matter. Although it sounds as if I am trying to avoid the question, consent should be considered on the facts and circumstances of a particular case. Indeed, that has to be done in any sexual offence. The committee will be aware of Lord Advocate's reference no 1 of 2001, in which—

The Convener: Please tell us about that case. It does not leap into my mind.

Dr Brown: The committee might recall that, a couple of years ago, there was an acquittal in a rape prosecution on the basis that the Crown had not proved force. The Lord Advocate referred that point of law to the High Court, which reformulated the definition of rape as intercourse that is obtained without consent. The focus now rests on consent or its absence instead of on force, which becomes a means of proving an absence of consent. That goes right through the matter.

My response might be a little circular. In its decision, the High Court said that, where a victim is incapable of giving consent because of mental disability, an absence of consent will be presumed, as happens if the victim is a child under the age of 12. As a result, although there is a presumption at one extreme, it still depends on an inability to give consent. That brings us back to the initial question, which I have not answered.

The Convener: I want to pursue the matter of consent, because I asked about the difficulties in a situation that involves two adults with learning difficulties. The problem with section 213 is that some people who could not be said to have the legal capacity to consent to sexual relationships nevertheless enjoy sexual activity that is not exploitative. Will such a situation present difficulties for prosecutors?

Dr Brown: Your example is based on a potential accused who has a mental disorder in the broad sense that is used in the bill. In such a case, one would always be a bit slow to prosecute, because surely there would be a more constructive way of dealing with the matter. Of course, that would depend on what has been done and whether any safety issue is involved. We would also seek and be guided by clear expert guidance from witnesses who are professionals in the field about the current state of knowledge concerning the question of what is and is not reasonable.

The Convener: Is it at the Crown's discretion to pursue the matter in that manner either in the public interest or in the interests of the alleged victim?

Dr Brown: That is right. There is a question whether the elements of the offence have been made out. In some cases, it would be difficult to show that the accused person had the necessary intent in order to constitute the crime. In that situation, there would be an insufficiency of evidence. As that would assume a mental disorder that was towards the more serious end, one would need a psychiatrist to explore that issue before one could be satisfied that the mens rea was made out and that the issue of the Crown's discretion came into it. Once we had something

that amounted to mens rea, we could get into the issue of discretion, and at that point we would want to have the best possible expert guidance on what is known about the whole situation. I do not necessarily mean what is known about the facts, but what is known about the sort of activity that involves persons with the particular disabilities that the accused and the victim—if that is the appropriate word—had in a particular case.

I think that all I am doing is proving that these issues are very difficult.

The Convener: I understand that the difficult issues will test the legislation. Is the Crown's decision final? If the Crown exercised its discretion and decided not to prosecute for a whole range of reasons, is the option of private prosecution still available?

Dr Brown: In theory, a private prosecution would be possible. However, there were only three such prosecutions in the whole of the 20th century.

The Convener: Otherwise, the Crown Office's discretion is final.

Dr Brown: The Lord Advocate's discretion is final.

Donald Gorrie: I hope that this question is not crass. Is not it usually clear from the body language of the person who is being interfered with at what point he or she is not enjoying what is going on? Is the mental problem such an issue?

Dr Brown: I do not think that I can answer that with regard to mentally disordered victims in particular, but it is commonplace in ordinary rape prosecutions for it to be said that it was not clear from the victim's body language whether she was enjoying and consenting to what went on. The issue goes before juries every week and it can go either way.

I do not know whether that is a terribly clear guide. Establishing in evidence what the body language was might be difficult.

Donald Gorrie: Is one of the problems the presumed difficulty of a person with a mental disorder being a credible witness and being able to explain what went on? Is that an issue?

Dr Brown: It is an issue, but it is a separate one. Once there is evidence, whether from the victim or from others, that seems to establish that the victim was, indeed, a victim and did not consent, the court has to be persuaded beyond reasonable doubt. Although there is no question of a person who suffers from a mental disorder being automatically excluded from competence as a witness, an obvious point for the defence to make is about the reliability of what the witness says. In some cases, that point might be criticised as being based on prejudice rather than knowledge, but it will be made.

Maureen Macmillan: When we were talking about the difficulties of bringing prosecutions under general criminal law, you said that the issue was communication, whether the offence was reported and whether the victim understood what had happened.

I want to compare the current law with what the bill proposes. The main sex offence created under section 213 will replace existing statutory offences under section 106 of the Mental Health (Scotland) Act 1984 and section 13 of the Criminal Law (Consolidation) (Scotland) Act 1995. The Millan committee received evidence to suggest that the existing provisions are not used frequently. Can you tell us why? Is it for the same reasons, to do with communication and understanding of what has happened, or are there other reasons why the existing provisions are not often used?

Dr Brown: I want to be a little bit cautious when answering this question. I got notice of the question on Friday and I have tried to get hard information, but I have not yet succeeded.

It looks as though very few cases are brought to court. I have heard mention of about six per year, which looks as though it might be the figure for convictions, although I cannot confirm that from our internal records.

My experience, and that of colleagues with whom I have discussed the issue, is that few offences are reported. I have no detailed knowledge of why they are not reported. I would not be surprised if it was to do with the factors that I mentioned earlier—awareness of the fact that one has suffered something that could and should be reported; when the offence is reported; the availability of additional evidence, because we require corroboration; or the fact that we do not have sufficient evidence to get started. I would not be surprised to learn that that is what is happening, but I am not asserting that it does happen.

Maureen Macmillan: Will that change? Will the proposed provisions make the evidence situation any easier?

Dr Brown: I think not. I have difficulty in seeing what legislation could do to make such cases easier, unless one was to take radical steps in relation to the law of evidence and put in place a special regime for this sort of offence. I would not urge the committee to do that.

Maureen Macmillan: As the Enable witnesses said, it might be a matter of education, which would result in more victims coming forward to report what has happened to them. That would provide more insight.

Dr Brown: To refer to the analogy with children—in so far as that is reasonable—I note

that ChildLine is saying that children are now reporting matters much more quickly than they used to. That seems to be because of education about what is possible. More education might achieve a higher level of reporting. Of course, we are assuming that more offences are being committed than are being reported. That seems to be a reasonable assumption, although we do not know it to be true.

14:30

Ms Alexander: I have a more general point to make. Part 17 of the bill creates four new statutory offences, three of which are designed to protect from abuse persons suffering from a mental disorder. The other is intended to ensure that authorised individuals such as social workers can carry out their functions under the bill.

The Crown Office and other bodies will have to make judgments on such difficult matters. Are the relevant provisions drafted as tightly as you think they can be to enable prosecutions to be brought in respect of the four proposed new statutory offences, or would you like there to be a change in their drafting?

Dr Brown: Throughout the progress of a bill, the Crown Office policy group has conversations with the policy-making department about how things might be altered and improved. Things that happen in committee can affect that. At present, we are as content as we can be with the drafting. I am not urging anything by way of alteration at this stage.

Paul Martin: On the main offence under section 213, which concerns the sexual abuse of a person suffering from a mental disorder, the Millan report stated:

"There should also be provision to ensure that couples with a pre-existing relationship are not inappropriately brought within the scope of the offence because one of them develops a mental disorder."

Such a provision has not been included. Does that mean that the prosecutor will take on an even bigger role in deciding whether a prosecution brought under section 213 is in the public interest?

Dr Brown: There will be a large role for prosecutors, but I do not know that there will be an even bigger one. We must remember that it is already the law that a husband who has intercourse with his wife without her consent is committing the offence of rape at common law, whether or not she has any kind of mental difficulty. There will be an issue of discretion or judgment for the prosecutor.

In some ways, the matter is difficult. The development of the law of rape in relation to so-called marital rape—I say "so-called" to distinguish it from other categories of rape—has been such that the old authorities, which said that, by consenting to marriage, the woman surrenders her person in that regard to her husband for all time, are no longer the law; she now has the right to consent or not consent.

In the Lord Advocate's reference, which I have mentioned, the Lord Justice General said that the law of rape should now protect the woman's right to choose to have or not have sex with whomever she chooses, whenever and wherever she chooses. By extension, that would apply in general to the law covering sexual offences. One has to consider that development. The situation depends very much on the choice, and so on the consent, of the woman.

In this case, we are dealing with the question whether the woman has the capacity to exercise such a choice. It seems to make good sense that, in a relationship that already exists, one should not treat the onset of a mental disorder as ending the sexual aspect of the relationship. At the same time, the relationship might have been abusive before the mental disorder arose, and that abusive conduct might continue. I do not understand how one can legislate for that. If the committee could think of a way, that would be wonderful, but I think that it comes down to discretion.

Paul Martin: So discretion should remain. You would rather that it was available to you.

Dr Brown: I think so, yes, primarily because of the risk that any defence would catch a relationship that was abusive but which only came to light after the onset of a mental disorder.

The Convener: The evidential problems seem to grow, do they not?

Dr Brown: Yes.

Michael Matheson: Recommendation 21.9 of the Millan committee report stated:

"The Crown Office should issue guidance on its policy in relation to sexual activity between adults with mental disorders, and sex education for people with learning disabilities."

It also noted that the last time that the Crown Office issued such guidance was back in 1985. Is there any plan to renew the guidance?

Dr Brown: No, there is not, perhaps because of what I am about to say. I was a bit startled to read that we should give guidance on sex education, because I do not think that that is our role. In the context, I think that the suggestion relates to the issue of inciting or encouraging. The Millan committee refers to correspondence attributed to the Lord Advocate in 1985, in which he said that

"the Crown would have regard to the purpose of the section, namely to protect women from abuse, in deciding whether to prosecute in a particular case. It would also take

account of the developments and advances intended to assist people with learning disabilities to live in as normal a way as possible."

I do not think that we could go beyond that, with the exception of wishing to substitute the word "people" for "women", so that the purpose of the section is to protect everyone from abuse. We have to examine the legislation's purpose and the undoubted right of those with disabilities to a private life, which includes a sex life, and we must form a judgment. I do not believe that going into more detail than that—supplemented by the prosecution code—would be of any great assistance.

Earlier witnesses described inciting or encouraging as a theoretical risk. We would want to know what those who work in sex education for people who have such difficulties regard as best or acceptable practice. If what was done appeared to be broadly consistent with that, I doubt whether we would prosecute. If one had something that was unregulated, undocumented and did not appear to be consistent with professional best practice, we would consider closely the prospect of prosecuting. I do not know that we can do any better than that.

The Convener: I wonder to whom such guidance would be issued. Would it be to formal care organisations?

Dr Brown: The Millan committee suggested it. It looks as though the Lord Advocate wrote a letter like one that he would write to this committee to ask a question and put it into the public domain. Guidance will certainly be issued to procurators fiscal about the Mental Health (Scotland) Bill, assuming that it becomes an act, because we do that for every piece of legislation. However, we will not offer guidance to the general public or carers about sex education. I do not think that that is our business.

The Convener: I can see that. Do you think that including section 213 might have a preventive role in prospective or possible sexual or physical abuse of people with disabilities? What is your view, given your experience in prosecution?

Dr Brown: One hopes that the presence of something in an act of the Scottish Parliament or of the Westminster Parliament acts as a disincentive to the conduct described. However, as a prosecutor, I see only the cases in which that has not worked.

The Convener: But in your experience, when legislation has introduced a disincentive—or, as I put it, a preventive measure—have you seen a change take place? The evidential problems would seem to be enormous if someone came to you with a case. The whole committee appreciates that.

Dr Brown: It is difficult to comment with any certainty, because as awareness is increased by the process of legislation one finds an increase in reporting, and those may well balance each other out. I have not done work on it, so I cannot comment.

The Convener: Are there any issues that we have not touched on that you would like to address?

Dr Brown: No.

The Convener: Thank you for coming.

Petitions

Road Traffic Deaths (PE29)

Dangerous Driving Deaths (PE55, PE299, PE331)

Road Accidents (Police 999 Calls) (PE111)

The Convener: Racing on, we move to item 5, on petitions on dangerous driving. Petitions PE29, PE55, PE299, PE331 and PE111 have returned to us. I refer members to paper J1/02/37/4, on dangerous driving and the law, in which members will see a response from the Minister for Justice to my letter of 6 September. That letter was written on the committee's behalf and was not attached to the paper, but members now have it, as it is useful to see what the minister was responding to. We also have correspondence from Mrs Dekker of Scotland's Campaign against Irresponsible Drivers, which I will refer to as SCID.

I am interested to hear members' views, in particular in the light of the minister's response. We have a list of options, which we do not have to stick to, but I need guidance on the next phase of the duel that seems to be developing with the minister so that we can get somewhere.

First, in my letter I asked for concrete time scales. We have not got them, although there is an undertaking to tell us about the next meeting of the steering committee. We have been told a number of times that the committee has met, but I would like to know the dates and some of the specifics. I asked who the members of the steering group would be. I meant which names were in the frame, not people's positions. The third paragraph of the letter dated 3 October states that the group includes representatives from

"the Scottish Executive's Justice Department and Crown Office"

and

"The author of the TRL report".

I wanted to know who the parties were. I do not know whether members thought that that was the information that we were asking for. I invite comments.

Michael Matheson: I feel as though we are not getting anywhere with this issue. I confess that I do not find the Minister for Justice's response entirely helpful, because it does not provide the concrete time scale that we requested in writing. I get the distinct impression from his letter that the minister is leaving the Department for Transport to lead on the matter. I think that he says that it is leading on the issue. I hope that I do not quote him wrongly.

The Convener: You are right; that is in the second paragraph of the letter.

Michael Matheson: I see no reason why we cannot address the specific issues for which the minister is responsible. There are a number of options that we could pursue in relation to the specific responsibilities of the Crown Office and Procurator Fiscal Service and the Minister for Justice. We should pursue them on their own.

The Convener: I will take more views before we make a decision. Does anybody else want to express views on the matter? It just feels like we are—

Maureen Macmillan: Swimming through treacle.

The Convener: We could all come up with metaphors, but the problem is how to get the minister to focus on what we want. There is no better person to ask than Wendy Alexander. Wendy, tell us how to do that.

14:45

Ms Alexander: The difficulty is how to respond proportionally when we have been dismissed. I congratulate the clerks on their paper. All the options at paragraph 11 should be pursued. They are proportionate but terrier-like and reflect the kind of response that we are trying to generate. If we write to Jim Wallace requesting everything in almost exactly the suggested form, an official will be obliged to send him a paper that says, "The committee has not let the matter go. This is what they are asking." All the suggested actions try to stay within due process but advance the timetable. Pursuing all the options at paragraph 11 simultaneously in writing to the minister would get the right balance between proportionality on our side and putting the matter further up the ministerial agenda.

The Convener: Bear in mind that the petitions started out two or three years ago—I am trying to recall the exact date on which they first came before the committee. I am advised that it was in 2000. It has been a long haul. We must get the minister to accelerate matters.

Ms Alexander: The attractive aspect of the suggested actions is that they try to get all the Scottish data on the table. I have some sympathy with Jim Wallace: drivers do not stop speeding at Carlisle. Such transport issues, particularly transport safety issues, are quite difficult. The same problem arises with regard to rail. The issues are the same as for the ban on tobacco advertising. There may or may not be a dramatic change in policy, but it is crazy to pre-empt that change if we know that Whitehall has already embarked on the exercise and has put huge resources into considering the matters.

On the other hand, we want to ensure that the pressure from Scotland is to accelerate what is being done in Whitehall. The suggested actions at paragraph 11 strike the balance. They do not strike out and try to solve the problem in isolation, which is not possible; they do everything that we can in Scotland to get the data on the table and get Jim Wallace's officials to put pressure on for movement on the matter elsewhere.

Paul Martin: As the convener pointed out, we have been considering the matter for some time—since 2000. We always receive a carefully framed response. Perhaps "framed" is not the best word to use—we receive a carefully collated response to our requests. We should ask the minister to appear before us to discuss the issues in detail. I do not know whether we have ever done that for a petition. I do not think that we have, but we have had no other petitions that have continued for such a long time.

I do not know whether we are able to meet the minister or whether the convener is able to do so, but the correspondence will only continue if we do not have a face-to-face discussion with the minister to discuss the issues in detail. I appreciate the time constraints that are on us, but we are spending as much time chasing up the correspondence as we would spend if we had a meeting to deal once and for all with the issues that are in the correspondence. If we had that, we would not have to get involved in the exchange of correspondence.

Donald Gorrie: I felt that Wendy Alexander hit the button correctly. We should certainly pursue the four bullet points on suggested action under paragraph 11 of the clerk's note. Unlike with some of the other issues that we pursue, there is a problem in that the issue is a United Kingdom issue, and Whitehall might not be all that receptive. If we can, we should somehow send a message—explicit or implicit—to the minister to say that we need progress on the Scottish front and we also need real pressure to be applied to those down in London.

On Paul Martin's point, the argument is the same as the Bush and the United Nations argument: at what point does reasonable negotiation cease and do we put the boot in? I am inclined to give the Executive one more chance. We should indicate—if we can do it without blackmail—that it is the last chance and that, because the committee is taking the matter seriously, the minister must do something.

Maureen Macmillan: Is there anything that we could do that does not depend on Whitehall?

The Convener: There is the issue of prosecutions in the High Court.

Maureen Macmillan: I would like that to be advanced. I read somewhere that it has happened only once.

The Convener: We have a letter from the Lord Advocate on the subject.

Michael Matheson: Three of the four bullet points in the committee's briefing document deal with issues that the minister and the Lord Advocate could deal with.

The Convener: Obviously, the issue of road traffic legislation is reserved, but the policy regarding prosecution and whether such cases are dealt with in the sheriff court or the High Court is a matter for the Scottish Parliament. Matters relating to a separate offence of committing serious injury by dangerous driving would be reserved, but we could formulate a view on them.

I am attracted to the idea of saying to the minister that we seek answers to our questions by a certain date and that, to prevent a paper-chase from developing further, we will invite him to one of our meetings to discuss the matter.

Maureen Macmillan: What about the Lord Advocate?

The Convener: We could invite the minister and the Lord Advocate. What time scale should we set?

Michael Matheson: We would want to have any responses before the Christmas recess.

Ms Alexander: To allow us to use the evidence-taking session most effectively, we should ask the minister and the Lord Advocate to reply to us by the Christmas recess so that the clerks can get a little bit of expert advice for us on our questions and we can invite the minister and the Lord Advocate to come to the committee in early January.

Michael Matheson: When we write to the minister and the Lord Advocate, we should let them know that we intend to invite them to the committee.

The Convener: We will write to say that we want a comprehensive response by the Christmas recess on the basis that we will call the minister and the Lord Advocate before us at the earliest possible meeting after that. We will also copy all of the correspondence to Mr and Mrs Dekker, who are here today. They have been quite correct to pursue the matter and I hope that they know that we take the issue extremely seriously and are pursuing it with the best of our vigour.

Donald Gorrie: Are we pursuing Maureen Macmillan's point and letting the Lord Advocate know that we are not impressed by his argument for not dealing with the offences in the High Court?

The Convener: Yes. We will produce separate letters for the Lord Advocate and for the minister and send each of them copies of the letter to the other one.

Are we content with what has been outlined?

Members *indicated agreement.*

The Convener: I will bring members up to date with progress at the next meeting.

14:53

Meeting suspended until 15:00 and thereafter continued in private until 16:23.

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