JUSTICE 1 COMMITTEE

Wednesday 8 December 2004

Session 2

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JUSTICE 1 COMMITTEE
38th Meeting 2004, Session 2

CONVENER

*Pauline McNeill (Glasgow Kelvin) (Lab)

DEPUTY CONVENER

*Stewart Stevenson (Banff and Buchan) (SNP)

COMMITTEE MEMBERS

*Marlyn Glen (North East Scotland) (Lab)
Mr Bruce McFee (West of Scotland) (SNP)
*Margaret Mitchell (Central Scotland) (Con)
*Mrs Mary Mulligan (Linlithgow) (Lab)
*Margaret Smith (Edinburgh West) (LD)

*attended

COMMITTEE SUBSTITUTES

Brian Adam (Aberdeen North) (SNP)
Helen Eadie (Dunfermline East) (Lab)
Miss Annabel Goldie (West of Scotland) (Con)
Mike Pringle (Edinburgh South) (LD)

THE FOLLOWING GAVE EVIDENCE:

Lindsey Anderson (Crown Office and Procurator Fiscal Service)
Hugh Dignon (Scottish Executive Justice Department)
Paul Johnston (Scottish Executive Legal and Parliamentary Services)

CLERK TO THE COMMITTEE

Alison Walker

SENIOR ASSISTANT CLERK

Douglas Wands

ASSISTANT CLERK

Douglas Thornton

LOCATION

Committee Room 4

Scottish Parliament

Justice 1 Committee

Wednesday 8 December 2004

[THE CONVENER *opened the meeting at 11:18*]

Protection of Children and Prevention of Sexual Offences (Scotland) Bill: Stage 1

The Convener (Pauline McNeill): I welcome everyone to the 38th meeting in 2004 of the Justice 1 Committee. I apologise for the late start—our previous private session ran on and we had then briefly to discuss lines of questioning.

Our only item of business is stage 1 consideration of the Protection of Children and Prevention of Sexual Offences (Scotland) Bill. For our first discussion of the bill, I welcome to the meeting the bill team, which comprises Hugh Dignon, the bill team leader; Kirsten Davidson, the bill team member from the Scottish Executive Justice Department; Paul Johnston, the senior principal legal officer from the office of the solicitor to the Scottish Executive; and Lindsey Anderson, principal procurator fiscal depute of the policy group of the Crown Office and Procurator Fiscal Service. We are also joined by Sarah Keenan and Susan Robb.

As I said, this is the committee's first opportunity to ask about the bill's content. Hugh, do you want to start by giving an overview of the bill or are you happy to go to questions?

Hugh Dignon (Scottish Executive Justice Department): I am happy to go to questions.

Stewart Stevenson (Banff and Buchan) (SNP): I want to begin with the age of consent in other countries. In particular, I want to put it on record that, according to a House of Commons library document, the age of consent in Austria is 14; in Denmark, Finland and France it is 15; in Italy it is generally 14; in Spain it is 12; and in Sweden it is 15. One slight anomaly is Northern Ireland, where the age of consent is 17.

Is it the policy intention behind the bill that a resident of, for example, Spain who visits Scotland for seasonal work and who communicates with someone who is over the age of consent in Spain, which is 12, but under the age of consent in this country, which is 16, will be committing an offence?

Hugh Dignon: The grooming offence that is set out in the bill contains three elements: communication with a child; travelling to or meeting a child; and intending to commit a relevant offence. If all those elements are present, an offence would be committed in Scots law irrespective of whether the offence that was intended was not an offence in another country. The example would constitute an offence if it involved communication, travelling and the intention to commit an offence in Scots law.

However, we also have to take into account issues such as whether prosecution of an offence would be in the public interest. We would expect the prosecution service to consider all the circumstances and to take a view on whether it was indeed in the public interest to prosecute.

Stewart Stevenson: Without making a binding decision, is the prosecution service likely to differentiate between the continuance of a relationship that existed before a Spanish itinerant worker came to Scotland, and the establishment of a relationship while he was in Scotland through making initial communication with someone back in the home country?

Hugh Dignon: I do not think that it would be appropriate to set out now how the prosecution service would view any particular set of circumstances. I imagine that it would take into account factors such as the pre-existence of a relationship, but it would not be right to say which circumstances would or would not result in a prosecution.

It might be helpful if my colleague Lindsey Anderson was to add to my comments.

Lindsey Anderson (Crown Office and Procurator Fiscal Service): We do not want to be overly prescriptive about our policy at this stage. Our prosecution code says that even if we have sufficient admissible, credible and reliable evidence we have to consider whether it will be in the public interest to prosecute. The code also sets out some of the factors that we would have to consider and weigh up in that respect, such as the offender's age and background, their relationship to the victim and the overall circumstances of the offence. However, as I said, I do not want to be overly prescriptive.

Stewart Stevenson: I want to complete the loop on the question of age of consent by considering the case of Northern Ireland, where the age of consent outwith marriage is 17, and the case of Portugal, where it can be 18. In those countries, it would be an offence for sexual activity to take place between people under those ages. Would the bill cover an act that was not an offence under Scots law but was an offence in those countries?

Hugh Dignon: No. The relevant offence would need to be an offence under Scots law.

Stewart Stevenson: Finally, on an issue relating to grooming but not to age, would

communication have to be initiated by the adult for the offence to exist? If the communication was initiated by the child, would that be sufficient for the adult to escape the reach of the bill?

Hugh Dignon: I think that communication could be initiated by either party. The important fact about communication is that there would need to be more than one communication, as well as the other elements. There is no specification in the bill as to who would initiate communication.

Stewart Stevenson: Is it not the essence of communication that it must include active participation by both parties? To give an example of a simplex communication, if a child were to send an e-mail or a text message to an adult and the adult did not respond, would that fall within the bill's definition of communication?

Hugh Dignon: I find it hard to see how that would fall within a definition of a person aged 18 or over having communicated with a person under 16, which implies some sort of active communication on the part of the adult.

Margaret Smith (Edinburgh West) (LD): On what it would be in the public interest to prosecute, would it be a defence to a charge under section 1 of the bill that the accused was lawfully married to the child at the time of the alleged offence, or reasonably believed that they were? I am thinking about people who get married in the jurisdiction of another country, where such a marriage was legal.

Hugh Dignon: It would not be a statutory defence, as such, but I am sure that it is the sort of circumstance that the prosecution would take into account in deciding whether it was in the public interest to prosecute.

Margaret Smith: Might there be an argument for including something about such a circumstance in the bill?

Hugh Dignon: Clearly, one could do that. We would be concerned about situations in which people were exploiting a low or non-existent age of consent in order to have sexual relations with children or young people and were possibly even marrying them for the purposes of doing so. The prosecution would want to examine the individual circumstances of each case to determine whether that was the sort of activity that was taking place.

Margaret Smith: Are you thinking about a situation in which a family in another country has—for economic or other reasons—in effect sold a child into marriage, possibly against the child's will? Is that the sort of situation that you are trying to cover?

Hugh Dignon: That is exactly correct.

Margaret Smith: In situations involving consensual marriage, would you leave it to the prosecutor's discretion to decide what was in the public interest?

Hugh Dignon: Yes. The bottom line is that we do not think that it would be appropriate for prosecutions in this country to be constrained by the fact that there is different law—or, indeed, no law—in another jurisdiction.

Margaret Smith: Have you thought about extending the legislation to cover vulnerable adults?

11:30

Hugh Dignon: That would be a policy alternative. We have identified difficulties with doing that and, for that reason, we have constructed the offence so that it will apply only to children. The sort of difficulties that I have in mind relate to the fact that we would need to construct a relevant offence, which would mean that the person who was undertaking the grooming would have to have intended to commit an offence of having sexual relations with a vulnerable adult. We are aware that some offences already cover having sexual relations with people who are unable to give informed consent.

However, vulnerability is a wide condition and there would certainly be room for argument in a court about what sort of person constitutes a vulnerable adult. The other aspect is that there might be difficulties in trying to prove that someone who undertakes grooming was aware that the person whom they sought to groom was a vulnerable adult or that they should have known that that person was a vulnerable adult. For those reasons, we felt that it was better to stick to the protection of children.

Margaret Mitchell (Central Scotland) (Con): Given that a child is deemed to be someone under 16 and the age of consent is 16, why has the alleged offender's age been set at 18 years and over in the bill? That means that the bill would not cover a 16-year-old who was potentially grooming a seven-year-old.

Hugh Dignon: That is correct. The bill seeks to strike at behaviour by adults who seek to exploit the trust and win the confidence of children with the purpose of committing sexual offences. Experience suggests that that is the kind of grooming behaviour that has taken place, so that is how the offence is constructed. At present, there are all sorts of circumstances in which we want to ensure that the grooming offence does not apply; for example, in the case of a 16-year-old boy and his 15-year-old girlfriend.

Margaret Mitchell: If we are looking at the offence in terms of reasonable behaviour—I think that we are, to a large extent—could the

circumstances that I described be considered? I ask because it would not be reasonable behaviour for a 16-year-old who was not a child any more and who has the power of consent to groom a seven-year-old or a nine-year-old.

Hugh Dignon: It is clear that that would be unacceptable behaviour; it would be possible to construct the offence so that it covered a 16-year-old. As I said, there are arguments on the other side of the equation about establishing a clear differential between the groomer and the person who is being groomed. In this case, we are ensuring that there is at least a two-year age difference. As far as we are aware, most grooming behaviour that has been seen to date has tended to involve adults who are considerably older than 18.

Mrs Mary Mulligan (Linlithgow) (Lab): I will ask a small supplementary to Stewart Stevenson's question before I ask my own question. It concerns who initiates contact. If, for example, a young person was making contact through an internet chat room, but believed that the older person who they were contacting was of a similar age, could it be used as a defence of the older person that they had not initiated the contact and that it had been done by the young person?

Hugh Dignon: Again, that would depend on the circumstances of the case. The bill is explicit in saying that there must be at least two occasions when communications have taken place. A reasonable definition of communications would involve at least two parties, so a communication that just involved contact that had been initiated by the young person, with no response from the older person, could not properly be called communication. However, if the older person chose to enter into dialogue with the younger person, that would seem to be communication.

Mrs Mulligan: Would the dialogue have to involve an intention to do something to the child?

Hugh Dignon: No. The communication need not carry indication of an intention. The simple fact of the communication will be sufficient for the purposes of the communication element of the offence. However, the prosecution will need to show that the person who carried out the grooming intended to commit a relevant offence, although that need not necessarily be shown in the content of the communication.

Stewart Stevenson: I have a technical question. The drafting of the bill suggests that the communication could take place when the accused is under 18, even though the offence might crystallise only after the person was 18. Is that the intention? An offence will be committed if "having met or communicated" with a child, the adult then met the child with the intention of committing a relevant offence. To take an extreme example, if a person was to communicate with a child on two occasions while the child was in primary school and subsequently—years later—met the child, would that constitute communication under the bill? Alternatively, is it intended that the communication must take place when the person is an adult?

Hugh Dignon: I do not know the answer to that question. Clearly, the intention is that the offence will apply to adults who are 18 or over. We will need to take advice on whether communication that took place when a person was not 18 would count as relevant communication. At least some elements of the offence will have to take place when the adult is 18 or over, but I will have to take advice on whether that applies to all the elements. Perhaps my colleague Paul Johnston can comment.

Paul Johnston (Scottish Executive Legal and Parliamentary Services): I have not considered that issue, but it strikes me from section 1(1)(a) that the initial meetings or communications with a person aged under 16 could take place when the potential offender was under 18. Certainly, intentionally meeting or travelling with the intention of committing the offence must take place when the accused person is 18 or over.

The Convener: I seek clarification on a point that arises from the line of questioning about the nature of the communication that is involved. Given that the bill is not explicit on the issue, is the statement in the explanatory notes the policy position? Paragraph 6 of the notes states:

"The offence is intended to cover situations where an adult establishes contact with a child through, for example, meetings".

That means that only an adult's communication with a child will be relevant. Should that be made explicit in the bill?

Hugh Dignon: We will need to consider that further. The intention is that the offence can be committed only by someone who is 18 or over. I suppose that circumstances in which the communication element of the offence took place when the person was younger than 18 might arise fairly infrequently. The prosecution would need to consider the circumstances in deciding whether all the elements were in place to allow the person to be prosecuted.

The Convener: I am trying to find out whether the communication that is referred to in the bill is communication from the adult to the child, rather than from the child to the adult. We could take it from the bill that it is intended to cover situations in which a child communicates with an adult and the adult responds. Will it matter who initiates the contact? The explanatory notes are clear that the bill covers

"situations where an adult establishes contact with a child".

Which of those situations do you want the bill to reflect? Do you want the provision to be open-ended or to be as explained in the explanatory notes?

Hugh Dignon: I am not sure that "establishes" necessarily means "initiates". The important point is that the adult would have to communicate consciously and knowingly—that is, deliberately—with the child. The issue of who initiated that communication will not be directly relevant.

The Convener: It is relevant that the bill be clear that that is the policy intention—I can see why you would want it to be. If the child initiated contact and the adult responded, you would want to ensure that the offence covered that situation. I would have thought that you might want to make it clear in the bill that what matters is not who initiates communication, but the establishment of contact on the adult's part. I take your point that "establishes" does not mean "initiates", but when I read the explanatory notes, I took it to mean that.

Hugh Dignon: We would be happy to look at that and determine whether further clarification is needed.

Marlyn Glen (North East Scotland) (Lab): There seems to be consensus that the new offence of grooming is necessary, but what does it add to existing criminal law and what is the scale of the problem that section 1 seeks to address?

Hugh Dignon: There is no doubt that the criminal law as it stands is able to deal with many instances of grooming behaviour. In the explanatory notes, we set out some of the offences that might apply to such behaviour, but it is clear that someone who was intent on carrying out grooming behaviour might carefully construct that behaviour so as not to fall foul of any offences such as fraud, lewd and libidinous behaviour or offences under the Civic Government (Scotland) Act 1982. That is why we want to be certain that, in all instances, there will be some way of dealing with people who undertake grooming behaviour with the purposes of committing a sexual offence, and that is what we set out to do in the bill.

As far as the scale of the problem is concerned, you might be better speaking to the Association of Chief Police Officers in Scotland or other police bodies for evidence on that. From discussion with them, I think that they are talking about 12 cases throughout Scotland being under investigation at any one time. I would not be able to say how that equates to cases per annum, but that is the information that I have from speaking to the police.

Marlyn Glen: There is some concern that the bill does not include grooming within families. Did you consider including that?

Hugh Dignon: I guess that, if all the elements of the offence are present and identifiable, grooming within families is not excluded. However, the bill is to strike at the sort of behaviour in which predatory sex offenders go out of their way to establish contact with children and seek to win their trust. Such behaviour would be difficult to identify in those terms within a family. Within a family, one would expect there to be communication and meetings, so it would be difficult to identify those as happening as a prelude to commission of a sexual offence under the bill. However, the bill does not exclude the possibility that an offender and a victim might be related.

11:45

Marlyn Glen: Why is prior meeting or communication with a child a necessary part of the offence?

Hugh Dignon: The offence is constructed to identify people who behave in a way that indicates that they intend to commit a serious offence, while avoiding innocent or unwitting communications or meetings between an adult and a child. We have tried to assemble a number of elements that together will add up to the offence. Those elements are communications on more than one occasion, meeting—or travelling to meet—a child, and evidence of the intention to commit an offence. It is necessary that all those elements be found together to constitute the offence in question.

Marlyn Glen: I can see the point of trying to exclude innocent or unwitting communications—that is eminently sensible—but I am still not clear about the idea of having to make contact on at least two earlier occasions. We are talking about internet communications, for instance. Some young people go into chatrooms and leave them on all day, which means that that communication could be over a lengthy period. Would that still count as a single communication?

Hugh Dignon: Again, that would depend on the circumstances of the case and whether the communication could be separated into more than one occasion. I would not like at this stage to speculate about what time difference or degree of separation would be required to constitute two separate communications. That is something that the prosecution service would need to consider in each case. I go back to my earlier point that the purpose of specifying two communications is to attempt to identify a pattern of behaviour so that we can seek to exclude circumstances in which people unwittingly find themselves in such a position.

Margaret Smith: Prior meeting or communication with the child is a necessary part

of the offence. What would happen if the adult had not met or communicated with the child but had communicated with a third party about the child, and then travelled to meet the child with a criminal offence in mind?

Paul Johnston: That would not be covered by the statutory offence as constructed in section 1. The adult must communicate with or meet the person under 16 on at least two occasions. There may be other ways of catching the situation, for instance when a number of persons are involved in grooming activity as some sort of grooming ring. In such cases we might be considering, for example, conspiracy to commit the relevant offence, or art and part—our Crown Office colleague might wish to comment on that.

Lindsey Anderson: A conspiracy is a completed crime when there is an agreement to affect the common purpose; it does not matter whether the relevant offence is actually committed. If it can be proved that there is an agreement between parties, there may be sufficient evidence that there is a conspiracy to commit one of the sexual offences, which would be a common-law crime. With art and part guilt, it has to be shown that a number of individuals are acting together for a common purpose, which would be to commit one of the relevant offences. There is also art and part guilt that would allow a number of accused persons to be libelled as having committed an offence under section 1 of the bill.

Margaret Smith: So, you are quite content that there would be a way to prosecute somebody who committed an offence in that way, bearing in mind the fact that such people are renowned for being able to get around legislation. You are content that we could able deal with that.

Hugh Dignon: On the basis of advice from Crown Office colleagues, I believe that there would be potential ways forward in terms either of proving conspiracy or of using another power. I would never say that we are quite content; however, there would be options for us.

Stewart Stevenson: I am sorry—I have another variant to put to you. If a British citizen who was permanently resident in Spain was communicating by telephone or other means with a 14-year-old Spanish girl who was visiting Scotland on holiday with her parents, would an offence be committed by the adult who was resident in Spain?

Hugh Dignon: Yes. We think that that would be an offence under Scots law.

Stewart Stevenson: Would that be the case even though that person had not been in Scotland since immediately after their birth, at which point they had achieved British citizenship, and although they had never subsequently visited these shores?

Hugh Dignon: Yes.

The Convener: I quite like that example. That is all we wanted to ask about section 1. We have a number of questions on sections 2 and 3, on risk of sexual harm orders.

Margaret Mitchell: My question is on the burden of proof, which will—because such orders will be a civil matter—be much less than would be required if a criminal offence were to be prosecuted. Can you give me an example of the type of behaviour that you think would be covered by a risk of sexual harm order?

Hugh Dignon: The sorts of behaviour that are covered are set out in section 2(3). There are four categories, one of which, in subsection (d), is

"communicating with a child, where any part of the communication is sexual."

Such communication could have taken place on more than one occasion between the adult and the child. It could also have taken place in circumstances in which only the two of them were present; therefore, corroboration may be difficult to achieve. In such circumstances, one might contemplate using an RSHO.

Of course, imposition of an RSHO will require not just the behaviours that are set out in section 2(3); a chief constable will also need to be convinced of the seriousness of the situation before making an application for the order and a sheriff must believe that the order is necessary because the person concerned is a risk to a specific child or to children in general. Nevertheless, the sort of activities that we have in mind are those that are set out in section 2(3).

Margaret Mitchell: Let me take you back. If a chief constable were convinced that the circumstances were such that he wanted to apply for an order, why not go a little bit further? It seems to me that the chief constable will be taking into account not just the word of the child, but some other factor, so would not corroboration and a higher standard of proof be necessary for prosecution?

Hugh Dignon: The activities that are set out in section 2(3) do not necessarily constitute a criminal offence. They may constitute a criminal offence and, in practice, the chief constable or the police force may discuss with the prosecution service the options that are available to them in the light of the evidence that they have to hand. However, it may be decided that a prosecution would be unlikely to succeed or that it would not be in the public interest at that point, in which case an RSHO might be appropriate.

Margaret Mitchell: If something is not a criminal offence, what are we talking about?

Hugh Dignon: We are talking about behaviour such as is set out in section 2(3), which would in most circumstances be likely to cause serious concern about the intentions of person who was behaving in such a way to a child. We are talking about clearly inappropriate behaviour that has sexual overtones.

Margaret Mitchell: So if a child accused an adult, what would a chief constable consider in deciding whether there were sufficient grounds for going ahead with an RSHO? It is not clear to me how a lesser burden of proof could lead to an RSHO. Surely the proof that led to a chief constable's wanting to impose an RSHO would also be sufficient proof for bringing a criminal charge. We must bear it in mind that, as soon as a court granted an RSHO, the adult involved would undoubtedly be targeted.

Paul Johnston: I do not know whether I can add much to what has been said, except to emphasise that there may be situations in which there is activity that falls short of being an offence. Section 2 will increase the package of measures that are available to the courts and to the Crown Office and Procurator Fiscal Service to protect children. Communications might take place between an adult and a child that would not, in and of themselves, be sufficient to give rise to prosecution for an offence. However, investigation of the communications might cause concern that the adult's intention was to commit an offence in the future. Therefore, early imposition of an RSHO may serve to prevent an offence from being committed further down the line.

Margaret Mitchell: Can you give an example? If there are no obvious examples, I will have serious concerns about RSHOs.

Hugh Dignon: An example of?

Margaret Mitchell: I would like an example of where an RSHO would apply.

Hugh Dignon: As my colleague Paul Johnston said, RSHOs are intended as an extra tool when we consider how to deal with a situation that is causing concern. It is a matter of deciding whether behaviour amounts to a criminal offence or whether that behaviour, although not an offence in itself, is cause for concern that it might lead to inappropriate sexual behaviour between an adult and a child. The problem is in deciding whether an adult's behaviour is such that they should either be prosecuted or made subject to an order that could prevent a serious and substantive sexual assault taking place in the future.

I cannot give a concrete example, because the RSHO does not yet apply in Scotland, so there have been no instances for which such an order has actively been considered. However, in our discussions with the Crown Office and the police service prior to the bill's introduction, no one said at any point that they did not feel that the RSHO would be a useful addition.

The Convener: At this stage, without evidence from the Executive as to why it has concluded that behaviour that causes concern in respect of an adult communicating with a child will lead invariably to criminal behaviour, I have concerns about RSHOs. Unless the two behaviours were linked, there would be no point in an RSHO. I think that such a link is what the provision is trying to achieve.

My concern is that we are starting down a road on which we will criminalise behaviour that causes concern. A civil order could lead to a criminal offence simply by the order being breached. Where would that leave us generally in Scots law? A similar civil procedure could be applied to other situations in which it was felt that behaviour was cause for concern but there was not enough evidence to suggest that it was a criminal offence. You will not be surprised to hear that many people would be concerned about such a possibility. We cannot start from the point of view that a person is guilty; we start from the point of view that evidence of an offence must be demonstrated. I believe that the balance of probability test is too thin for what I regard as an onerous order. Is the principle that underlies the need for the order the fact that the Executive believes that concerning behaviour invariably leads to a physical act of criminality? What is the evidence for that?

12:00

Hugh Dignon: I do not think that the Executive would say that such behaviour invariably leads to a criminal act. The position is that the harm or damage that can arise from sexual offences that are committed against children is such that early intervention is justified in seeking to prevent such damage. That is the principle behind the order.

The Convener: That means that if it can be demonstrated that someone has been, in the words of section 2(3),

"communicating with a child, where any part of the communication is sexual",

that would be enough to bring the case before a sheriff.

Hugh Dignon: Clearly, that is a necessary part of imposing the order, but it will not be sufficient in itself to have an order imposed. The sheriff will also need to be convinced that the order is necessary to prevent sexual harm to a child or children in general.

The Convener: Does that mean that it will have to be demonstrated in court that, if there had been two separate instances of sexual

communication—we could debate the definition of sexual communication but, for the sake of argument, we will pretend that we have settled that—those two instances will lead to the child being harmed? If so, what sort of evidence will have to be brought to the court about the individual against whom the order is being sought?

Hugh Dignon: As I said, the sheriff will have to agree that the order is necessary to protect the child from sexual harm. That is the orders' purpose. As part of that, there will need to be evidence that the sort of behaviour that is set out in section 2(3) has taken place on at least two occasions.

The Convener: Will that be enough? If that behaviour has taken place, will the sheriff be entitled to infer that the child might be harmed?

Paul Johnston: It must be proved on the balance of probabilities that that behaviour has taken place. There are two aspects. First, the sheriff must exercise his judgment in weighing up the evidence and considering whether the chief constable has brought evidence that establishes, on the balance of probability, that the behaviour has taken place. Quite separately, the sheriff must then consider whether it is necessary to impose an RSHO. I suggest that, when he is considering—

The Convener: I must stop you there—that is what I am driving at. I understand that an RSHO will not be imposed unless it can be demonstrated that there have been two communications as defined in section 2(3)(d). However, from what you said, that seems to be all that will be required. You said that an order will be imposed where the sheriff deems it to be necessary, but what will be the criteria for that?

I draw your attention to previous discussions about the question of the risk that is posed by an offender. In dealing with previous legislation, this committee has strongly stated its view that assessment of the risk of someone's potential to commit an offence has to be robust. For example, to ensure that a lifelong restriction order be granted, the court must see evidence of likelihood that the person will commit an offence. When the sheriff is deciding whether an order is necessary, the sheriff must be convinced that the order will prevent harm. Surely, therefore, something other than two separate incidents of communication must be placed before the court.

Paul Johnston: The sheriff would have to decide whether it was necessary to impose an order based on the evidence that was presented. The balance of probabilities test comes in at the point at which the sheriff decides whether two such incidents have taken place. When the sheriff moves on to consider the necessity of an order, he or she must then consider all the evidence. At that point, it will be less a matter of what standard of proof applies than of the sheriff exercising the classic function of considering whether the imposition of a particular order is necessary.

The Convener: I will leave it there, but I am looking for more information on the criteria that the court will use in deciding whether an interdict is necessary. If I picked you up correctly, applying for an interdict will depend on the balance of probabilities—the civil test—that the two communications took place.

Paul Johnston: Yes.

The Convener: Could there be a further test, when the sheriff decides whether it is necessary to grant an interdict to prevent risk to a child?

Paul Johnston: Yes.

The Convener: So there could be two tests.

Paul Johnston: There are certainly two stages. In considering whether an order is necessary, the sheriff will need to consider the evidence that has been put before him or her. In addition, section 2(6) states:

> "The only prohibitions that may be imposed … are those necessary for the purpose of protecting children generally or any child from harm from the person against whom the order has effect."

Further provision is made there for what constitutes a necessary provision.

Mrs Mulligan: Margaret Mitchell asked for specific examples. I will posit a couple of cases and you can say whether the measures would apply. First, where a person against whom an order was being sought had a previous conviction for a similar offence, would that influence the sheriff? Secondly, would you employ the measures where you might otherwise seek a criminal prosecution but, because it is one person's word against that of another, you feel that you have insufficient evidence?

Hugh Dignon: On the first example, the fact that someone had a previous conviction would not necessarily be determinative of whether an RSHO should be made. On the second example, such considerations might be taken into account in deciding whether a prosecution was appropriate or whether an application for an RSHO would be more appropriate. However, it will remain to be proven on the balance of probabilities that the actions took place; it is not as though there is no burden of proof or no requirement because there is the balance-of-probabilities requirement. That might be a more appropriate course of action where, for example, corroboration—which is required for a criminal prosecution—is not available.

Lindsey Anderson: Using your example, if a child were to make an allegation of criminal conduct by an adult, the police would instigate

their child protection measures. There would be a joint investigative interview with the social work department and the family protection unit police officers, the purpose of which would be to establish the child's version of events and to see whether further protective measures were required. At that stage, the investigation might proceed with a view to criminal proceedings.

It may be that at the end of the investigation there would be insufficient evidence. The police might report the case to the procurator fiscal, or have informal discussions with the fiscal without a formal report being made. At that stage, the fiscal might advise that there was insufficient evidence and lack of corroboration. There might be two acts, as covered in section 2(3), relating to the same victim, but no corroboration and it would be the victim's word against the adult's. In such circumstances, if the fiscal advised the police of the situation, I envisage that an order would be appropriate.

Mrs Mulligan: How frequently will orders be used? Do you have any idea?

Hugh Dignon: In advance of the act coming into force, it is difficult to say, but my guess is that they will be used fairly infrequently. The band of behaviour, from that which is criminal and justifies prosecution to that which will be subject to an RSHO, is fairly narrow.

Mrs Mulligan: Given that granting an RSHO against someone could be quite serious, will an RSHO be disclosed if a search is carried out on someone who has one?

Hugh Dignon: As a civil order, an RSHO will not automatically be part of the disclosure regime. However, a chief constable would disclose it under the enhanced disclosure arrangements if it was considered relevant to the inquiry being made.

Margaret Smith: I will pick up on Mary Mulligan's point about the number of people who might apply for an order. I want to clarify the circumstances that you are talking about. You mentioned that it might be the case in such situations that it is the child's word against the adult's, with no witness. At the moment, many families decide that on the balance of what has happened to their child, they will not be able to go to court to obtain justice, because it is the child's word against the adult's. If such families felt that the balance of probabilities would be used to deal with such circumstances and that they could obtain an order from a sheriff, several people might come forward who would not do so had the order not been in place.

Hugh Dignon: Under the bill, a chief constable rather than a private individual would apply for an order.

Margaret Smith: I am talking about people coming forward to say, "I believe that behaviour towards my child has been inappropriate, although it might not constitute a sexual offence." The existence of the RSHO with a lesser evidential requirement might encourage more people to come forward than do at present, when they know that a successful prosecution in court is unlikely.

Hugh Dignon: The number of people who will come forward if the measure is implemented remains to be seen. It will be necessary for a chief constable to make the application and for evidence to be provided of the behaviour that is described in section 2(3). A sheriff will also be required to be convinced that an RSHO is necessary to protect a child. A similar order has been in place in England and Wales since May. I am not aware that many—if any—orders have been made there.

Marlyn Glen: The bill is to protect children from physical and psychological harm. How wide is section 2(3)(b)? What does

"a moving or still image that is sexual"

cover? For instance, does it cover ordinary late-night terrestrial television programming? How stringent is the provision?

Paul Johnston: I am afraid that the answer is again that much depends on the precise circumstances of the case. At one end of the spectrum, if an adult sat down with a six-year-old child and caused or incited them to watch a pornographic film, that would clearly be conduct that fell within section 2(3)(b). That adult would be

"causing or inciting a child to watch … a moving … image that is sexual".

At the other end of the spectrum, if a film had a sexual element, intent on the adult's part to engage in the behaviour that the provision describes might not be proven on the balance of probabilities. Much would depend on the precise circumstances, on the nature of the activity and on whether it was established in court that that activity had been undertaken.

Marlyn Glen: So, there would have to be intent as well.

12:15

Paul Johnston: I am not sure whether Lindsey Anderson wants to add anything. It is unlikely that a situation in which an adult and a child were watching a film in which there were suddenly images of a sexual nature would be covered. The chief constable will look at all the facts and circumstances of a case and decide, on the basis of those facts, whether it is appropriate to apply for a risk of sexual harm order. It seems to me unlikely that such circumstances would ever come

to the attention of the court. If they did, the sheriff would have to consider whether it was necessary for an order to be made, and it seems doubtful that the sheriff could be so satisfied in the circumstances that I have described.

Hugh Dignon: It comes back to the point that we talked about in relation to communications for the grooming offence, for which two communications are required. Similarly, a single event would not be sufficient for an offence under section 2(3). The bill allows for accidents, unwitting errors and mistakes. We are trying to identify emerging patterns.

Marlyn Glen: So, a regular babysitter watching adult movies would be covered.

Hugh Dignon: Yes, if the babysitter was allowing the child to watch images that fell within the definition.

Marlyn Glen: I am surprised how wide the provision is.

Hugh Dignon: Of course, as we have made clear, the sheriff would have to be convinced that an order was necessary to protect the child. The fact that the babysitter had allowed the child to watch pornographic films on more than one occasion would not be sufficient, in itself, for an order to be made.

Marlyn Glen: It would also have to be shown that psychological harm had been caused.

Hugh Dignon: It would have to be shown that the order was necessary to protect the child from the risk of sexual harm.

Marlyn Glen: Is such a provision in the legislation that covers England and Wales at the moment?

Hugh Dignon: Yes.

Stewart Stevenson: In providing policy guidance, has the Executive concluded that two 17-year-olds indulging in sexual activity in front of a 12-year-old child is acceptable, whereas two 18-year-olds undertaking the same activity could face risk of sexual harm orders?

Hugh Dignon: I do not think that we would go so far as to draw that conclusion. The order is about adults who present a risk of sexual harm to children. Two 17-year-olds carrying out sexual activity in front of a child may be behaving unwisely and inappropriately, but it does not immediately follow that they pose a risk of sexual harm to children.

Stewart Stevenson: Was there any evidential basis for concluding that 18 should be the age at which risk of sexual harm orders should apply?

Hugh Dignon: The purpose of the provision, and of the bill generally, is to protect children from the risk of sexual harm from adults. That is the sort of behaviour at which the bill seeks to strike. It is possible that the age limit could be drawn at a different age; however, 18 was chosen because the bill is about protecting children from the risk of sexual harm from adults.

Stewart Stevenson: I take it that section 2(4)(b) would lead the sheriff to consider that a risk of sexual harm order would not be required where a child in a cot, who is not sentient of activity in the room, is present while his or her parents resume normal sexual relations in another part of the room.

Hugh Dignon: Clearly, the activities that are described in section 2(3) are not sufficient in themselves. In addition to those activities having taken place, the person against whom the order is sought must represent a risk to children. It is difficult to see how a sheriff could come to that conclusion in the example that you describe.

Margaret Mitchell: The breach of RSHOs carries heavy penalties: on summary prosecution the penalty is imprisonment for six months and/or a fine up to a statutory maximum of £5,000, and on prosecution on indictment the penalty is imprisonment for up to five years and/or an unlimited fine. A breach is very much a criminal act. Are you confident that there would not be a challenge under article 6 of the European convention on human rights, given the burden of proof and the fact that most of the conduct contemplated in the granting of the order is criminal?

Paul Johnston: The Executive has considered the provisions and it is satisfied that they are compatible with the European convention on human rights. We are considering a civil process at the stage at which an order is imposed; the process will normally be made by summary application and the normal summary rules will apply. The person will have the right to be heard and to make representations in relation to the imposition of the order. As such, they will be entitled to a fair and public hearing within the meaning of article 6 of the convention. If an order is made, the person will be made aware of what types of conduct they may not engage in. If they subsequently engage in such conduct, proceedings could be brought on the ground that a criminal offence has been committed. You will note from section 7, on the offence of breach of an RSHO or interim RSHO, that there will be a trial at which the person will be entitled to be heard and to put forward their case. In particular, in relation to section 7(1), they will be entitled to argue whether there was any "reasonable excuse", which covers situations in which the person against whom the order was made had no intention of doing anything prohibited by the order.

Margaret Mitchell: Why is there a difference in what is required to grant an interim RSHO? For example, with an interim RSHO there is no necessity to prove that there is a general risk to children or a risk to an individual child. Anything that is described in the order as prohibited is sufficient.

Paul Johnston: The process for imposing an interim RSHO will require the person against whom the order is sought to be made aware of the application and they will be entitled to be heard and to make representations. The sheriff must consider whether it is just to impose an interim RSHO. It is not the case that the order can be imposed without there being any court process in which the person against whom the order is sought has a right to make representations.

Margaret Mitchell: However, an interim RSHO can be imposed without there being a general risk to children or a risk to an individual child.

Paul Johnston: In section 5(3), the test for making an interim RSHO is that it is "just to do so". It may be that the sheriff will need to go back to the tests for the main order in section 2.

Margaret Mitchell: That is not stated in section 5.

Hugh Dignon: An interim order could be applied for only as part of an application for the main RSHO, so the facts of the case would be set out in the application for the main order. Where an interim order is sought, the sheriff will need to be aware of the facts of the case so they may need to hear argument and evidence on those facts. An interim order might be required in situations in which urgent action needs to be taken. For those reasons, we believe that the interim order is a justifiable procedure for the purposes of protecting children from potentially serious sexual harm.

Margaret Mitchell: It seems strange that the bill does not require the application for such an order to state that the person poses a general risk to children or a risk to an individual child.

Hugh Dignon: The application for an interim order would need to be considered together with the application for the main order. Also, section 5(3) permits the sheriff to make an interim risk of sexual harm order only if they consider it "just to do so".

Margaret Mitchell: Why would the sheriff not just consider the main order if the person posed a general threat to children or a threat to an individual child?

Hugh Dignon: As you described, the main RSHO will be a serious order that will last for a minimum of two years and will carry some consequences for the individual who is the subject of it. Before making an order for that period of time, any sheriff would want the opportunity to hear the arguments for and against doing so and to consider the evidence on the behaviours that have taken place and the risk that is involved. For those reasons, the sheriff might want a period in which those issues can be considered before making the main order.

However, we believe that it remains conceivable that there might be instances in which rather quicker action was required, such that the sheriff recognised that, given the potential risk that the person posed to a child or to children in general, it would in the circumstances be just to make an interim order in advance of hearing all the arguments and evidence on the main order.

Margaret Mitchell: All kinds of questions might remain unanswered when the interim order is imposed, but a breach of that order would automatically be a criminal offence with no questions asked. Is there not a problem with that?

Paul Johnston: A breach of an order is not automatically a criminal offence and, in this case, would have to be proven beyond reasonable doubt. The process of the criminal law would need to establish that a breach had taken place.

Lindsey Anderson: From a criminal law point of view, we would need to prove that the accused was aware of the terms of the interim order, which, obviously, would have been spelled out in court, and that the accused had, without reasonable excuse, breached those terms. Consideration of a breach of an interim order would be a slightly different matter from the considerations behind its imposition. For there to have been a criminal offence, we would need to show that the accused was aware of the terms of the order and that he or she breached them without reasonable excuse. The criminal law standard of beyond reasonable doubt would apply.

The Convener: The interim order is what concerns me most because it seems that not very much would need to be proved before it was imposed. The interim order could be prejudicial to the full hearing at which the evidence for the main order was considered. If the interim order was breached prior to the full hearing, the person who was the subject of the interim order would already be at the point of committing a criminal offence. Would it not be fairer to set out in section 5 the things that a sheriff must consider before granting an interim order?

Paul Johnston: At present, section 5 states that the sheriff must consider it just to impose the interim order. Also, the normal rules of court require certain standards to be met before interim orders are imposed. In terms of our general law, there must be a prima facie case for the interim order and the sheriff must be satisfied that, on the

balance of convenience, it is appropriate for the order to be made.

Whenever an interim order is sought in a civil process, the standard that I have set out is the standard that will apply. There is no need therefore to specify it expressly on the face of the bill. The sheriff will need to look at the evidence and consider whether, prima facie, it suggests that an order requires to be imposed. The sheriff must then go on to consider whether, on the balance of convenience, it is appropriate for an interim order to be made.

12:30

The Convener: How far does the sheriff go in testing the information that is before them before they grant the interim order?

Paul Johnston: Certainly, the test is lower than the test for imposing a full order. However, it is clear that the whole idea of an interim order is that it can be imposed quickly. As I said, what must be considered is the question of whether there is a prima facie case and whether the balance of convenience favours the making of an order. After that stage in the process, the provisions of section 5(3) effectively impose the additional condition that the making of the order must be just.

The Convener: Given what you have said this morning, I imagine that the power would be used fairly infrequently and only in serious circumstances. Given that the chief constable is the only person who can apply for an order, it seems clear that the measure is a serious one. If the offence is so important, would it not be better to dispense with the idea of an interim order, get the case into court and test the evidence?

I am uncomfortable with the idea of a civil interdict being made when we do not know what the test will be, given that a sheriff can have a pretty open-ended go at deciding what is necessary to prevent harm to a child. A breach of the interim order can lead to a criminal offence. If our criminal justice system places such importance on the protection of children, would it not be better to ensure that an application for a full order is heard quickly?

Paul Johnston: It is important that, when a full order that could remain in force for a minimum of two years is imposed, the opportunity is given for a full and fair public hearing. The situations that are envisaged are those in which the risk is such that interim orders need to be imposed speedily. The convener will note from section 5(4) that the interim order

"ceases to have effect … on the determination of the main application."

The interim order is simply an order that will—

The Convener: You have no doubt and no concerns whatsoever about prejudice to the accused.

Paul Johnston: As I have tried to point out, certain tests must still be met. They are common to the tests that must be met whenever an interim application is sought, namely the prima facie case and the balance of convenience.

The Convener: The interim order does not cover a fixed period. Would it not be fairer to set a maximum period, as has been done with the maximum period of two years for the full order? At the moment, the interim order is completely open ended—a sheriff can grant one for as long as they like.

Paul Johnston: The main application must proceed: an interim order cannot be sought without the seeking of a full order. When the full order is sought, the normal summary procedure will be used under which the time limits for consideration of applications are set out. In the normal course of events, a relatively short period of time would elapse between the granting of the interim order and the consideration of the full order.

The Convener: If I may, I will skip back a bit to section 2(3)(d). Where the Crown shows that two incidents have taken place, does the order have to relate to those incidents? For example, I assume that the circumstances described by Marlyn Glen of a babysitter or parent allowing a child to watch obscene or pornographic material would be covered by the offence outlined in section 2(3)(d). If an order were granted against a person who allowed that to happen, would it have to be proportionate to the behaviour? In other words, if the harm to the child was that they were allowed to watch pornographic movies, would the order have to prevent that from happening again, or could a further assumption be made that that behaviour could lead to something else? Does there have to be a relationship between the behaviour and the order?

Hugh Dignon: Section 2(6) specifies that the prohibitions that can be set out in the order are those necessary for the purposes of protecting the child.

The Convener: Does that mean that there is a relationship?

Hugh Dignon: Clearly, if the behaviour in question is considered to pose a risk to the child, the order will require that it be desisted from.

The Convener: So you would expect there to be a relationship between the behaviour and the order.

Hugh Dignon: Yes.

The Convener: For example, if the behaviour that the court was considering was that of

"communicating with a child, where any part of the communication is sexual",

could the court jump to the conclusion that it had to protect the child by preventing any contact with the adult? Does there have to be a relationship between the behaviour and the order?

Paul Johnston: I think there has to be a relationship between the nature of the conduct and the conditions that are imposed. Your use of the word "proportionate" is absolutely right. The court will need to act in accordance with the European convention on human rights when it is considering which conditions to impose. It is possible that, under article 8 of the convention, the conditions could have an impact on the person's private and family life. Any restrictions that are imposed that have such an impact must be imposed in accordance with the law and must be necessary and proportionate.

The Convener: Does the bill have to say that?

Paul Johnston: The courts are obliged to act in accordance with the convention. The court will decide which conditions are necessary, and any condition that is unnecessary or disproportionate could be challenged on that basis.

Mrs Mulligan: We asked earlier how many RSHOs you envisage being imposed. Do you propose to monitor their use?

Hugh Dignon: In the normal course of events, the police would apply for RSHOs and monitor compliance with them. We in the Executive would wish to monitor how many orders were applied for and how many were in place at any one time, but monitoring day-to-day compliance will be a job for the police.

Mrs Mulligan: Are you confident that the police will be able to do that if and when we pass the bill and that other criminal justice services will be able to support the introduction of RSHOs?

Hugh Dignon: Yes. As we have said, we do not imagine that RSHOs will impose a significant extra burden on the police. We imagine that in many cases the people concerned will have come to the attention of the police or criminal justice social work departments already. The RSHO will be an extra tool for those bodies in managing offenders or potential offenders, rather than a significant addition to their workload.

Mrs Mulligan: We understand that in granting an order we would be seeking to protect the child or children so it is important that the orders have the desired effect. We would need a guarantee of that.

Hugh Dignon: Clearly there would be no point in a police force applying for an order if it had no intention of ensuring that it was complied with.

Mrs Mulligan: It would be the police's responsibility to do that.

Hugh Dignon: Yes.

Margaret Mitchell: Sexual offences prevention orders can be imposed on conviction. Can they also be imposed at the end of a prison sentence?

Hugh Dignon: At present, under the Sexual Offences Act 2003 they can be imposed at the end of a prison sentence on application by a chief constable.

Mrs Mulligan: Has that happened?

Hugh Dignon: There are sexual offences prevention orders in place in Scotland, but I am not able to say whether any were imposed after someone finished a custodial sentence.

The Convener: You will be glad to know that we have reached the end of our questions. Thank you for giving us such full and frank responses to our questions. The information has been very useful indeed. I am sure there will be more questions after today, but that is all for now.

That concludes our business. I remind members that our next meeting will be on Wednesday 15 December when we will take further evidence for our inquiry into the effectiveness of rehabilitation programmes in prisons, because we have to draw up a report quite soon.

Meeting closed at 12:41.

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