JUSTICE 1 COMMITTEE

Wednesday 22 December 2004

Session 2

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JUSTICE 1 COMMITTEE
40th 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 ALSO ATTENDED:

Hugh Henry (Deputy Minister for Justice)
Alasdair Morgan (South of Scotland) (SNP)

THE FOLLOWING GAVE EVIDENCE:

Tam Baillie (Barnardo's Scotland)
James Chalmers (University of Aberdeen)

CLERK TO THE COMMITTEE

Alison Walker

SENIOR ASSISTANT CLERK

Douglas Wands

ASSISTANT CLERK

Douglas Thornton

LOCATION

Committee Room 1

Scottish Parliament

Justice 1 Committee

Wednesday 22 December 2004

[THE CONVENER *opened the meeting at 10:11*]

Subordinate Legislation

Criminal Procedure (Amendment) (Scotland) Act 2004 (Incidental, Supplemental and Consequential Provisions) Order 2005 (draft)

The Convener (Pauline McNeill): I welcome everyone to the 40th meeting in 2004 of the Justice 1 Committee. As usual, I remind members to switch off their mobile phones. We have received no apologies and there is a full attendance this morning. I welcome the committee's adviser on the Protection of Children and Prevention of Sexual Offences (Scotland) Bill, Professor Chris Gane, who is sitting to my right.

Item 1 is subordinate legislation and I begin by welcoming, once again, Hugh Henry, the Deputy Minister for Justice, who will be taking part in the proceedings. I refer members to the paper on the draft Criminal Procedure (Amendment) (Scotland) Act 2004 (Incidental, Supplemental and Consequential Provisions) Order 2005. I invite the deputy minister to move and speak to motion S2M-2170.

The Deputy Minister for Justice (Hugh Henry): Sections 26(1) and 26(2) of the Criminal Procedure (Amendment) Scotland Act 2004 give Scottish ministers an order-making power to make incidental, supplemental and consequential provisions for the purposes of, or in consequence of, that act. That includes power to modify any enactment, including the 2004 act itself. The instrument exercises that power in order to make minor technical amendments to the 2004 act and to the Criminal Procedure (Scotland) Act 1995, largely to provide clarification as to the effect of the provisions of the 2004 act.

Article 3(2) of the order inserts a reference to the accused having been cited to appear at a trial diet in the sheriff court into new section 81 of the 1995 act, as inserted by section 9 of the 2004 act, which relates to the procedure where a trial diet does not proceed. That is to clarify the effect of that section in relation to solemn proceedings in the sheriff court and is necessary because the current reference to the trial diet having been appointed is not appropriate in relation to proceedings in the sheriff court, where the accused is cited to a trial diet.

Article 3(3) amends section 92(2F) of the 1995 act, as inserted by section 10 of the 2004 act. Section 92(2F) provides for the exceptions to the requirement on the court to appoint a solicitor to act for an accused where the trial proceeds in his absence. A reference to section 288F was omitted from section 92(2F), and article 3(3) corrects that. That ensures that the court is not obliged to appoint a solicitor to act for the accused under section 92 where an order has been made under section 288F. That is necessary because, where section 288F applies, the court will already have appointed a solicitor to act for the accused under section 288D.

Section 25(2A) of the 1995 act, which was inserted by section 18(2) of the 2004 act, provides that the intimation of an application by the accused to change the address specified in a bail order must be made to the Crown Agent. Article 3(4) clarifies that as a matter of practice that requirement will be satisfied if intimation of the application is sent to the local procurator fiscal.

10:15

Article 3(5) corrects a reference in paragraph 50(b) of the schedule to the 2004 act to "the relevant time", which should have been to "the required time".

Article 4(2) corrects a consequential error in the numbering in the 1995 act, which was the result of the insertion of new sections 24A to 24E into the 1995 act by section 17 of the 2004 act. The Extradition Act 2003 had inserted a section 24A into the 1995 act while the Criminal Procedure Amendment (Scotland) Bill was passing through its parliamentary stages. Article 4(2) renumbers the section that the 2003 act inserted as section 24F.

Preliminary hearings in the High Court, which were introduced by section 1 of the 2004 act, are intended to dispose of all preliminary matters that can be dealt with before the trial diet. In particular, section 72(6)(b)(ii) of the 1995 act, which was inserted by the 2004 act, provides that

"any child witness notice … or vulnerable witness application … appointed to be disposed of at the preliminary hearing"

should be disposed of unless the court considers it inappropriate that that should be done. For the avoidance of doubt, article 4(3) inserts new section 71(2XA) into the 1995 act, to ensure that it is clear that the sheriff at the first diet in the sheriff court must also deal with any such notice or application appointed to be disposed of at that diet.

I move,

That the Justice 1 Committee recommends that the draft Criminal Procedure (Amendment) (Scotland) Act 2004

(Incidental, Supplemental and Consequential Provisions) Order 2005 be approved.

Stewart Stevenson (Banff and Buchan) (SNP): I want to examine the sequence of events that caused the problem with the numbering of section 24A of the 1995 act. Was the Extradition Bill going through the parliamentary process at Westminster at the same time as the Scottish Parliament was considering the changes to the 1995 act that led to the insertion of sections 24A to 24E?

Hugh Henry: I had thought that no issues would be raised about the draft order, but I was forgetting that Stewart Stevenson would be here.

I am advised that the Extradition Act 2003 came into force in January 2004. The Extradition Bill was going through its later stages when consideration of the Criminal Procedure Amendment (Scotland) Bill began in the Scottish Parliament.

Stewart Stevenson: I suspected that. What arrangements have been put in place to protect the integrity of legislation when Westminster and the Scottish Parliament are simultaneously legislating to amend the same act of Parliament?

Hugh Henry: We try to ensure that there is close co-operation between officials in both legislatures. We also try to ensure that matters that are relevant to the Scottish Parliament are brought to the attention of committees when they are deliberating on proposed legislation. It is clearly in our interests to ensure that legislative proposals in the Scottish Parliament reflect relevant considerations at Westminster and we ensure that Westminster is aware of what we are doing.

If tidying up needs to be done because a matter has been overlooked, as in the case that we are discussing, we can do that speedily and effectively. The committee will be aware that we make a commitment that if a policy issue arises in relation to a Sewel motion after a committee of the Scottish Parliament has considered the matter, we will bring the matter back to the committee and to the Parliament for further consideration. The matter that we are discussing today is a technical, tidying-up issue. Very good co-operation takes place between officials and we try to ensure that such issues do not arise, but sometimes that cannot be done.

Stewart Stevenson: I accept all that, minister, and I am glad, in a sense, that you have the power to amend the acts by order. That is not a power of which my parliamentary colleagues and I are generally in favour but, in this instance, it is clearly to the advantage of proper administration and legislation that you happen to have the power. Is there a case for updating the concordats between the Scottish Executive and the London Government to ensure that such a technical problem—that is all that it is—does not occur in future? I am slightly concerned that we might find ourselves in a position in which you do not have the powers to effect the necessary change as conveniently as in this case and I want to be able to continue to argue that ministers should not have the blanket right to change acts by secondary legislation, because I continue to have grave concerns about that.

Hugh Henry: I accept the argument that you make and the concerns that exist. As you know, the amendment of an act by secondary legislation is not something that we would do lightly. The amendments are, as you acknowledged, technical matters and therefore it is advantageous to amend the acts by order.

I am not sure that any problems that have been encountered have been such that they would require any change to the concordats. If we felt that the procedures were not working adequately, properly or to the Scottish Parliament's advantage, we would reflect on the matter. However, the arrangements work reasonably well. That is not to say that they would work perfectly on all occasions, but we have sufficient flexibility and I know that our Westminster colleagues will try to accommodate the requests that we make and to be aware of anything that we are doing. We will reflect on the point that you make, but I am not persuaded that the situation requires any fundamental change to concordats that seem to work well at the moment.

The Convener: I can see nothing controversial in the order. Section 25(2A) of the 1995 act, which was inserted by section 18(2) of the 2004 act, says that if an accused changes their bail address, that must be intimated to the Crown Agent, and article 3(4) of the order clarifies that, as a matter of practice, intimation to a procurator fiscal counts as intimation to the Crown Agent. Would that not normally be accepted in any case? The procurator fiscal acts on behalf of, and has a commission from, the Lord Advocate. Why did you think it necessary to specify that?

Hugh Henry: You are right that we would expect that to be case, but we want to make absolutely clear what the procedure should be, and we think it right that that be reflected in the legislation. It is for the avoidance of doubt.

The Convener: I do not take issue with that, but I make the point that, if procurators fiscal have a commission from the Lord Advocate, there should never be any doubt that they act on the Crown Agent's behalf in everything that they do. If we clarify that in the 2004 act, do we have to do it in every act if there is any doubt over it?

Hugh Henry: The advice that I have is that, on some occasions, there could be some doubt as to who the proper designated person would be. We would rather that there was no doubt and that the roles of the Crown Office, the Crown Agent and procurators fiscal were clearly specified so that no one could misunderstand.

The Convener: I have a practical question. I see the order as a tidying-up exercise. When someone goes to look at the 2004 act after the order is passed, will they have to seek out the supplementary legislation to ensure that they have all the law, or will the 2004 act, which has just been published, have to be published in its amended form? My only concern about these tidying-up exercises is that I want the law to be easy for people to find. The act has only just been published, and I want to ensure that people are aware that changes, albeit minor and technical, have been made to it recently.

Hugh Henry: The amendments, although minor, will be to the 1995 act, and anyone who seeks to consult the legislation will have to go back to the 1995 act, as amended. That would have to be done in any case. I am sure that solicitors acting in this area will have updated copies of the relevant legislation.

The Convener: Do you think that there is a case for consolidating the legislation at some point in the future?

Hugh Henry: I am sure that there is a case to be made for that. However, where that sits in our priorities over the next few years is another matter. I am sure that we will always consider carefully any representations that a committee or the Parliament makes about the prioritisation of legislation, and you are right to say that consolidation would help. However, as you know, we have other matters to attend to first.

The Convener: If we got a lot of orders amending the 1995 act, albeit uncontroversial, there might be a case for consolidation. I just want to ensure that, once an act is passed, it is fairly easy for users to track what changes are made to it.

Hugh Henry: It is right that the Parliament has placed such emphasis on making justice more easily accessible to everyone. For too long, we had a system that was not easily understandable and that was over-complicated. Nevertheless, the difficulty in drafting legislation—as you know—is that it is hard not to simplify without introducing technicalities and complexities. It is our aspiration to ensure that all those who use the system have easier access to it and that it is easier to understand. All the different sections of the system have been changing over recent years, and we have seen a remarkable change. We might one day get to the stage at which we pass a bill that is so simple that it will never need amendment and that is easy for everyone to understand, but I do not think that I will be here when that happens.

The Convener: Nor will we. Thank you. The committee has no further comments.

The question is, that motion S2M-2170 be agreed to.

Motion agreed to.

That the Justice 1 Committee recommends that the draft Criminal Procedure (Amendment) (Scotland) Act 2004 (Incidental, Supplemental and Consequential Provisions) Order 2005 be approved.

The Convener: As usual, the committee is required to report to Parliament on the order. Our report need not be any more than what is in the *Official Report*. Is that agreed?

Members *indicated agreement*.

The Convener: That report will be circulated for comment at the end of the recess and must be published by Monday 10 January. I thank the minister and his officials for their attendance this morning.

Act of Sederunt (Fees of Sheriff Officers) 2004 (SSI 2004/513)

The Convener: On the second item of subordinate legislation, I refer members to a note that has been prepared by the clerk. This is a negative instrument, and I invite comments from members.

Stewart Stevenson: I have given the clerk a note of the issues that I have with the instrument. I do not propose to move that nothing further be done on the instrument at this stage, and I suspect that I am unlikely to do so within the prescribed period. Nevertheless, there are several questions that the clerk's paper simply does not answer. First, does the 3.7 per cent increase in fees include the change that allows sheriff officers to be paid for postage in addition to the prescribed fees? If it does not, the increase will be greater than 3.7 per cent.

Secondly, how has the figure of 3.7 per cent been arrived at? The previous instrument, which was dealt with 12 months ago in December 2003, raised the level by 3.2 per cent. I do not know where the new figure has come from. Is it the same as the figure for average wage inflation over the same period? If so, why has the increase not been based on the average inflation in the cost of living? After all, those figures are different. No justification has been given for that.

10:30

Thirdly, I simply do not understand how the various figures relate to the costs of the provision of services by sheriff officers. Indeed, I cannot see any relationship between the actual fees and the different headings setting out the work that is involved.

My final point is relatively minor. Some recent legislation—for example, with regard to planning—has provided for the sending of legal notices by e-mail. However, I am not sure whether any notices can legally be provided by sheriff officers by e-mail. If they can, there does not appear to be any provision for fees in that respect. As a result, I propose that it is reasonable for the committee to write to the Minister for Justice and seek answers to those questions before allowing a committee member to decide whether to move that nothing further be done under the instrument.

The Convener: Thank you for giving us notice of the issues that you wished to raise.

At this stage, all the committee can do is to write and ask for clarification on the points that Stewart Stevenson has raised. I believe that we would write to the minister on the subject of sheriff officers' fees.

Stewart Stevenson: So we would write to the minister rather than to the Lord President.

The Convener: Yes.

Stewart Stevenson: Okay.

Mrs Mary Mulligan (Linlithgow) (Lab): Given that the changes are to be enacted on 1 January, what would be the effect of this delay?

Stewart Stevenson: It would have no effect.

The Convener: As this is a negative instrument, it has already been laid and simply lies there for a number of days. There is still time for someone to lodge a motion to annul, but Stewart Stevenson has said that he wants to wait for answers to his questions before he makes any such decision. The provisions will come into force on the date of enactment, unless Parliament annuls them. All we would do is to recommend that Parliament should annul the instrument, but that can happen only if a member moves a motion to do so. No member is moving such a motion this morning, but it would not be out of order for the committee to consider any such motion within the timeframe.

We have until 20 January. I have to say that I would not be minded to support a motion to annul the instrument unless we received something earth shattering from the minister. That said, I have no problem with asking the Executive why it has arrived at a figure of 3.7 per cent—in any case, fees should be updated to reflect any changes in technology—but I do not know whether there is a legal answer to the question whether such an increase is allowed in the first place.

Stewart Stevenson: It is unlikely that I will lodge a motion to annul. However, I want to ensure that ministers argue the case for introducing provisions that will require the public to bear additional costs. I do not believe that the clerk's paper presents that argued case. That is the real issue for me. I am not trying to deny sheriff officers, who in effect work as private companies, the proper reward for their work.

The Convener: In the spirit of what Stewart Stevenson said, I see no problem in writing for more information, unless anyone dissents. When we receive a reply from the minister we can decide which aspects should be included in a report. The reply will not constitute the whole report, but there may be elements within it that Parliament should be aware of when it agrees the instrument. Is that agreed?

Members *indicated agreement.*

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

10:35

The Convener: Agenda item 3 is the Protection of Children and Prevention of Sexual Offences (Scotland) Bill. I welcome to the committee Tam Baillie, who is the assistant director of policy at Barnardo's Scotland. Good morning, and thank you for the helpful paper that you supplied, which made useful reading. We will go straight to questions. Why do you think the bill is important?

Tam Baillie (Barnardo's Scotland): The instruments that are available to protect children from sexual harm are rather blunt. The three main provisions in the bill—the offence of grooming, the risk of sexual harm order and the sexual offences prevention order—will add to the range of measures that can be taken to ensure that youngsters are properly protected. Although we generally welcome the bill, we have reservations that I hope will come out in questioning and be taken on board in shaping the future stages.

The Convener: We have questions on your issues, so do not worry about it. If anything is not covered during questions, I will ensure that it is covered at the end.

Your position is that the current law needs to be strengthened.

Tam Baillie: Yes. I expect that somebody will ask me about prevalence and the increase in the behaviour that the bill covers, but that is not easy to quantify. We know that there has been an explosion of sexually abusive images of youngsters on the internet, and we know that increasing numbers of people are accessing those images. For example, operation ore threw up 7,200 names within the United Kingdom.

Barnardo's Scotland recently held a conference on the topic, and one interesting statistic that emerged was that Strathclyde police reported that of 295 referrals for computer-related offences, only five related to grooming. The focus of the bill, while it is helpful, targets a small area of activity. Most sexual abuse of children takes place in familiar and family surroundings, rather than through the internet. It is useful that attention is being paid to grooming, although it has to be put in context. The figures on the internet are frightening, but the number of grooming offences is relatively small.

The Convener: It is helpful to have that on the record. Does Barnardo's have any experience of working directly on any such cases?

Tam Baillie: Yes. We have four services around Scotland that work with young people who exhibit sexually problematic behaviour. In fact, many of the positions that we have adopted on the bill have come directly from the experience of those services. We support the measures generally, but that support is tempered by the professional experience of working with youngsters who exhibit worrying behaviour.

Stewart Stevenson: You have anticipated some of the questions that we wanted to ask. Your paper refers to the need

"to protect children from the detrimental effects of grooming and sexual exploitation"

through technologies. The second page of your paper refers to working

"in cooperation with internet service and mobile phone providers".

However, it is possible for someone to use an ISP that has no legal existence in the United Kingdom. Could any practical steps be taken to monitor that, or do we have to rely on other means of detecting aberrant behaviour and protecting our children?

Tam Baillie: There are several elements to the detection or discovery of the fact that a child is subject to sexual abuse. The police need to have enough intelligence to know what part of the internet or what communications to target, which requires additional resources. The policy memorandum does not refer to any additional resources being allocated to the police on the basis that they are already carrying out investigations. However, we know that the police cannot keep up with the current amount of internet traffic and that their task is like looking for a needle in a haystack. The police need good intelligence and the ability to follow up that intelligence. We also need to consider the time periods for which internet service providers hold information, which would allow the police to interrogate their systems. Compared with the amount of money that is ploughed into the licensing of third-generation mobile phone technology and the companies that hold the licences, we spend only a pittance on the detection side.

Those are the issues on the policing side. We must also change our general approach to the issue of child sexual abuse. Most of the information will come from the children, not necessarily through the interrogation of internet systems. Having said that, the bill is a helpful additional weapon in the armoury to protect children from sexual abuse.

Stewart Stevenson: You make reference to the importance of internet service providers maintaining records for a period of time to assist police investigations. Do you think that legislation might be needed—although I do not think that the

Scottish Parliament would be competent to pass it—that would require people to access the internet via internet service provider data stores that are within the legal reach of the United Kingdom?

Tam Baillie: Yes. That has already been considered, but the Westminster Parliament decided not to press a requirement on internet service providers to hold information for a minimum period. There are considerations at a national level, and it is beyond the Scottish Parliament to pass legislation on that. However, if a spin-off of the bill was the creation of pressure at national level, that would be helpful.

The Convener: By its nature, grooming takes place when children are using the internet, and different parents will have different rules about the use of computers in their homes. Is Barnardo's picking up any issues with regard to parents? For example, should there be rules or charters about the use of computer technology in the home?

Tam Baillie: The Scottish Executive has published useful educational information for parents and children on the use of the internet. However, in our experience, young people are much more internet-savvy than ourselves and their parents. There is a job for us to do, as parents, in catching up with how the systems operate and in educating ourselves because, to be honest, children are outstripping us in the use of the internet.

The ownership of mobile phones is another issue. It is expected that 50 per cent of youngsters who are aged 14 and above own mobile phones—although I expect that more than 50 per cent of us here own mobile phones. Young people have a hunger to use the technology, and the internet can be a power for good; we just have to ensure that people are aware of the dangers of introducing strangers into their homes through the internet.

The Convener: Do you mean that many parents do not understand the full extent of what the internet is capable of and therefore cannot monitor their children?

Tam Baillie: That is one aspect. We as adults must try harder than youngsters, who have a natural affinity with new technology.

The Convener: That is not what I meant. Access to the internet for children of different ages must vary widely. Some children use their computer in a room on their own without the presence of parents. Is grooming more likely if children live in households in which they have complete and unrestricted access to the internet in their bedroom?

Tam Baillie: Parents have to exercise good judgment over what their children are up to.

The Convener: You said that you had some experience. I am trying to get a handle on whether having unrestricted access makes a difference. If you do not know, that is fine.

Tam Baillie: The issue is not so much unrestricted access. It is important to have sensible conversations with children and to know what they are doing with the internet or in any activity.

10:45

Mrs Mulligan: You are right to say that such conversations are needed, but they are probably the hardest thing that we do as parents. Unfortunately, we cannot legislate for that, but I am sure that we will return to the matter.

Your written evidence emphasised the need for sufficient resources to be made available, particularly to the police, to ensure that the bill is effective and offers the protection that we seek. Can you give us examples of where resources will be needed?

Tam Baillie: Two other aspects need resources, one of which is child victims. A review of child protection arrangements in Scotland is under way. We need to ensure that child protection is properly resourced. We know that the children's hearings system is overburdened by care and protection cases and we must have a reasonable balance to what that system is expected to do. It must also be properly resourced when we are aware of children who are victims of abuse or sexual abuse.

The second aspect—it is actually the third, as the police were the first—is the treatment of perpetrators, which must be considered if we are genuine about protecting our children from future harm. The orders for which the bill provides will be restrictive, but we must do more than that to ensure that the perpetrators of sexual abuse against children change their behaviour. That depends on the stage that their criminal career is at, on how ingrained the behaviour is and on whether they are at a more contemplative stage. We need to consider having resources to try to change perpetrators' behaviour; if we do not, we will issue restrictive orders with the same risk of repeated behaviour.

The bill contains no measures for treatment interventions for the people whom the bill identifies as offenders. That was one element that we called for in our submission. We may well think about stage 2 amendments in relation to that. Having restrictive orders will help, but they will not in themselves make our children safer in the longer term.

Mrs Mulligan: We will discuss work with perpetrators later. Your first point was about the

resources that are available for the police. I will play devil's advocate for a minute. If we gave the police more money to do the work now, could we not bother with the bill? Is that the problem?

Tam Baillie: The police need intelligence on which to base police work. Additional resources to the police are not the only measure that is needed. The way in which to give the police intelligence is to have good child protection procedures, so that when children are subject to sexual abuse or may be in danger, we have the right systems, networks and support to assist youngsters and to provide some of that intelligence, so that the police know who presents a danger to our children. We have to operate on a number of fronts. Additional resources for the police only would be of no help.

Mr Bruce McFee (West of Scotland) (SNP): Section 1, which creates the offence of meeting a child following certain preliminary contact, refers to the age of the offender. Under the bill, the minimum age of the offender would be 18, but in your submission, you recommend that it should be reduced to 16, although there are some conditions on that recommendation. Will you explain more fully why you feel that the age should be reduced from 18 to 16? What evidence do you have that 16 or 17-year-olds groom younger children?

Tam Baillie: We thought a lot about that point, as we made clear in our written submission. The main evidence that encouraged us to opt for an age of 16 was our services' experience of working with young people who are exhibiting sexually problematic behaviour. The information that we got back from our services was that they were working with young people aged 16 and 17 who were capable of using, and at times had used, the internet. On that basis, we felt that it was reasonable to advocate that the offence should apply from the age of 16.

However, there are two main caveats to that. One is that the bill should specify that, for 16 and 17-year-olds, the offence should be dealt with through the children's hearings system. The second is that there must be clear guidance about the interactions between a 16 or 17-year-old and youngsters to whom they are close in age—for instance, 15-year-olds—because youngsters engage in sexually explicit communications and we do not want the bill to be misused to capture all such communications between youngsters.

The bill needs to contain something about how the offence will be dealt with after it is committed and about the circumstances that would trigger the making of a charge.

Mr McFee: You have raised a few issues that I will explore a little further. Would grooming by a 16 or 17-year-old of, for example, a 15-year-old necessarily be appropriate for criminal law intervention? Your submission suggests that we should aim to intervene in such behaviour rather than to criminalise the individual.

Tam Baillie: We were asked for our view on what the age threshold should be and we pitched it at 16. If it was decided that the threshold would remain at 18, that would still leave the committee and the rest of the legislature with the issue of what would happen with 16 and 17-year-olds. We are working with youngsters who would pose a threat to other young people, so that leaves us with the question of how we should deal with those youngsters. If there was a way of making referrals through the children's hearings system, which is our care and protection system, we would be satisfied with that, but we cannot just leave 16 or 17-year-olds in some kind of void. Under the bill as it is drafted, that is exactly the position that we would be in.

Mr McFee: Do you have any indication what percentage of your case load those 16 and 17-year-olds would make up? How would you determine which cases were suitable for referral to the children's hearings system, or are you suggesting that all cases should go to that system?

Tam Baillie: There were two issues there. Could you repeat the first question?

Mr McFee: Can you quantify the problem among 16 and 17-year-olds?

Tam Baillie: As I said, it is difficult to quantify that group. We are talking about a small number, but we deal with a number of youngsters who exhibit sexually problematic behaviour. It would not be right to extrapolate from that group of youngsters.

What was the second point?

Mr McFee: How would you determine which cases were appropriate for referral to the children's hearings system, or should all cases go through that system?

Tam Baillie: That raises the general issue of how sexual offences by young people are dealt with. Although we have the Lord Advocate's guidance to procurators fiscal and reporters, there is some inconsistency in deciding which offences go to the reporters and which offences go to the sheriff courts. More than likely, we will back up some of the evidence that we have given previously with a call to review the advice that comes from the Lord Advocate on that. My direct answer to your question is that all cases should go through the children's hearings system.

Mr McFee: Last but not least, you recommend

"that the age for the offender be set at 16 with the following conditions … guidance is created which helps draw

distinctions between grooming behaviour and normal adolescent 'romantic exchanges'".

Tam Baillie: Yes. That wording is clumsy. We had only so long to respond to the call for evidence.

Mr McFee: Given the fact that it has probably been a while since most of us engaged in "normal adolescent 'romantic exchanges'", can you expand on how that guidance might be constructed?

Tam Baillie: I think that I touched on it earlier. Sexually explicit communications are made frequently between youngsters, but some of those communications are about grooming behaviour, in which the youngsters are not communicating on an equal basis. I will not try to establish the wording of the guidance just now, but it would try to separate out those exchanges and would not be a catch-all rule if the age was set at 16. To be honest, even if the age was set at 18 there would be the same need to separate out the different exchanges between an 18-year-old and a 15-year-old, for example, although the difference in age would be slightly more significant in such exchanges.

Mr McFee: If the exchanges were between a 15-year-old and a 16-year-old, it would be a grey area.

Tam Baillie: Yes. We acknowledged that in pitching the target age at 16.

Mr McFee: I wonder whether we would introduce the potential to discredit the bill if we ended up, early on, in a quagmire of trying to differentiate between the two forms of behaviour. Are you suggesting that there has to be a position of inequality between the two parties? Is that the essential element in distinguishing between the two forms of behaviour?

Tam Baillie: I was interested to read the briefing that was produced by the Scottish Parliament information centre. It cited an example from Maine, where an age differential was set as one of the criteria that had to be met before charges could be brought. I regarded that as one of the justifications for having a bar at 18, which would automatically create a two-year gap. The example that is given in the SPICe briefing—of which I was not aware before I read about it—is of an age gap being necessary to trigger the offence.

Mr McFee: In other words, 16 and 17-year-olds could be offenders if there was an age gap of two years or whatever?

Tam Baillie: Yes. That might be even more messy for the legislation; however, I thought that an interesting approach had been taken in Maine.

The Convener: The age difference is an interesting point for debate, in terms of what the legislation should be driving at. What would happen if there was sexually explicit communication between two 16 or 17-year-olds? What would constitute grooming in a case in which there was no age difference?

Tam Baillie: The communication would have to be with someone who was under the age of 16. The closer that the young person's age gets to that bar, the more difficult it may be to interpret the communication as either grooming or just sexually explicit exchanges.

The Convener: You have given a thoughtful analysis of why you feel that the age bar should change. However, you feel that more cases should go to the children's hearings system. How well equipped would that system be to deal with such offences? It does not do so currently and its members are not trained in dealing with that type of offence.

Tam Baillie: We are in the middle of a review of the children's hearings system. One of the considerations will be how well equipped the system is to deal with all cases but especially those involving the older age group. We have the facility to deal with youngsters up to the age of 18, but we have not considered how the system is resourced for that or how it responds to that.

Part of the reason for focusing on the children's hearings system relates to my earlier point that the issue is not simply about applying restrictions when this type of behaviour appears but about finding ways of dealing with it. How do we get a young person or perpetrator of such an offence to look at and change their behaviour?

11:00

The Convener: That is a fair position and, as you said, the whole system is under review. However, do you accept that the current system is not equipped to deal with people from 16 to 18 who have committed such an offence?

Tam Baillie: It has the capacity to do so under the proposed legislation. There might be a question of resources when it comes to how we respond to referrals through the hearings system. We are about to commence the second phase of the review—

The Convener: You have said several times that we need to treat the offending behaviour. Your point is well made, but is the current children's hearings system really equipped to deal with that matter? I do not think that it is.

Tam Baillie: If we had sufficient resources to provide more of the services that we currently provide to deal with sexually problematic behaviour, the answer to your question would be yes.

The Convener: But if those resources were not available, the answer would be no.

Tam Baillie: That is not an issue for the bill.

The Convener: But the bill would have to be amended to allow young people from the ages of 16 to 18 to be dealt with by the children's hearings system.

Tam Baillie: If the guidance was such—

The Convener: No, the bill would have to be amended in that way. The committee discussed this matter when it considered the Criminal Justice (Scotland) Bill a couple of years ago.

Margaret Mitchell (Central Scotland) (Con): I want to explore some of the issues surrounding the risk of sexual harm orders. On page 4 of your submission, you say that

"it is essential that any work to"

restrain

"the behaviour of perpetrators is reinforced with intervention and support to ensure the maximum success".

What do you mean by that?

Tam Baillie: I will probably repeat myself but, as I said earlier, restricting the behaviour of perpetrators of sexual abuse is necessary and the bill's provisions will assist in that respect. However, such an approach will have limited impact unless there is some kind of intervention or treatment that requires the perpetrator to look at and change their behaviour.

People who perpetrate sexual abuse against children range from those who contemplate it to those who regularly exhibit hard-driven and determined behaviour. There are many stages in between those two points and we have to examine how society responds to such behaviour. Restriction is one means of addressing the problem, but we need also to consider ways of changing the perpetrator's behaviour. If that does not happen, the level of risk for our children will be no less great than it is at the moment.

Margaret Mitchell: What form would such intervention or support take?

Tam Baillie: I can speak only from our experience. We have established projects in which a number of youngsters who exhibit sexually problematic behaviour and their families are given assistance; assessments of their risk to the community are carried out and long-term packages of support are provided. We must remember that these people are young and are at a stage in their development at which we can impact positively on their behaviour and the support that the family can provide.

Margaret Mitchell: Who would be responsible for providing those support packages?

Tam Baillie: I had better not say "What an invitation". We and other organisations would be more than capable of expanding the range of support for those young people.

Margaret Mitchell: Given that the targets of RSHOs have not been convicted of any offence, how would such interventions operate?

Tam Baillie: The RSHO is a civil order, so there is a lesser burden of proof—the balance of probability, rather than beyond all reasonable doubt—which can give cause for concern. However, there are some situations in which an RSHO could be of use. I am thinking of a situation in which young people have been exposed to pornographic videos or pornographic material, there has been a police investigation, and it has been decided not to proceed to prosecution. In such circumstances workers have said to me, "We are certain that something is happening, but there just isn't the evidence to prove it." RSHOs could be used when enough evidence is coming forward in terms of what young people say, but there is not enough evidence to go to court and prove the case beyond reasonable doubt.

The problem is that we have numerous examples of civil orders not being used because of misgivings. I note that the policy memorandum contemplates a small number of RSHOs—between 10 and 20 a year. However, because we have so few constructive tools with which we can intervene, in the longer term it is better to have RSHOs than not, even with all the doubts that have to be weighed up because of the lesser burden of proof. We gave that great thought in deciding which position to adopt.

I was asked for specific examples. We have an example of a young person who is staying with an older sibling and there have been complaints. The older sibling was investigated by the police and no charges were brought. We are now working with the younger brother, who is telling us worrying things, but there has already been an investigation. We are left with a youngster for whom we will have to consider whether the circumstances are the best for him. It might be useful to have access to an RSHO for the older sibling in such circumstances.

Margaret Mitchell: That brings me to my next point. If the older sibling was the subject of an RSHO, how would it be enforced?

Tam Baillie: As I have said, one of the key issues is treatment intervention. That should be a condition of an RSHO. Are you asking how that would be policed?

Margaret Mitchell: Yes. What would actually happen if an RSHO was granted?

Tam Baillie: There would be restrictions on the behaviour that he would be able to exhibit. Importantly, he would be required to examine the behaviour that is causing concern. That is where the supportive treatment-oriented element of the RSHO would come in, which does not exist just now. As it stands, the RSHO would say only, "You're not allowed to conduct yourself in this manner." It would not add, "And here is something that you need to do about it."

Margaret Mitchell: Is there a timescale?

Tam Baillie: As it stands, I think the timescale is two years. We have not commented on the length of time, and we have not considered whether RSHOs should always apply for two years, or the point at which someone is deemed to have satisfied the terms of such an order.

Margaret Mitchell: And whether the orders would be extended?

Tam Baillie: We need more time to consider that. The main point is that there are examples that have been identified by our services. In addition, constructive input is required. Orders should not just be restrictive.

Margaret Mitchell: If an order were breached, should the case then become a criminal matter?

Tam Baillie: Yes. That is the case with most civil orders.

Margaret Mitchell: Do you have any problems with that? Could problems arise under the European convention on human rights, given that no offence has been committed and an order has been applied for because it is thought that the risk is sufficient?

Tam Baillie: The case still has to be made by presenting evidence to a sheriff. Evidence must satisfy people that making an order is appropriate. Concern is always felt about orders—including antisocial behaviour orders and parenting orders—that start as civil matters but whose breach is a criminal matter. However, recent legislation contains examples of such powers.

Margaret Mitchell: Do you accept that because the offence in relation to RSHOs is of a sexual nature, the connotations and the stigma that are attached to the orders are likely to be much more of a problem than they are with other civil orders that are granted on the balance of probabilities?

Tam Baillie: That could be the case. However, if we want to protect children and we think that it is better to have than not to have RSHOs, we must weigh up whether the objective is worth running the risk of some of the negative effects of having a civil order.

The alternative is to have a criminal threshold. However, we know that about three quarters of youngsters do not report sexual abuse at the time of its commission or even into early adulthood. Only one in three reports sexual abuse. We must overcome some big hurdles to ensure that youngsters know that their word will be believed.

I recognise that further debate is needed. The outcome depends on which priority we put first.

Margaret Mitchell: Does it have to be a question of priority? Do we not balance the rights of the child, which the bill is of course all about, against the rights of the adult? For example, it is not entirely unknown for an adult to be labelled by a malicious accusation.

Tam Baillie: Those are not insignificant points. People will have to decide where the balance lies. We adopt in our submission the position that the balance lies in trying to increase the protection of children.

Margaret Mitchell: So that would involve examining the circumstances.

Tam Baillie: The bill is in its early stages, so what is missing is guidance to back it and to contextualise the decisions that are being made. Some of those decisions might be fine—particularly those about civil orders and the acceptable threshold of probability. At times, I and many others who work with young people who are subject to sexual abuse know that something is happening but we cannot put our fingers on the evidence.

Marlyn Glen (North East Scotland) (Lab): I will return in a way to the age differential.

Tam Baillie: I thought that I had got away from that.

Marlyn Glen: I will also introduce the idea of vulnerability—a power difference, rather than just an age difference. Your submission says that young people with learning difficulties represent

"a high proportion of those referred to our services as both perpetrators and victims of sexual exploitation."

Will you quantify that?

Tam Baillie: I do not have more definition, other than saying that the number is significant. The figure is significant enough for us to include the matter in our written evidence. That raises the issue of vulnerable adults—it is not just under-16s who are subject to the offences that we are discussing.

We talked about judgment over civil orders versus criminal orders. Similarly, careful consideration is needed of how to define a vulnerable adult, particularly because youngsters have different levels of learning difficulty. Some

may have mild learning difficulties, which still make them vulnerable. At what point does the label apply? That is an issue for the committee to consider further. A clear definition would be needed of when somebody is and is not a vulnerable adult, and if there was a way of incorporating that into legislation, it would be helpful to do so, although perhaps it is a matter for guidance. Our experience would make us sympathetic to the committee considering that matter, but defining vulnerability raises some thorny issues.

11:15

Marlyn Glen: Would the bill make any difference to vulnerable adults?

Tam Baillie: We were not alone in raising vulnerable adults. The bill would not make any difference to them, because the proposed thresholds are based on age, not vulnerability. We take issue with some of those ages. If the committee were to consider a vulnerability threshold, it would need a way of defining vulnerability. Age is easy to define—somebody is 16 or they are not—but there may be different interpretations of vulnerability. We know from experience that a number of young people have mild learning difficulties that have not been picked up at all. Those people do not carry any label, but they are vulnerable.

At an early stage, we considered the position of looked-after children and whether they constituted a particularly vulnerable group. However, that raises issues, because the age of sexual consent is 16, so how do we define the vulnerability of the particularly vulnerable youngsters whom we want the bill, which is well intentioned, to protect? That might be an issue for the committee to consider later. We make no stronger submission than to flag it up.

Marlyn Glen: The issue is very important. You mentioned the criticism that the bill appears not to address grooming within the family or household. Will you comment further on that?

Tam Baillie: The examples that I gave of situations in which an RSHO could assist were family settings. I return to my opening comment that the vast majority of abuse of children takes place in family or familiar settings, not with people who are not familiar to the children. The bill might not cover family settings, but we know that grooming also happens within such settings. It is all the more difficult to define, because family relations naturally involve familiar contact with young people. We should not forget that most abusive situations occur in family settings.

Mr McFee: I accept entirely what you say, but I will press you further on it. Is there a danger of the bill conjuring up an image that modern technology—to be specific, the internet—is the greatest threat? Is there a danger that lessons along the lines of "Don't speak to strange men" will draw attention away from the main source of abuse, which is the domestic setting?

Tam Baillie: As I said, the internet is basically a force for good for all of us—that is probably a controversial statement—and we should not lose sight of that. We need a heightened awareness of the internet's dangers, but paying undue attention to those dangers and to the danger of abuse happening or abusive situations developing through the internet must not make us lose track of the main danger areas for youngsters, which are in family settings. A review of child protection is taking place, which is also good. The bill is a useful addition to the range of interventions that we have, but I would definitely put the emphasis on what happens to children in family settings and with people whom they know.

Margaret Mitchell: Do we have an accurate assessment of how much internet grooming is going on?

Tam Baillie: The example that I gave was from a recent conference that we held. Strathclyde's 2003 figure was 295 referrals for computer-based crime, five of which were related to grooming.

Margaret Mitchell: Those are the figures that have been picked up. Are they an accurate reflection of what is going on out there?

Tam Baillie: Personally, I do not think so. The figures represent an under-reporting, but I would be cautious about the extent of that under-reporting. Operation ore threw up 7,200 names and operation falcon has followed that up successfully. There is definitely increased activity through the internet, but it might be quite difficult to quantify that.

Margaret Mitchell: Have you looked at any studies abroad, such as in the United States?

Tam Baillie: Combating paedophile information networks in Europe—COPINE—is a very useful European study group. I can certainly get additional information to the committee if you think that it would be helpful.

Margaret Mitchell: I think that one in four children between certain ages had been approached, which seems a horrendous figure. I wondered whether you felt that the figure of 295 accurately reflected the potential scale.

Tam Baillie: The figure of 295 is for referrals for computer-based crime, not just grooming. Of that 295, only a small percentage concerned grooming. The information is difficult to get, but if the committee wants more information, we can try to provide it with further briefing.

Margaret Smith (Edinburgh West) (LD): It is slightly unfortunate, but I think that I might be going to ask you questions about things that you do not know anything about.

Tam Baillie: They will be very easy to answer in that case.

Margaret Smith: I will try to explain before I ask my question.

We have been told that the Executive proposes to make further amendments to the bill to bring Scots law into line with the UN Convention on the Rights of the Child and a European Union framework on the sexual exploitation of children and child pornography. At the moment, it is an offence to create, possess or distribute indecent photographs of children under the age of 16. If we bring Scots law into line with the convention and the framework, the age limit would be raised to 18 as has been done in England and Wales. What are your views on that?

Tam Baillie: Funnily enough, I have some thoughts on that.

Barbardo's is a national organisation, so I have colleagues down south who have been campaigning for this. We welcome in principle the proposals that I believe the Deputy Minister for Justice will present. As always, there are some caveats to that welcome, one of which is that it throws up some anomalies—that has been highlighted in some of the briefing that the committee has been given. My understanding is that those anomalies have been dealt with through guidance in the legislation down south, but I am not absolutely au fait with it.

Margaret Smith: By anomalies, do you mean cases such as those in which one of the people aged between 16 and 18 was married?

Tam Baillie: Yes. We return to that 16 to 17 years age bracket. In essence, the age of sexual consent is 16, but some protection would be built into the legislation for 16 and 17 year olds under certain circumstances when offences could be done to them, if you like. In principle, we agree with that because the intention is to try to take youngsters who are subject to sexual exploitation out of the criminal justice system.

The other caveat is that those young people are still youngsters who are at risk. They are still in need of care and protection and that brings in our care and protection system, which is the children's hearings system. In considering what would happen to the 16 to 17-year-olds who would not then be subject to criminal prosecution, we must realise that they are still vulnerable young people. We do not know the detail of the proposed amendment, but it is important that those youngsters are not just set adrift by us saying that there is no offence so no intervention is needed. Those youngsters need support. The issue depends on the detail of the proposed amendment, but we have not seen that yet.

Margaret Smith: Your first caveat was about the anomaly that, in England and Wales, appears to have been covered by guidance and a phrase suggesting that the law does not apply to people who are in an enduring family relationship, which covers not only marriage, but co-habitation or same-sex relationships—I presume that such relationships could be covered by mention of the Civil Partnership Bill. That caveat can be dealt with.

Tam Baillie: There is also the issue of consent. The offence of soliciting is about a financial transaction that takes away consent. If we are considering the implications for 16 and 17-year-olds, it is worth worrying about how consensual the acts are in which people engage. Consideration of that will help to sort out the issues that we want to cover in guidance. We need to ensure that the provisions are not just a catch-all and that we do not get into situations that we really do not want to be in.

Margaret Smith: At present, Scots law has no specific offence of prostitution and it is not an offence to pay a person for sexual services. You have mentioned the issue already, but can you see other difficulties in making it an offence to pay or reward a person who is under 18 for sex or to offer to do so? Do you welcome the proposed amendment on child prostitution?

Tam Baillie: We welcome it, but with the rider that we must consider the care and protection issue and think about how we offer support to young people. We need to consider the interventions and resources that are at our disposal to assist young people. I am not saying that simply because I am expected to ask for more resources; I genuinely believe that if the proposed amendment is well intentioned, it must be followed up with consideration of how to support the young people. We want to remove them from the criminal justice system, but we must also ensure that we offer the right care and protection and the support that they require.

The Convener: Barnardo's does a lot of work with 16 and 17-year-olds. We may not have any choice about the proposed amendments, because some of them will enforce our obligations under European law. Margaret Smith has raised some of the issues. I am certain that, in a well-known red-light area in my constituency, high numbers of younger women are involved. I may be wrong, but I suspect that women who are between 16 and 18 are prevalent there. Although we have not seen the details of the proposed amendment, it seems

that it would make women in that age group guilty of an offence.

Tam Baillie: My understanding is that it would remove such women from the criminal justice system. My point is that, however well intentioned it is, it will leave the question of how we provide appropriate support. Having identified that age group as vulnerable, what will we do about it? We must consider how to provide adequate support for that group of women.

Marlyn Glen: Are you confident about the positive effects of your treatment programmes? I know that it is difficult to measure that, but what are the success rates? If we are going to push that issue, we need information.

Tam Baillie: I am happy to provide additional information to the committee and I invite members to visit some of our services.

Marlyn Glen: The information is important.

The Convener: There are no further questions. Tam, do you want to add anything?

Tam Baillie: I have said just about everything that I need to—I have taken up enough time. I am satisfied that I have made the points that we feel we need to make.

The Convener: On behalf of the committee, I thank you for your valuable evidence. You have put your points across well and we are grateful for your oral and written evidence.

11:30

Meeting suspended.

11:35

On resuming—

The Convener: I welcome to the committee James Chalmers, who is a lecturer in criminal law in the University of Aberdeen's school of law and is a member of the Scottish Law Commission's advisory group on reform of the law of rape and other sexual offences.

Mrs Mulligan: Good morning, Mr Chalmers. I know that you listened to the first evidence-taking session, so it might seem a bit late to be asking you this question. However, do you think that there is a need to create the offence under section 1 of the bill? I ask that because I am aware that, at the moment, cases are reported to the police and are investigated and that the judicial process takes its course. If you believe that it is necessary to create the new offence, could you say what is unsatisfactory about the current situation that makes that the case?

James Chalmers (University of Aberdeen): The creation of the offence is necessary. Some of the activities that the offence strikes at would already be criminal in one of two ways. It might be that online grooming, for example, would amount to the offence of lewd and libidinous practices, which the High Court has previously suggested is the case. There are two problems with that, however. First, although that offence applies to girls under the age of 16, it does not apply to boys who are 14 and over. Secondly, online grooming might not be sexual in itself and the offence of lewd and libidinous practices applies only to conduct that is liable to deprave and corrupt the child. If the conduct is objectively innocent at that stage, that offence is not committed.

The other possibility is that preparatory grooming followed by travelling to meet the child might amount to an attempt to commit a sexual offence. However, an attempt occurs only when someone moves beyond the stage of preparing for an offence to the stage of perpetrating it. It is not quite clear when preparation ends and perpetration begins.

Another factor is that the new offence applies to the intention to commit a sexual offence anywhere, not only in Scotland. Although some statutory provisions cover sexual offences abroad, they do not apply to the same range of sexual offences as the bill does. Furthermore, they apply only outwith the United Kingdom, not to other parts of the UK.

The bill will fill in some gaps, but the main issue is that the legislation will draw some clear lines in areas in which police and prosecution authorities might not otherwise be quite sure at what stage intervention is possible.

Mrs Mulligan: You will have heard Tam Baillie say that Barnardo's found it difficult to find information about the prevalence of grooming. Do you know of any research that has been done into the extent to which grooming takes place?

James Chalmers: Some research has been done. I am not aware of any being done specifically in Scotland or the UK, although Barnardo's has been able to report the number of people with whom it has come into contact who have either engaged in grooming or have been the recipients of online solicitations and similar activity.

Earlier, Margaret Mitchell referred to the figure of one in four children. The University of New Hampshire in the United States conducted a telephone survey of 1,501 children between the ages of 10 and 17. It showed that one in five of those children claimed to have received some sort of online sexual solicitation over the previous year. Some caveats should be added to that. Those

solicitations might have been coming from children their own age, only around one in 50 children had received a request to meet and only one in 500 had received such a request from someone who admitted to be over the age of 25. Obviously, we do not know what the actual ages of those people were and the number of actual requests to meet, particularly from people who are not in the child's age group, might be small.

Mrs Mulligan: You say that there is currently no research in Scotland or in the UK. Are you aware of anybody proposing any research?

James Chalmers: I am aware that Barnardo's at one point called for a national audit to assess the scale of the problem. If research is on-going, I am not aware of it, I am afraid.

Stewart Stevenson: There was discussion in the previous evidence session of the apparent legal limbo that 16 and 17-year-olds would be in under the bill as it is currently cast. Do you have any views about the legal implications of the fact that the offence can by committed only by a person aged 18 and over rather than by a person aged 16 and over?

James Chalmers: As Tam Baillie said, there is certainly evidence to suggest that sexual offences are committed by children under the age of 18. A Home Office study that was published in 1998 suggested that adolescents might be responsible for as many as a third of all sexual offences. I tend towards the view that the age that the bill currently specifies, which is 18, may need to be reduced. I agree that prosecution might not be the normal response, but at least the matter would clearly be covered by the criminal law.

Stewart Stevenson: Would there be any legal difficulties if the age were to come down to 16?

James Chalmers: There is a general problem with regard to the extent to which the criminal law should cover consensual sexual activity between children and young adults of around the same age. I do not think that that is a problem in the bill as such; it is a problem that relates to the underlying law on sexual offences. I think that the Scottish Law Commission will examine the issue in its current review of sexual offences, although that is a matter for the commission. The bill applies only where the person concerned is acting with the intention of committing a sexual offence.

Unfortunately, there are no easy solutions to the problem. The law on sexual offences has fairly recently been reviewed and changed in England. The Home Office found the matter to which I have referred rather difficult and eventually gave up trying to make specific provisions to exempt such activities from the scope of criminal law. I am not sure that the problem can be addressed in the bill; it is a problem with the law on sexual offences generally.

Stewart Stevenson: My next question is on the cross-jurisdictional issues that are associated with age, in particular when somebody is legitimately married to someone who is under the age of 16. What legal issues would be associated with, for example, a marriage exemption?

James Chalmers: Some of the underlying offences already contain marriage exemptions. Most obviously, the offence of sexual intercourse with a girl under the age of 16 applies only to unlawful—that means extramarital—sexual intercourse. However, with other offences, there is either no explicit exemption or the issue is unclear. There would be no great difficulty with such an exemption.

Stewart Stevenson: In practice, would the situation be that the fiscal would decide that it would not be in the public interest to prosecute?

James Chalmers: In practice, the issue could be—I am sure that it would be—dealt with as a matter of prosecutorial discretion. However, it could be also be explicitly dealt with in legislation if that were thought to be desirable.

Stewart Stevenson: A House of Commons research paper that was produced in 2000 suggests that the legal age of sexual consent in Spain is 12—a footnote makes the point that in Spain

"there is no statutory age of consent",

although in practice it seems to be 12. In that example and in others, such as Northern Ireland where the age of consent is 17, are there cross-jurisdictional issues about which the committee should take particular care?

James Chalmers: If someone is travelling to commit an offence abroad, the bill does not require that what they propose to do be criminal under the law of that country, so there is an issue about whether it would be appropriate to prosecute somebody for intending to travel to commit an offence in, for example, Spain that would not be an offence in the UK or Scotland. Given the huge range of provisions in different jurisdictions, the matter might easily be dealt with only by way of prosecutorial discretion. The alternative would be to adopt a rule that the bill does not apply to actions that are not criminal in the country where they are to be carried out, but that would defeat some of the objectives of the bill.

Stewart Stevenson: The footnote that relates to Spain in the House of Commons library research paper states:

"there is no statutory age of consent. In general, consensual sexual relations are not penalised from the age of 12, although a person aged over 16 who has sex with a

person aged between 12 and 16 may be liable to prosecution".

It appears difficult to rely on legal provisions in other jurisdictions, and that is only in relation to the European Union; I suspect that the issue becomes much more complex outwith the EU. Do you agree that it would be unwise to rely on legal provisions elsewhere?

11:45

James Chalmers: Yes. Because legal provisions in different countries are not consistent, a neat general rule cannot be adopted, other than one that would remove actions that are not criminal in overseas jurisdictions from the scope of the bill entirely, which would be undesirable.

Mr McFee: The offence in the bill will apply if a person has had at least two prior communications or meetings with the child. Is that necessary? Could the offence be constituted with only one prior meeting or communication? Could an offence be committed if an adult simply arranged to meet a child with the purposes of engaging in sexual activity?

James Chalmers: On your last point, I am not sure in what circumstances a person could arrange to meet a child without prior communication with them. Do you mean cases in which communication is made with a child through an intermediary?

Mr McFee: That is a good point. I was thinking about that as I asked the question. How would a person arrange to meet somebody if they had not communicated with them? Perhaps modern technology has gone further than I know. I suppose that we are talking about opportunists.

James Chalmers: One of the practical issues is proving exactly what the adult intends to do, which may be difficult in the absence of prior communication. However, I have doubts about the requirement for two previous meetings or communications. The bill does not require that those communications must have a grooming nature—they could be entirely innocent or inadvertent, but that would suffice to bring the further actions under the scope of the bill. I assume that the reason is that it is difficult to find a definition so that the provision would apply only to communications that have a grooming nature.

One lengthy internet conversation could last hours or the best part of a day and could be much more significant than two short conversations. That is why I have my doubts about the limitation of requiring two previous meetings or communications. I am not sure that that provision serves any useful purpose.

Mr McFee: It has been whispered in my ear that a third party could be involved in the communication. Is that covered in the bill, particularly if the third party is furth of our shores?

James Chalmers: That could be covered by treating the situation as a conspiracy of two people acting together to commit a criminal act. However, the bill is not absolutely clear on how that would be dealt with. An explicit provision might be needed if the issue was thought to be a problem.

Mr McFee: You raise a couple of points that we should consider.

Is it your understanding that the bill is directed only at cases in which the adult initiates the contact or is the bill neutral on that issue so that it does not matter whether it is the adult or the child who initiates the contact, for whatever reason?

James Chalmers: The bill is absolutely neutral on that. There may be good reasons for that. Although the bill is not limited to cases of internet grooming, I will use that as an example. A child might initiate contact with an adult but believe that the adult is another child because they portray themselves online in a certain way. An attempt to limit the offence to cases in which the adult initiates communication would give rise to serious problems, such as problems with proof. However, the wording of section 1 makes the issue irrelevant. Of course, the matter may be taken into account in the exercise of prosecutorial discretion.

Mr McFee: We need to follow up the point about how third parties come under the bill and the point that one long communication might be more effective for grooming than a couple of shorter ones.

The Convener: You raised the issue of whether it matters who initiates. The Executive's evidence is not clear on that point. It did not suggest that there was a particular reason or subtext for not including a specification in the bill, so we need to pursue the matter.

I want to press you on how the offence should be drawn up. We are trying to show that the adult has taken some action to arrange to meet the child. Do you think that there is a simpler way of creating an offence—for example, from the communication? If there are two communications, should that not be enough to make it clear that someone is arranging to meet a child and has committed an offence? Do we need something in the middle?

James Chalmers: In that situation, there is still scope for intervention through a risk of sexual harm order. There is something to be said for the view that, where matters are only at a very preparatory stage, a criminal prosecution may not be the best way of dealing with the actions. An

intervention such as a risk of sexual harm order would probably stand more chance of being effective.

The Convener: In your view, would it be possible to make it an offence for someone to arrange by internet communication to meet a child who thinks that that person is their age? Is it necessary also to show that there has been more than an internet exchange and that the adult has acted on a communication by arranging to buy a ticket to travel to meet the child?

James Chalmers: Under the bill as drafted, it would be necessary to show that the adult had met the child or travelled with the intention of meeting them. An offence could be drafted that covered simply the communication, but that might pose evidential difficulties. It might not be possible to be certain from the communication that the adult seriously intended to meet the child. We may be confident that an adult is not just contemplating a sexual offence, but has the intention to commit it, only when they take action to travel to meet a child. That may be one reason for limiting the offence in that way.

The Convener: Are there any evidential issues relating to the communication? Could someone argue that the fact that a message has come from their computer does not mean that they typed it? Are there difficulties in proving that the communication came from the alleged offender?

James Chalmers: There is always a general problem with evidence that is obtained from computers in such a way. That problem is not peculiar to the bill. I am not sure that much can be done in the bill to deal with it. To a certain extent, it is a technological rather than a legal problem. At issue is the information that the police are able to derive from computer and other records.

The Convener: Perhaps that is why the bill includes the provision that the accused must have made arrangements, which shows that they are acting on a communication and provides confirmation that the communication came from them. Without that confirmation, one would have to prove that the communication came from the accused.

James Chalmers: I agree.

Margaret Mitchell: In your view, are risk of sexual harm orders compatible with the European convention on human rights?

James Chalmers: In my view, they are compatible with the convention. They are very similar to antisocial behaviour orders in the way in which they are drafted. In the case of McCann v Manchester Crown Court in 2002, the House of Lords held that ASBOs were compatible with the convention, at least under English law. The same issues arise in relation to risk of sexual harm orders. The basis for any ECHR challenge would be the argument that the orders are criminal penalties and that it is inappropriate to apply the safeguards that apply in civil proceedings to criminal cases. However, the case law of the European Court of Human Rights makes it clear that court proceedings that cannot result in a penalty are not criminal proceedings for the purposes of the European convention on human rights. The proceedings that we are discussing can result only in an order being made. A penalty might be imposed later on if the order is breached, but that will require the criminal standard of proof to be met in criminal proceedings. The ECHR safeguards would be properly met in such proceedings.

Margaret Mitchell: That has taken us quite far down the proof slide, as it were, but perhaps we could go step by step. Are you confident that, in the event of such a challenge, no distinction could be made between the stigma that is attached to breaching, or even to being served with, a risk of sexual harm order and that which is associated with other kinds of orders for behaviour such as vandalism, which one would in no way condone but which nevertheless tends not to provoke the same kind of reaction that the behaviour that we are talking about does?

James Chalmers: Civil proceedings may also involve significant stigma. For example, in an action for defamation that is based on an allegation that someone committed a sexual offence, the relevant standard of proof would be on the basis of the balance of probabilities. In such an action, the safeguards that are applicable in criminal proceedings would not apply.

The House of Lords judgment on the McCann case was quite clear that court proceedings that could not in themselves result in a criminal penalty were not criminal proceedings for the purposes of the ECHR. In an application for an antisocial behaviour order, allegations might be made that could attract almost as much stigma as those that might be made in an application for a risk of sexual harm order. However, despite the stigma attached to those allegations, the proceedings would not be criminal proceedings and it would not be a violation of the ECHR to deal with the issue as a civil matter.

Margaret Mitchell: Did the judgment consider only the proof, evidence and consequences of the issue? Did it take into consideration the balance between the obvious necessity to protect the rights of the child and the desire to protect the rights of the adult?

James Chalmers: In the McCann case, which concerned an antisocial behaviour order, the House of Lords laid a great deal of stress on the

rights of communities to be free from antisocial behaviour. The same sort of argument could apply to the rights of the child to be free from unwanted and illegal sexual activity. That would also be an important consideration.

Margaret Mitchell: In other high-profile cases in the past, evidence has been called into question and found in retrospect to have been unsubstantiated. Is there any danger of that kind of thing happening if a risk of sexual harm order was imposed on an adult after a malicious accusation, given that the standard of proof—a matter on which the bill is silent—is likely to be, as you have confirmed, on the balance of probabilities?

James Chalmers: With stigma, there is always an issue that wrongful accusations might be made. A potential way of dealing with that problem is to consider whether it would be necessary for an application for a risk of sexual harm order to attract publicity and for the person against whom the order is sought to be publicly named. Depending on how the bill operates in practice, it might be felt that publicly naming the individual would be inappropriate and unnecessary, just as the names of those who are on the sex offenders registers are not released. That might be one way of dealing with the stigma issue.

Margaret Mitchell: We have covered most aspects apart from the sanction for a breach of an RSHO, which is a civil order. We may have gone over that issue, but I want to be absolutely sure that we have the matter on record.

James Chalmers: Under section 7, the bill explicitly provides that the sanction for a breach of a risk of sexual harm order or interim RSHO would be a criminal prosecution. In that situation, the criminal standard of proof and all the safeguards that apply in criminal proceedings would apply.

Margaret Mitchell: Is that the usual sanction for a breach of a civil order?

James Chalmers: No. The measure that is most analogous to a risk of sexual harm order is, I suppose, an interdict. The appropriate sanction that follows on from proceedings for breach of interdict is dealt with in the civil courts but the criminal standard of proof applies because of the nature of the allegations involved.

Margaret Mitchell: However, the proceedings under the bill would go a bit further in that they would be for a prosecution rather than for an interdict.

James Chalmers: That is correct, but an action for breach of interdict can result in criminal penalties. Although the action takes place in the civil courts, the proceedings are, in effect, criminal in nature.

Marlyn Glen: The types of conduct that section 2(3) identifies include

"giving a child anything that relates to sexual activity or contains a reference to such activity"

and

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

Is there any risk that, for example, a doctor who prescribed the contraceptive pill for a 15-year-old girl or a schoolteacher who provided sex education would be subject to an order?

James Chalmers: No. A doctor or someone else in that situation would commit an act that fell within the scope of the section, but that would be insufficient for a chief constable to bring an action before a court to make an order, because it is also necessary to show that an order is required to protect

"children generally or any child from harm from that person."

That condition would not be satisfied.

12:00

Marlyn Glen: That covers the doctor. What about the teacher?

James Chalmers: The same applies to the teacher. It would not be necessary to make an order to protect any child from harm from the teacher. If that is a concern, a model is available in the English Sexual Offences Act 2003, which contains the offence of facilitating commission of a child sex offence and an exception for teachers who provide sexual health advice and doctors who provide contraception—for anything that is done for a child's welfare. Those provisions would provide an appropriate model if it were felt necessary for the bill to say that such actions do not fall within the scope of section 2. Even if they did fall within the list of acts in the section, the necessity test would not be met.

Marlyn Glen: The bill defines a child as a person who is under 16. What is the situation when the target of an application for an RSHO reasonably believes that the younger person is over 16?

James Chalmers: That person would still have committed one of the acts that is referred to. It is not necessary to show a relevant criminal state of mind; it must simply be shown that they committed the act. If the trigger condition was satisfied, an order could be made. However, if the person concerned reasonably believed that the child was over 16, it is difficult to see how the test that an order must be necessary to protect children from harm could be passed.

The Convener: I will return to Margaret Mitchell's questions on risk of sexual harm orders, which you said are compatible with the ECHR. I am a bit uneasy about how wide the scope is. The bill gives no clues to the evidence that must be led, other than what is necessary to protect a child. Does the bill need more detail about what the court will look for? In the absence of that detail, I presume that, as a chief constable can request an order, they must lead evidence that a child has perhaps been sexually abused or has had sexually explicit material put in front of them. In some cases, a chief constable may lead evidence that would be insufficient to be led in a court of law. In leading evidence, will such issues have to be raised to obtain a sheriff's agreement to a risk of sexual harm order?

James Chalmers: Evidence might be led that would be inadmissible in a criminal court, but it would still have to be admissible in a civil court, because civil proceedings will be used. The standard of proof that will apply in such cases may raise an issue. I understand that the Executive's view is that, because the bill is silent on the subject, the civil standard of proof applies and only proof on the balance of probabilities is required. I am not as confident about that, because it has been said of antisocial behaviour orders in England, which are made on a similar basis, that the criminal standard of proof must apply and that proof must be beyond reasonable doubt.

It is impossible to say whether Scottish courts would take the same view on the provisions in the bill, which are different in nature. I am not sure whether a conclusion can be reached, because in some circumstances Scottish courts have ruled that the higher standard of proof applies in civil proceedings. However, even if it did, the other rules of criminal evidence would not apply. For example, there would be no prohibition to the same extent as in criminal law on the use of hearsay evidence. Corroboration—evidence from two independent sources—would not be required. There would also be no requirement to show that a person against whom an order was sought had acted with a criminal state of mind. It would be necessary to show only that they had committed the act in question. Therefore, the standard of proof required would clearly be much lower.

The Convener: Do you agree that evidence could be presented to a civil court that might refer to a crime that cannot be proved in a criminal court?

James Chalmers: Yes.

The Convener: Would that be compatible with the European convention on human rights?

James Chalmers: Yes, because the only situation in which the matter could be resolved by a criminal penalty's being imposed would be if, in a subsequent prosecution, a breach of the order were proved beyond reasonable doubt.

The Convener: Is not it a fundamental human right that if someone has committed a crime for which there is evidence they should be tried in front of their peers in a criminal court?

I come next to the interim order, which seems to me to be bizarre, because there is no test whatever for it. I realise that a risk of sexual harm order might be used when a person's behaviour is not necessarily criminal, but is such that we want to prevent it from continuing. Are you comfortable with trying people under the rules of a civil court when the evidence against them is insufficient for them to be tried in a criminal court?

James Chalmers: On the basis of the law as it stands, I am comfortable that what is proposed appears to be compliant with the ECHR. That may not mean that it would, as a matter of policy, always be advisable to seek RSHOs. A decision's simply being compatible with the ECHR does not mean that it is a wise decision. Orders such as the RSHO—for which we could certainly go beyond what is required for the ECHR—are designed to deal with situations in which it is not possible to bring a criminal prosecution but there is thought to be risk. Therefore, in a sense, the RSHO represents a deliberate policy decision to relax the standard of proof to allow preventive measures to be taken. The Executive might give you the answer that the order would not in itself require that the person in question was guilty of a crime. To obtain an RSHO would certainly require proof that a person had committed an act. If it could be proved that such an act also involved an appropriate criminal state of mind, that would amount to a crime. However, there is no need to prove such a state of mind in order to obtain an RHSO.

The Convener: That is my point.

My next question is about the fact that the RSHO provision has no detail about what needs to be proved in court. Do you think that there should be detail about what must necessarily be shown?

James Chalmers: I am not entirely sure how it would be possible to frame a provision along such lines. The provision is designed to allow an order to be made if it is shown that a child is, or children are, at risk. I am not sure why, provided that that were shown, it would be desirable to limit how it might be shown. I have great difficulty in envisioning what any such restriction would look like, or how it could be usefully drafted.

The Convener: Section 5 makes provision for an interim RSHO but, unlike the full order, there is no test for the making of such an order other than

a sheriff thinking that it is just to do so. Should we have a clearer test for the interim RSHO?

James Chalmers: I think that that provision is rather surprising, which I touched on in my written submission. I think that the test for the interim RSHO is modelled on the English legislation on antisocial behaviour orders in the Crime and Disorder Act 1998, in which an interim ASBO may be made if a court considers that it is just to do so. It seems that that test was not considered appropriate for the Scottish antisocial behaviour legislation—the Antisocial Behaviour etc (Scotland) Act 2004—in which all the conditions that are required for a full ASBO must also be met for an interim ASBO. However, it is necessary only to show prima facie evidence that the acts that would justify making an order had been committed. In a sense, the test for a full order is relaxed to the extent that only prima facie proof of the act is required. However, it must still be shown that the order is necessary to protect a person from antisocial behaviour. As I said, that is a clear and somewhat stricter test than that which is proposed in the bill. The Antisocial Behaviour etc (Scotland) Act 2004 provides a clear model that could be followed.

I should explain that the written evidence that I submitted, which does not relate to my oral evidence, was submitted only yesterday afternoon, so I suspect that few people have seen it yet.

The Convener: I have some difficulty with this issue and have asked the Executive about it. If we are treating the protection of children as the priority for the system and we get to the point at which it is necessary to apply for an order to protect the child, the system should give priority to that, rather than be modelled on antisocial behaviour orders, the nature of which is completely different.

I am not in any way trying to downgrade the serious issue of antisocial behaviour, but given that child protection is regarded as being a priority, we should design the legislation so that we can reach the point at which we get a case to court. An interim order would seem to defeat any attempt to deal urgently with a matter. Is it necessary to have an interim order?

James Chalmers: An interim order is designed to be used pending a hearing on a full sexual harm order. If there is a problem, it is a problem with orders in general rather than specifically with the interim order provisions.

It might simply be that it is, in some cases, difficult to lead evidence that would satisfy a criminal court that an offence has been committed. The situation with regard to antisocial behaviour orders is analogous to the extent that it was found that the victims of antisocial behaviour were unwilling to give evidence for fear of reprisals. Children who have been the target of behaviour that would be covered by an RSHO might be unwilling or unable to give evidence. Because proceedings are civil, hearsay evidence could be used.

There are, of course, provisions to address those problems that would allow for children's evidence to be taken in special ways in criminal proceedings, but the matter might be more easily met by the relaxed standards of evidence that are required in civil matters. I take the point that that would reduce the protections available to the person who was the subject of the order.

If the problem is considered to be to do with the stigma that attaches to an order's being made, I think that there is something to be said for the view that the proceedings should attract anonymity and that the person against whom an order was sought should not be publicly named.

The Convener: Would you take the view that, if there were to be an offence in the future, after an order had been applied, the criminal court that was dealing with the case should have that information before it? In other words, should the order be treated the same as previous convictions?

James Chalmers: If the offence for which the person was being prosecuted was a breach of the order, the court would necessarily have the details of the order in front of it. If the person was being prosecuted for a full criminal offence, I expect that they would, as a matter of practice, be prosecuted at the same time for a breach of the order. Again, in that case, the court would have before it the fact that the order had been imposed when it was imposing the sentence.

The Convener: The court would not have that information before the sentence was imposed.

James Chalmers: That is correct.

The Convener: So, in your view, a breach would be treated like a previous conviction.

James Chalmers: No—it would not be treated like a previous conviction. If an accused were being prosecuted for breach of an RSHO, the fact that they were being prosecuted for that offence would demonstrate that they had been subject to an order in the same way that somebody who was prosecuted for—

The Convener: If an unrelated offence—that is, one other than a breach of the order—were committed, would the order be treated in the same way as a previous conviction would be?

James Chalmers: If the offence were unrelated, my view is that the order would not be treated as a previous conviction. Such evidence would not normally be relevant evidence in such a case,

which would mean that it might not be possible to lead it. I do not want to state categorically that such evidence could never be led, but it would not normally be evidence that would be relevant in relation to proving a charge against the accused in a case such as the one that you outlined.

Stewart Stevenson: Will you confirm that, for an interim antisocial behaviour order, there has to be a demonstrated urgency and—this is my recollection, which you might confirm or otherwise—it is not necessary that the person on whom the order might be served has been found?

12:15

James Chalmers: I will consult my copy of the relevant legislation, which I have with me.

Under the Scottish legislation on ASBOs there must be, for an interim ASBO to be made, an application for a full ASBO, which must have been intimated to the person against whom it is sought. The conditions for making an interim ASBO are the same as those for the full ASBO, with the exception that, rather than satisfy the court that the accused has engaged in antisocial behaviour—roughly speaking—it is necessary only to satisfy the court prima facie that that condition has been met. That is the one difference.

Stewart Stevenson: I must confess that although I remember the discussion on that subject, I do not remember the outcome. One of the arguments that was made on interim ASBOs was that the supposed perpetrator of antisocial behaviour should not be able to escape having an order placed on them by removing themselves and not turning up. Are you suggesting that we did not win that argument?

James Chalmers: I will just check the statute. It states that the application must be intimated.

Stewart Stevenson: Is that on a best-effort basis?

James Chalmers: Yes—the intimation need not necessarily be successful.

Stewart Stevenson: Therefore, under the Scottish legislation on antisocial behaviour, it is possible that a person on whom an interim antisocial behaviour order—not a full order—has been served could be unaware of that.

James Chalmers: Yes.

Stewart Stevenson: Is that mirrored in the bill's provisions for interim RSHOs?

James Chalmers: The bill requires only that the application must be intimated.

Stewart Stevenson: Again, such an application might or might not have been successfully communicated. Therefore, there are some distinct differences in the proposals for the interim RSHO that would cover particular circumstances that might apply in a small percentage of cases.

James Chalmers: Yes.

Stewart Stevenson: So the existence of an interim RSHO could have a value in preventing the person on whom it might be served from thwarting the protection of the child in question simply by removing themselves for a period.

James Chalmers: Yes, although it would still be necessary to make that person aware in some way of the order's existence for it to have any value. The matter is not clear from section 7, which would create the offence of breach of an RSHO or interim RSHO, but it is probable—if not certain—that the courts would require that the accused was aware of the order's existence before they could be found guilty of a breach.

Stewart Stevenson: Are you suggesting that, if a person against whom an interim order has been sought and granted has commenced a journey and left the jurisdiction of the UK, they could not necessarily commit a breach of the interim RSHO if they were unaware of the granting of that interim order?

James Chalmers: Yes. The offence of breach of an RSHO, which is the same whether the order is a full or interim RSHO, requires that the offender has breached the terms of the order "without reasonable excuse". Not being aware of the order would generally be a reasonable excuse. However, if the person knew that an RSHO was about to be made and deliberately absented himself or herself from the jurisdiction in order to avoid finding out about the order, that might not be treated as a reasonable excuse. That would have to be determined case by case. The courts would probably require knowledge of the order or the risk of the order. It is difficult to see how, if an order of which the accused was entirely unaware had been made, the accused could not be said to have a reasonable excuse for not knowing that they were prohibited from doing certain things.

Stewart Stevenson: So, after all that, under what circumstances will interim orders be of value?

James Chalmers: Interim orders will be of value simply because it will take time, in many cases, to schedule a full court hearing at which all the evidence can be led. Under the terms of the bill, interim orders are designed to cover the gap between proceedings being initiated and a full hearing before the sheriff.

Mrs Mulligan: On the point that Stewart Stevenson was making, would the RSHO always be about preventing an act that was, in itself, an offence?

James Chalmers: No. The terms of the RSHO are not limited in that way. All that it has to do is prohibit the person against whom the order is taken out from doing anything that is described in the order. The fact that breach of an order is an offence demonstrates that the order is not designed to be limited to preventing things that would constitute offences. If that were the case, there would be no need for breach of an order to be an offence. There is a necessary implication that the order may go much further than simply prohibiting criminal offences.

Margaret Smith: You may have heard me ask this question of Barnardo's earlier. The Executive has proposed a series of amendments for which we do not yet have the text, so we are slightly in the dark, although we know that it is trying to bring Scots law into line with the UN Convention on the Rights of the Child and the EU framework regarding the sexual exploitation of children and child pornography. The present law makes it an offence to create, possess or distribute indecent photographs of children under 16. The bill proposes to raise that age limit to 18, as has been done in England and Wales. We would be interested to hear your views on that and on the need for exceptions and exemptions to that to cover circumstances in which the person involved is married or, as in England and Wales, is in an enduring family relationship; that is, cohabiting or in a same-sex relationship.

James Chalmers: I was aware of the Executive's proposals, and I am grateful to the clerks for making me aware that that issue was going to be raised today.

My views are similar to those expressed earlier by the witness from Barnardo's. It seems that it would be a sensible change to make, but there would need to be caveats, possibly including a marital or cohabiting-type exemption. The same considerations seem to apply that apply generally to criminalisation of sexual activity between young people. Just as criminal liability and prosecution may not be the appropriate response to sexual intercourse between a 16-year-old and a 15-year-old, it may not be the appropriate response to two 17-year-olds taking indecent photos of each other, even if they are not in an enduring family relationship or something similar. That may be best dealt with through procurator fiscal discretion rather than through attempting to frame the matter in legislation. When the parties to such an offence are similar in age, they would not normally be the subject of a criminal prosecution.

Margaret Smith: At present, it is not an offence to pay a person for sexual services, irrespective of the age of the provider of those services, unless the child is under 16, in which case the age of consent is a consideration. Can you foresee any difficulty with making it an offence to pay or reward a person under 18 for sex or to offer to do so? What implications does that have for our view of the law on prostitution, which is currently under review in Scotland?

James Chalmers: The practical implications of such a change would be relatively minor, especially concerning a girl under the age of 16, because the examples that you cite would already be criminal. The implications would obviously be more significant if the girl was aged between 16 and 18. I cannot foresee any specific difficulties in making that change. It might be desirable to make it clear that the child is not guilty of the offence as an accessory. That problem arises generally in the law on sexual offences in Scotland, and has never been resolved by the courts for the simple reason that people in that situation are not prosecuted.

However, for the avoidance of doubt, it might be desirable to make it clear that a child who sells sex is not guilty of aiding and abetting the purchase of sex by an individual. Subject to that caveat, I see no particular problems with the provision. Much might depend on exactly how concepts such as reward are defined in the legislation.

Margaret Smith: Would it be necessary to prove that the person who procured the prostitute was aware of the prostitute's age? I offer a practical example. Someone who is driving around the middle of Glasgow or Edinburgh might choose—possibly in great haste—a young woman from the street who turns out to be 17 and a half years old, rather than 19 years old. I presume that for that person to be guilty of an offence, it would have to be proved that they knew that the young woman was under 18.

James Chalmers: It is difficult to answer that question because the matter depends in part on how the Executive chooses to draft the amendment. The law could be drafted as you suggest, but it is more likely that the Executive will propose a defence of reasonable belief, instead of placing a positive obligation on the prosecution to show that someone had knowledge of the individual's age. There might be a defence of reasonable belief that that person was over the age of 18, which might be sufficient to deal with concerns.

Of course, there are general issues beyond the scope of the bill concerning the extent to which the law should criminalise the sale of sex by adults. However, if it is accepted that that should be outwith the scope of the criminal law, it would be desirable to allow a defence of reasonable belief—which tends to be the norm in Scots law when dealing with sexual offences—rather than to place a positive obligation on the prosecution to show knowledge of the age of the victim, which is very difficult.

The Convener: As there are no further questions, I thank you for your evidence. You have made some valuable points that we need to consider. Would you like to make some concluding remarks?

James Chalmers: No. All the points that I wanted to make have been covered in questioning.

Security of Tenure and Stability of Rents

12:27

The Convener: Item 4 concerns security of tenure and stability of rents. I refer members to notes that have been prepared by the clerk and our adviser. I invite the committee to consider a number of options. We have had a meeting with our adviser, Professor Robert Rennie, and discussed various options with him. We have had a chance to examine in detail the advice that he has given us in writing.

I invite members briefly to discuss on the record the advice that they have been given and the action that they wish to take. I welcome Alasdair Morgan to the committee. He has a particular interest in this matter and was able to join us at our meeting with Professor Rennie. Before members comment, I wish Chris Gane—who is about to leave us—a merry Christmas and look forward to seeing him next year for more legislation.

Stewart Stevenson: I am conscious of the options that the clerks have offered us. The first of the three options set out in paragraph 16—option (a)—is for us to ascertain whether the hutters groups have considered part IV of the Land Registration (Scotland) Act 1979. It would be sensible for us to do that.

Given that options (b) and (c) are much more substantial, in that they would involve consideration of legislative changes, I suspect that it would be difficult for us as a committee to pursue them. I think that, for the moment, we should just proceed with getting information from the hutters. That is the sensible next step.

12:30

Alasdair Morgan (South of Scotland) (SNP): Following the briefing that the committee received, I talked to the legal adviser for the hutters at Rascarrel bay in Kirkcudbrightshire and to some of the hutters themselves. They were quite excited by the option that the Land Registration (Scotland) Act 1979 seemed to offer them. I believe that their solicitor is proceeding on that basis, although I am not sure what legal stage matters have reached. He certainly seemed to think that there was at least a prima facie case that many of the hutters could be tenants at will and therefore able to avail themselves of the act. When the hutters were apprised of that information, they were interested in exercising the purchase options for which the act provides. That seems to offer a way forward, although there are lots of ifs.

The Convener: Chris Ballance wrote to me to say that one of the hutters whom he knew was attempting to pursue that course of action. As yet, there is no outcome. I do not know how the process started, but a hutter is attempting to use the provisions in the 1979 act.

As members know, we have dealt with the issue for a long time. It seems that with every idea that we have had, we have come up against a brick wall—although we could solve part of the problem, another problem was always created. That is what we found at our meeting with Professor Rennie. We had five or six options, but once we began to consider them, we realised that there were obstacles in our way. For me, what came out of our meeting with Professor Rennie was a solution that we had not thought about, which lay in the provisions of the 1979 act. Rather than try to give people rights in relation to a variety of hutting properties, we could give them an option under other provisions, although there would have to be some amendment of the 1979 act. As someone who has examined the issue for several years, I do not think that there is any other option. We have considered everything and there is no other legislation that it is worth spending time on. I am willing to go for option (a).

Margaret Mitchell: It is reasonable for us to establish what interest there is in the opportunity that the 1979 act offers and to take things from there.

Alasdair Morgan: Professor Rennie's opinion makes it clear that there are matters relating to what constitutes a tenant at will that have never been tested in court. If the Rascarrel hutters proceed with their case and those matters are tested in court and there is a judgment, it might be wise for the committee to return to the issue at some stage in the future. A decision in court would allow the committee to say either that the 1979 act offered a solution in some cases or that it did not. The committee might like to resurrect its interest at that stage, depending on the outcome in court.

The Convener: I think that the committee is saying that it supports option (a), which is to seek information from the hutters about whether they have considered the relevant provisions of the 1979 act and whether they would be interested in pursuing that possibility. As a committee, we should be clear that choosing option (a) would mean closing down the other options. The committee has been willing to try to find a solution, but I see no alternative course of action. I do not want us to go halfway down one road, only to find in any subsequent consultation that we were going down a road that we had already been down.

Margaret Smith: I note from the briefing paper and from your comments that the 1979 act might have to be amended to cater for the tenancy at will option. I am not aware that we have had a response from the Executive specifically on that option, so it might be worth asking for its views on that.

The Convener: If you remember, it was only the tail-end of our discussion that focused on that option. We have had no time to explore the matter. All that I want to do today is to get it on record that we wish to explore option (a). We have already discussed the matter in private. We would be happy to pursue writing to the Executive and to the hutters, so that members have the maximum amount of information in front of them when we next have the opportunity to take the matter further. The suggestion is a good one. If the committee is agreed, we will also write to the Executive.

Mr McFee: Could we clarify whether there are further issues to do with access rights to the surrounding land in situations in which individuals are permitted under the 1979 act to buy the land on which their property sits? It is one thing to be allowed to buy the land under the property, but if somebody else owns all the land around it and does not allow the person right of access over that surrounding land, then it is quite useless. Has that been addressed?

The Convener: As ever, there are anomalies and surrounding issues that must be considered. You are right to point out that scenario. At the moment, we need to establish the principle of law. In which branch of law should the Executive legislate? Should it be the law on leases, the law on rent or property law? That is the starting point. We know that, further down the line, we will have to consider other issues. It is a matter of getting the work started. It may well be that we come up against other obstacles—indeed, we undoubtedly will. If the committee agrees, we will pursue option (a) as set out in our paper. I will get back to members on the matter.

Civil Partnership Act 2004

12:36

The Convener: I refer members to the note that has been prepared by the clerk on the Civil Partnership Act 2004, and to the correspondence that we have received from the Deputy Minister for Justice, which gives details of the enactment of the legislation—to put it on record, there is now a Civil Partnership Act. Members will note the comments in the minister's letter of 29 November thanking the Justice 1 Committee for its careful scrutiny. You will notice that a number of the issues that we raised during our scrutiny of the bill and of the corresponding Sewel motion have been taken up by Westminster in some shape or form. I wanted members to be aware of that and to note that the bill has now come into force.

Margaret Smith: I put on record my absolute delight that the Civil Partnership Act 2004 is now law. I am not quite telling members to buy their hats yet—but it might not be a bad idea.

This has worked out well: the committee's work has been taken forward via the Executive into the process at Westminster. However, it has become apparent that there is not really any formal way of doing that, although I know that some of us were informally making sure that Westminster colleagues knew that both the Equal Opportunities Committee and the Justice 1 Committee of the Scottish Parliament had done work on the bill. I wonder if there needs to be some tightening up of Sewel motion procedure in general. There have been a number of occasions when Scottish parliamentary committees have done quite a lot of work to ensure that the relevant Westminster committees took issues into account, rather than just leaving matters to the Executive. Initially, I found it difficult to get the message across informally to people at Westminster that we had done a substantial amount of work on the bill.

We find from the briefing note and letters in front of us that, as a result of our work on the issue of religious premises, for example, not only did the Executive draft an amendment to the Scottish provisions, but the English and Welsh provisions were also amended, resulting in the adoption of a much clearer position. That is a direct result of our work here. We have to have mechanisms in place to ensure that such things happen all the time and are not dependent on whether a minister or an Executive official is minded to do something.

It was also good that Scottish Executive civil servants were involved in drafting the Scottish parts of the legislation. They did a tremendous job on a complex and difficult piece of legislation. Perhaps that should happen with other pieces of UK legislation that have a substantial effect on Scots law.

The Convener: This is an example of a situation in which legislation can be affected if time is taken to work through it and if the appropriate channels are used. However, I cannot imagine a formal mechanism. The situation is almost akin to what we do when we scrutinise European legislation, when we simply pick up certain points that we think are important and try to influence the process. It is up to us to push at the open door. The only way in which a formal mechanism could be arrived at would be by including it in the concordat.

I would expect that, whoever the minister is, if technical and fundamental changes are being made to Scottish provisions, Scottish officials should be on the case as a matter of course. That would seem to be the easiest route for everyone. It makes sense.

Marlyn Glen: I underline what Margaret Smith said. The process was a good example of a successful intervention. However, it still seems to be the case that the press, for example, will raise this piece of legislation as an example of something that we did not deal with when, in fact, the Equal Opportunities Committee took a lot of evidence on it and reported to Parliament before the Justice 1 Committee dealt with the matter. We should flag that up.

Protection of Children and Prevention of Sexual Offences (Scotland) Bill (Witness Expenses)

12:42

The Convener: I invite the committee to delegate to me the authority to arrange for the Scottish Parliamentary Corporate Body to pay, under rule 12.4.3 of the standing orders, any witness expenses that arise during the consideration of the Protection of Children and Prevention of Sexual Offences (Scotland) Bill. One of our witnesses is coming from Birmingham and might make a request to have their expenses paid. Do members agree to delegate that authority to me?

Members *indicated agreement.*

The Convener: I remind members that the next meeting of the Justice 1 Committee will be on 12 January at 10 o'clock, when we will take further evidence on the Protection of Children and Prevention of Sexual Offences (Scotland) Bill.

My brief also tells me that we are scheduled, on that day, to consider a statement of reasons relating to the proposal by Karen Whitefield for a member's bill to prohibit large retail premises from trading on Christmas day. However, I am not aware of anything to do with that.

Margaret Mitchell: Will that proposal be a matter that this committee will deal with?

The Convener: This is the first that I have heard of the matter. That is all that I can tell you.

Mr McFee: I would like to place on record Stewart Stevenson's disappointment that the meeting will be held on 12 January, not 5 January.

The Convener: Why is that?

Stewart Stevenson: I was not talking about having a meeting on 5 January; I suggested that we have one next week. We should make progress. What is all this holiday stuff?

The Convener: I close the meeting and thank members for their work this year. Coffee and mince pies are available, so we can all be festive.

Meeting closed at 12:43.

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