JUSTICE 1 COMMITTEE

Wednesday 12 January 2005

Session 2

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JUSTICE 1 COMMITTEE
1st Meeting 2005, Session 2

CONVENER

*Pauline McNeill (Glasgow Kelvin) (Lab)

DEPUTY CONVENER

*Stewart Stevenson (Banff and Buchan) (SNP)

COMMITTEE MEMBERS

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

*attended

COMMITTEE SUBSTITUTES

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

THE FOLLOWING GAVE EVIDENCE:

Gerry Brown (Law Society of Scotland)
Chief Superintendent Tom Buchan (Association of Scottish Police Superintendents)
Iain Fleming (Law Society of Scotland)
Ian Hooper (Scottish Executive Environment and Rural Affairs Department)
Anne Keenan (Law Society of Scotland)
Douglas Keil (Scottish Police Federation)
Deputy Chief Constable Robert Ovens (Association of Chief Police Officers in Scotland)

THE FOLLOWING ALSO ATTENDED:

David Cullum (Scottish Parliament Directorate of Clerking and Reporting)
Karen Whitefield (Airdrie and Shotts) (Lab)

CLERK TO THE COMMITTEE

Alison Walker

SENIOR ASSISTANT CLERK

Douglas Wands

ASSISTANT CLERK

Douglas Thornton

LOCATION

Committee Room 6

Scottish Parliament

Justice 1 Committee

Wednesday 12 January 2005

[THE CONVENER *opened the meeting at 09:39*]

Christmas Day and New Year's Day Trading (Proposed Bill)

The Convener (Pauline McNeill): Good morning, everyone. I wish you all a happy new year and welcome you to the first meeting in 2005 of the Justice 1 Committee.

Amazingly, I have only one apology. I know that Marlyn Glen is stuck in Dundee, but she might get here eventually. Otherwise, we are all here and should shortly be joined by Professor Gane, our adviser on the Protection of Children and Prevention of Sexual Offences (Scotland) Bill, although he might also have difficulty getting here because of the weather.

I welcome Karen Whitefield MSP and David Cullum, who is from the non-Executive bills unit. They will be taking part in today's proceedings. I refer members to the note prepared by the clerk on the proposal for a member's bill to prohibit large retail premises from trading on Christmas day and new year's day. I emphasise that today we are considering not the content of the bill but the reasons why Karen Whitefield is not going to further consultation. This morning, members have the opportunity to ask questions and decide whether they are satisfied with Karen Whitefield's statement about why she is not going to consultation on her bill.

Margaret Mitchell (Central Scotland) (Con): Before we ask Karen Whitefield to address the committee, can we lay down a marker? I realise that we are not considering the principles of the bill today. However, I certainly do not think that it would be appropriate for this committee to do that because Karen Whitefield has consulted largely with trading organisations; therefore, the appropriate committee would be the Enterprise and Culture Committee, the Local Government and Transport Committee or, perhaps, the Communities Committee. As a point of order, I made that point at our previous meeting, but it was not noted. Although I am happy to hear Karen Whitefield's statement, it is important that we set down that marker. The Justice 1 Committee has a very heavy workload and I note that the Enterprise and Culture Committee is not even meeting this week. On that point alone, it seems to me quite outrageous that we should be asked to do this additional and inappropriate piece of work.

The Convener: I am not going to ask Karen Whitefield to respond to that point, because the issue is a matter not for her but for the Parliamentary Bureau, which decided that the proposal had to come to a justice committee, although I am not sure why it has come to the Justice 1 Committee. This is only a short item so we thought that we could fit it into the agenda. Karen Whitefield can comment if she wants to, but it is really a matter for the bureau.

Stewart Stevenson (Banff and Buchan) (SNP): I have a brief question. In the opinion of NEBU, is the consultation that Karen Whitefield is undertaking substantially that which would have been undertaken in structure, form and timetabling if it had been undertaken under the new standing orders?

Karen Whitefield (Airdrie and Shotts) (Lab): I will start and then David Cullum can comment for NEBU. I drew up the consultation with advice from NEBU and my understanding is that the unit was very much aware of the forthcoming proposed changes to members' bills that might be implemented by the Parliament. My consultation document has been widely circulated to MSPs, local authorities and organisations that would be affected by the legislation, including companies and trade unions. As a result, the consultation should meet the requirements of the new procedures.

David Cullum (Scottish Parliament Directorate of Clerking and Reporting): I would add only that the bill conforms to what the Procedures Committee anticipated. For the committee's information, the Procedures Committee was codifying an informal procedure that we were following in any event. We have really continued with what was being proposed before the Procedures Committee reported.

Stewart Stevenson: I have another simple little question that slipstreams behind Margaret Mitchell's point. Did you consider sending—or have you now sent—a request for feedback to the Law Society of Scotland, given that it is not on the list of consultees?

Karen Whitefield: If an organisation is not on the list, I have not sent a copy of the consultation document to it. The Law Society has not asked for a copy, although it could have done so because there has been considerable press coverage of the proposal. However, if Mr Stevenson would like me to forward a copy to the Law Society for its consideration, I would be more than happy to do so.

As the matter of the proposed bill's referral to one of the justice committees has been raised, I should also point out that, in terms of Executive responsibility, the decisions about and the ambit of

any such bill would lie within the justice portfolio. It is for the Parliamentary Bureau to decide which committee a bill comes to and the bureau decided that the proposed bill should come to one of the justice committees.

As a former member of one of the justice committees, I suggest that we need to remember that those committees consider not only criminal justice matters but the wider justice agenda. Given that that can relate to home affairs matters, I suggest that that is why the bill falls within the remit of the Minister for Justice. Although I believe that it is appropriate that the proposed bill should be dealt with by one of the justice committees, I appreciate and take on board the views of some members of the committee. Ultimately, however, the decision lies with the bureau.

09:45

Mr Bruce McFee (West of Scotland) (SNP): As I am also a member of the Procedures Committee, I realise that the bill is caught in the transitional arrangements that have resulted from the change in procedures. You said that you distributed your consultation paper widely—indeed, you listed the organisations to which you sent information. Can you give the committee an indication of the level of response that you received?

Karen Whitefield: As of yesterday, 428 postcards have been returned, 1,106 signatures have been added to the petition and I have received full responses from 27 individuals, including four responses that were made on forms that were downloaded from my website, which means that they are from respondents who were not sent the consultation document directly.

The Convener: As there are no further questions, is there anything that you want to say in conclusion?

Karen Whitefield: I am grateful to the Justice 1 Committee for taking the time to consider the matter. The proposal is worth while. Certainly, over the Christmas and new year holidays, I received indications of wide support from much of civic Scotland, including individuals and many colleagues in most parties in the Parliament. I hope that the committee will look sympathetically at the proposal this morning.

The Convener: Thank you. The only question is whether the committee is satisfied with Karen Whitefield's explanation of why she is not going out to further consultation. Are members satisfied?

Members *indicated agreement.*

The Convener: As you can see, Karen, the committee is satisfied with your reasons. As it is only 9.47, you are in good time for your committee meeting. Thank you for attending this morning.

Subordinate Legislation

Part 1 Land Reform (Scotland) Act 2003: Draft Guidance for Local Authorities and National Park Authorities (SE/2004/276)

09:47

The Convener: Item 2 is consideration of subordinate legislation. I refer members to the note that has been prepared by the clerk on the draft guidance for local authorities and national park authorities under part 1 of the Land Reform (Scotland) Act 2003. Members will note that we are to consider the instrument under the negative procedure. Does any member wish to comment on the instrument?

Stewart Stevenson: Like, I suspect, other members, I have received correspondence from the Scottish Environment LINK access network, or LAN. I have also received correspondence from the Mountaineering Council of Scotland. From the correspondence, it appears that the instrument differs in certain material respects from the bill and from the debate on the bill.

The LAN has commented that the introduction to the order refers to access rights being

"for the purpose of open air recreation"

and that the other purposes that were set out in the act have been ignored.

The act specified that the three ways in which access rights can be exercised are "for recreational purposes", for the purposes of "relevant educational activity", or for the purposes of

"carrying on, commercially or for profit, an activity which the person exercising the right could carry on otherwise than commercially or for profit."

By restricting the order to the first of those three purposes, local authorities might not be able to meet the needs of people wishing to undertake educational activity, for example. That was one of the important things that I, other members and the Executive—the issue is not the sole prerogative of the Opposition—wanted to entrench in the bill when it was passed by the Parliament. I am baffled by the situation.

The LAN also makes the point that the drafts that were submitted for consultation were drafted in a different way. A number of the points that the LAN raises have made their way into the instrument only in the final version. However, there has not been the opportunity to respond, in the consultation, to other specific phrases that are used in the final version. I think that that is the fundamental point. There are other, detailed points, but I want the Executive to think very

carefully about the way in which the instrument has been drafted, to withdraw it and to bring it back quite quickly in a form that is much more in line with both the spirit of the act and the particular descriptions in the act that we passed to cross-party acclaim in 2003.

The Convener: I should say that in attendance in the public gallery are officials who, I believe, are able to answer questions if members have any. It would be helpful if they were able to talk to the committee.

Like Stewart Stevenson, I have some concerns about the draft guidance, especially regarding the core paths plan. He and I are at an advantage, as we were involved in the passage of the Land Reform (Scotland) Act 2003. I was keen to ensure that access to land did not necessarily have to be taken through core paths; I thought that it was important to have a core paths plan to give easy access, but I did not want that to be the main way in which people took access. People want just to wander through the countryside. The LAN is suggesting that the draft guidance puts too much emphasis on the core paths plan. If that is the case, I am unhappy about that. I believe that we passed legislation to give people access rights to roam the countryside responsibly. The fact that we encourage the core paths plan is almost incidental to that. Can the Executive officials give a response to the points that have been made so far?

Ian Hooper (Scottish Executive Environment and Rural Affairs Department): Good morning. I am Ian Hooper, from the countryside and natural heritage division, and my colleague is Malcolm Duce.

This issue is quite complex, and there has been quite a lot of pressure from local authorities and others to have guidance on how they should carry out their responsibilities. What we are discussing is guidance and although it comes to this committee because of the terms of the legislation, the legislation itself takes precedence over the guidance. The guidance is intended to help local authorities with the business of implementing the access provisions. We accept that we may have to return to the guidance at a future date, in the light of experience, as we do not yet really have anything to inform the guidance beyond a rather theoretical consideration of what might cause difficulty for local authorities or others.

The guidance probably focuses on the essential elements in the first phase of the implementation of the access provisions, and I accept that, in an attempt to respond to the comments that we have received from local authorities, we have included in the guidance some words about the core path network. Because we were asked to give guidance on what the core path network might mean—what a core path might be—the guidance talks about it as the core framework for giving access throughout an area. We hope that that is constructive; however, as I say, the matter can be revisited in fresh guidance in the light of experience.

Stewart Stevenson: I wonder whether you recall that, as early as the stage 1 report and then in the debates at stage 2 and stage 3, one of the provisions about which there were key concerns was section 9—as it was at that stage—which listed the exclusions. One of the key exclusions, which was deleted as a result of a debate in which people were seriously engaged, was that of commercial activities. It is perhaps not unreasonable for there to be a certain amount of paranoia if the draft order is put out for consultation and it is only in the final expression of that draft order that it drops commercial access from the rights and relates the guidance to access

"for the purpose of open air recreation"

alone.

There has to be grave discomfort if the order is meant to express the context within which the guidance is supposed to operate but, at the very last moment—not as part of the consultation, but in the publication of the final draft after the consultation—a specific phrase is introduced that appears to limit the application of the secondary legislation to access for recreational purposes. That is despite the fact that there was so much debate on the issue without any particular party-political bias—the debate was engaged in by people of a variety of political persuasions.

If you do not feel that the guidance should be withdrawn and re-presented, at least to reflect more properly what is in section 1(3) of the 2003 act, the option exists for us to lodge a motion to annul the instrument. However, it would be far better for the Executive to reconsider its position on the matter, as that would enable a quick response to concerns. You suggest that we wait and see how the guidance operates; however, I suggest that we will not see how it operates for at least a calendar year—probably longer—and that we would be starting off on the wrong foot. The exclusion of commercial activity used up an awful lot of debating time at every stage of the bill and, ultimately, there was broad acceptance of the fact that that was not the bill's intention; however, it appears that that exclusion has come back. That makes me most uncomfortable.

Ian Hooper: I reiterate that that is not the intention of the guidance. The guidance is for local authorities. It may be that, in attempting a shorthand version of what the right of access is about in the introduction to the guidance, we have fallen into the trap that you describe. However, I do not believe that it will lead to the confusion that

you describe, because of what is in the rest of the guidance and the access code, which sets out what the right of responsible access amounts to and which is a document that local authorities will look at as well as the guidance, as it is specifically about how they should conduct themselves.

Stewart Stevenson: I have a short and focused question. Why does the phrase appear only in the version of the guidance that has been brought to Parliament and not in the draft version that was put out for consultation? What caused the introduction of that phrase into the final version? Who was responsible for that?

Ian Hooper: As a result of the consultation, we were asked to provide a brief summary at the beginning of the guidance, and therefore we provided a one-page summary as part of the introduction section. That was something that consultees asked us to do and I suspect that we have over-compressed the summary in the introduction. I do not believe that the guidance that follows on from the introduction conveys the restriction that you are describing. Certainly, the access code, which the Parliament has approved, does not convey that restriction. Local authorities will consider the guidance and the access code in detail when carrying out their responsibilities.

10:00

Margaret Smith (Edinburgh West) (LD): I have a general point to raise, although I do not know if it is an appropriate question to ask officials. It appears that there is still concern in Perth and Kinross Council about the resources required. I wonder whether we can write to the Executive about that point to see where we are with it. We cannot really talk to the officials about it at this stage but if the resources are not in place, it is questionable whether what we want to happen will happen. Perth and Kinross Council have concerns about that, as do people from the LAN.

The Convener: I have no difficulty with that suggestion but my primary concern is that the guidance should not give the impression that the core path network is necessary. It is desirable but, for the code to operate, it is not necessary. The question of funding has been on-going since the introduction of the bill and local authorities have been concerned about the cost to them.

How confident are the Executive officials that the consultation responses agree that the draft guidance reflects the balance that we need?

Ian Hooper: My preliminary comment is that the bill gives us the power to issue guidance to local authorities, and we considered whether we needed to do so, given that the legislation spells out the rights of access in detail and that the access code explains them further.

However, a lot of local authorities asked us for help in understanding how they should carry out their duties and responsibilities. That is why we produced a draft of the guidance. I am not sure whether I am answering your question directly, but that is a sort of historical explanation. We are responding to local authorities that want to understand a complex range of duties and responsibilities under the primary legislation. They also want to understand how those duties and responsibilities relate to the access code. We have tried to express that in the guidance.

As with the access code itself, there has been an encouraging consensus about how to proceed. We have simply tried to respond to a request from local authorities and others for a bit of clarity about what the duties amount to.

The Convener: I can see that you are responding to the demands of local authorities. At the end of the day, they are still required to protect the access code and implement the legislation, so the guidance ought to match directly the primary legislation. That is the difficulty. Organisations are telling us that the draft guidance is subtly different from the 2003 act, but subtlety is important on the issue.

For example, the LAN mentioned the lack of reference to the reform of the common agricultural policy in relation to the issue of field margins and whether people can access them. When we considered the Land Reform (Scotland) Bill, we were told that farmers were ploughing to the very end of fields, but that the issue would be resolved because CAP reform would eventually take that into account and pay farmers for not ploughing the margins in order to allow access. Those issues are not mentioned in the draft guidance for local authorities, which will lead to arguments that will end up in the local access forums. The local authorities will rely on the guidance, but the access takers will rely on the access code or the primary legislation. Do you accept that arguments might result if the guidance is not entirely in step with the code?

Ian Hooper: I see your point, but we were faced with a dilemma because local authorities asked for further interpretation of the legislation, although one might argue that it was already clear. The draft guidance tries to explain to them how they should carry out their duties and responsibilities.

On the CAP reform issue, we have a bit of a timing problem. The most relevant proposal that is referred to in the LAN's evidence to the committee has not yet been formally promulgated. That is the proposal that, through the land management contract menu, land managers will be able to obtain funding to maintain and improve paths on their properties. The LAN is interested in that proposal, as are we, but we cannot include details

of the proposal in the guidance simply because it has not yet been formally promulgated.

Under the reformed agricultural regime, it is a requirement of good agricultural practice to maintain field margins and that matter will be considered by agricultural inspectors. A process exists for ensuring that field margins are maintained because that is a condition of farmers receiving single farm payments.

Stewart Stevenson: Section 4 of the 2003 act gives ministers the power to modify certain sections of the act. Section 4(2) states:

"They may do so generally … or by making provision which relates to particular areas, locations or classes of land or"—

this is the important point—

"to particular access rights or particular activities which may take place in the exercise of access rights".

Given that the order is limited to recreational purposes and excludes educational and business activities, are you using the power in section 4 of the 2003 act to change the way in which those rights may be exercised or otherwise under other sections of the act? There appears to be a danger that the Executive, through an instrument of the Parliament by ministers' order, may be changing the purposes for which access may be granted, as is legitimate under the 2003 act, by excluding some of the purposes that are in the act.

Ian Hooper: I do not believe that we are doing that, because a modification under section 4 would require an instrument that would be dealt with under the affirmative procedure—a modification order—and that would have to be approved by the Parliament. The draft guidance is not a statutory instrument or order; it is simply guidance that the legislation requires us to bring to the Parliament so that the Parliament can decide whether to reject it. The answer to your question is that I do not believe that the guidance has modified in any way the legislation and the rights that are defined by it.

The Convener: I agree that that was probably the intention, but my recollection of the debate is that we were arguing about the words that were to go in the bill. There was disagreement over whether we referred to statutory rights of access or whatever—we eventually settled on something. We do not want to continue the misuse of language in the draft guidance by inaccurately describing access, although I accept your main point that local authorities must ultimately abide by the primary legislation.

I have not read the introduction to the guidance, so this may already be there, but surely your first note of guidance to local authorities should be that they have a responsibility to implement primary legislation—full stop. It is their duty to do that and to ensure that they have checked the requirements of the act and the access code to implement it. The purpose of the guidance is to provide easy access. Is that in the introduction?

Ian Hooper: It is not and I accept that we could have put it in. We have operated on the basis that there is an understanding between central Government and local government about the way in which these things operate and that local government in a corporate sense understands that its responsibilities are defined by statute and are not reinterpreted by the guidance. I accept that it would have been helpful had we done what you suggest.

As I said, the introduction was included at a late stage because of the requests that we received in the consultation for a brief summary of the guidance. One of the responses was, "This guidance is very long and it's very hard to understand. We would like to be able to take it to our committees and have a summary of what the guidance is there to do." In providing that summary, I am afraid that we over-compressed the point, but not with any intention of reinterpreting the legislation.

Stewart Stevenson: A number of issues have been brought to my attention and that of other committee members, but for me the sticking point with the guidance's introduction is the fact that it is limited to one of the three purposes. The guidance should list all three purposes; the omission of education and commercial purposes seems to signal a lower priority. That is the most charitable way of expressing my point.

You make the fair point that we are dealing with guidance, not a reinterpretation of the act. I would not wish with the same vigour to push other points, but there is the need to state with utter clarity what the rights are, in view of the debate at every stage of our consideration of the Land Reform (Scotland) Bill. If you are not prepared to indicate a preparedness to reconsider the guidance, I will seek to identify what parliamentary actions can be taken to ensure that such a change is made.

10:15

The Convener: We clearly have some issues. I am reluctant to jump to the conclusion that we should annul the guidance. In fact, we have been urged not to do that, because people want to see the whole thing through. However, I am reluctant to just let it go when there are issues.

One matter that I have not yet mentioned is local authorities' duty to uphold access rights. I appreciate that this is only Scottish Environment LINK's interpretation, but that organisation's concern is that the guidance emphasises dialogue

and consensus building rather than removing obstructions.

I accept that the legislation requires dialogue and consensus building, but I also know that it is the type of legislation that requires local authorities to take firm action—local authorities must remove obstacles in order to uphold access rights. I can think of cases in which that would be expected to happen. We all know that, during the foot-and-mouth crisis, whole areas were sectioned off for no apparent reason. We expect local authorities to take firm action under the legislation. If Scottish Environment LINK's interpretation is correct, I have serious concerns.

If the committee wanted to take action, it would have to meet next Wednesday, when a meeting is not scheduled, because we have arranged a seminar in place of a meeting. We would have to schedule a meeting before the seminar. I suggest that we collate our concerns and write to the minister today to try to obtain a quick response. I have described the timetable to which we are operating. Any motion to annul would have to be considered at a meeting next Wednesday.

Ian Hooper: The main concern that you raise with us is about the introduction. We do not accept Scottish Environment LINK's comment that it is insufficiently clear to local authorities that they must uphold access rights. It is interesting that the evidence that the committee has received from the Scottish Rural Property and Business Association is that the guidance emphasises that point too much.

Your main concern is with the introduction. If it helps the committee, I will be happy to return to ministers and to talk to our lawyers about the implications of amending the introduction. I accept that in an attempt to provide a summary introduction, we have inadvertently over-compressed the legislation.

Margaret Mitchell: I am happy with that. I am not as au fait with the subject as the convener and Stewart Stevenson are, as they scrutinised the bill, but what Mr Hooper has said suggests that the situation is unsatisfactory. Any clarification that can be obtained within seven days would be useful. If Mr Hooper examined the issue and returned with something to allay people's concerns, that would be the best way forward.

The Convener: That suggestion is helpful. Our primary aim is for the introduction to make it clear that the responsibility lies with local authorities to implement the primary legislation to the letter and that the guidance is intended to provide a short cut to some of the 2003 act's main provisions. Is Stewart Stevenson happy with the suggestion?

Stewart Stevenson: I want ministers to be asked whether they are prepared to lay the guidance again with mention of the three purposes. I have other concerns, but they would not lead me to seek to annul the instrument. However, I certainly want to hear what the minister has to say about the potential for laying the guidance again.

I recognise the need to consult lawyers. That is perfectly proper, but it should not cause a delay of more than a few weeks at the most. If we got off on the wrong foot, that would send the wrong signal, particularly as the issue was at the core of the debate. If I have not received an adequate response within the appropriate timescale, I will be prepared to lodge a motion to annul. The earliest possible indication—however informal—would be mutually advantageous.

The Convener: We have had a helpful offer, but there are still legitimate concerns, about which the committee should write to the minister today. We have a week, which is not long. We could pencil in a short meeting prior to the seminar; that meeting would be required only if a member lodges a motion to annul, but I hope that we will have a reply from the minister before then, which would allow committee members to decide what action they wished to take. Are there any other issues to which committee members want to alert the minister or should we simply use the list that we have?

Margaret Smith: We should include the general point that I made on Perth and Kinross Council's concern about resources.

The Convener: We will include Margaret Smith's point about the funding of the core path network.

I thank Ian Hooper and Malcolm Duce for attending. It has been helpful to have you here. How we will know how you have got on with the lawyers? Will you write to us and advise us?

Ian Hooper: I will get in touch with the committee clerk. I am thinking about whether it would be possible to rewrite a preamble paragraph without its being treated as part of the formal guidance. We will explore that and get back to you.

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

The Convener: That leads us on to item 3. I refer members to the correspondence from the Lord President's office on the Act of Sederunt (Fees of Sheriff Officers) 2004. Committee members will recall that we considered the instrument at our previous meeting and asked for an indication as to why the increases in fees were as they are. The instrument is subject to the negative procedure. It was laid on 30 November

and is subject to annulment under the Parliament's standing orders. Stewart Stevenson raised the issue, so I ask him to comment first, if he has any comment to make.

Stewart Stevenson: I am reasonably content, now that I can see the explanation. The real point is that, when such instruments are produced, explanations should be provided in the first instance. I hope that that will be noted for future reference.

The Convener: The note from the Lord President's office is helpful for our understanding of the increase. Is the committee satisfied to note the instrument?

Members *indicated agreement*.

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

10:22

The Convener: Item 4 is stage 1 consideration of the Protection of Children and Prevention of Sexual Offences (Scotland) Bill. I refer committee members to the summary of the responses that we have received to the consultation and invite them to comment on the written submissions that we have received in response to our call for evidence. Some common themes run through the responses. There seems to be a variety of views on whether the age of the offender should be set at 16 or 18. The Law Society of Scotland has made some useful comments about the process, particularly about whether there is a need to write into the bill a specific provision allowing the accused to be heard in relation to a risk of sexual harm order.

Margaret Mitchell: There are some worthwhile submissions, which make points that move us on in our consideration of the bill and examine aspects of the bill in more depth. Perhaps there are issues that can be discussed more fully at the seminar. The response has been excellent and respondents have made some testing comments.

The Convener: The evidence from Childnet International is interesting. That organisation has given us examples of legislation in other countries and different ways of constructing the legislation.

This discussion is just an opportunity for the committee to put on the record its points about the written evidence. Sometimes in the oral sessions we forget that we have a whole pile of written submissions from a range of people and organisations, so I wanted to draw the committee's attention to that evidence.

Margaret Mitchell: Some of the submissions highlight the fact that addressing the issue could have a positive effect on other services, whether in relation to health, drugs or people who have been abused. We should try to nip the problem in the bud, as that could have an impact on services that are being used by people who have psychological problems or who are suffering from other effects of abuse. I do not think that we should underestimate the good that the legislation could do.

The Convener: If there are no other comments, we shall move on.

I welcome our witnesses to the committee. We shall hear evidence from Deputy Chief Constable Robert Ovens of the Association of Chief Police Officers in Scotland, Chief Superintendent Tom Buchan of the Association of Scottish Police

Superintendents and Douglas Keil MBE, general secretary of the Scottish Police Federation. Unfortunately, David Feldman is unable to be here due to adverse weather conditions.

Margaret Smith: Will we be able to put to David Feldman in writing the questions that we wanted to ask him?

The Convener: In the first instance, we shall try to reschedule evidence from him. Failing that, it is a good suggestion that we should put our questions in writing. I am sure that that would be fine.

I invite Bruce McFee to ask the first question.

Mr McFee: Good morning, gentlemen. I refer you to the submission by ACPOS. Under the heading of "Grooming", it says:

"Due to the difficulty in obtaining evidence, it is likely that the new offence would only be used in a very small number of cases and therefore not address the problem of on-line grooming as effectively as intended."

Could you go into a little more detail about why that should be the case? Could you quantify the number of cases, even in general terms? Are you suggesting that the existing law is sufficient to counter that type of activity or just that the bill is not the right instrument?

Deputy Chief Constable Robert Ovens (Association of Chief Police Officers in Scotland): Given that those comments were made by ACPOS, it is probably proper for me to answer that question first. In one of the notes that I submitted, I said specifically that it would not be appropriate for us to get into details about tactics and so on in a public forum, for very obvious reasons. Nonetheless, I shall try to be as helpful as I can in responding.

First of all, I should say that we think that the move towards the proposed legislation is a helpful and useful step. We are not saying something opposite to that. We think that the current law is not as robust as we would want it to be, particularly given the advent of internet grooming. That is why we support the proposals.

10:30

We say that we think that the bill may not bring about large numbers of cases because it includes a factor that may be difficult to have in place in every instance. I will put that into simple terms. We would have to establish that there were a minimum of two contacts. We would have to establish that what we would call an accused person, or a person who is under suspicion, has made an attempt to travel to meet an individual. That introduces another element that we have to demonstrate and be able to evidence. We also have to try to prove that there is an intention to engage in inappropriate sexual behaviour. That last element may be very difficult in the light of the two-contacts factor. That factor, coupled with the fact that the internet offers enhanced opportunities for people to retain anonymity and not reveal who they are or where they are located, introduces added complexities as to how we identify them and get information that would allow us successfully to conclude an investigation and report the case to the procurator fiscal for consideration of a prosecution.

We are not saying that we do not welcome the legislation. We are pointing out that a number of issues will add to the complexities. It is not straightforward to deal with these matters.

It is very difficult to assess the number of cases that there will be. Currently, the number of cases that are brought to our attention is not large. We have to accept that a change in the law will not necessarily lead to more reports being made to us. If individuals—parents in particular—are concerned, they have the opportunity now to raise their concerns with us and we can respond to them. Our view is based on the fact that currently we do not get a large number of such cases reported to us. Of course, that does not necessarily reflect what may be happening. It would be foolish of me to suggest that the level of activity on the internet may not be considerably higher than we are aware of.

Mr McFee: I do not want you to go into the technicalities of how you would intend to trap someone who is engaging in such activities, because it is clear that you would not want to publicise that. The submissions by ACPOS and by the Scottish Police Federation state that the offence might be difficult to detect, far less prove. I will leave aside the question of the age of criminality, because I know that one of my colleagues wants to raise that as a separate issue. You say that one of the factors that may make it difficult to prove is the minimum of two contacts. I am slightly confused, in particular in relation to the Scottish Police Federation evidence. Perhaps you can clear the matter up for me. The evidence from the Scottish Police Federation suggests that a way round the problem is that, instead of stipulating that there must have been two contacts, the wording could be

"*having met or communicated with a person under the age of 16 … on at least one earlier occasion*".

That suggests to me that two contacts would be involved. What is the thrust behind that suggestion? Are you saying that the provision that there must be two contacts is too blunt an instrument? Can you give me the thrust of the argument as to how your suggestion would make the offence easier to prove?

Deputy Chief Constable Ovens: I will comment and perhaps my colleague Mr Keil, from the Scottish Police Federation, will also comment.

The thrust of what we are suggesting is that we accept that in order for a grooming offence to be committed there must be contact, but it is not necessarily helpful to attach a number to that. More than one contact may often be made in the grooming. That has often happened, for example, when children are groomed for sexual abuse in a non-internet situation. In some cases that we deal with, a family member or friend of the family strikes up a relationship with a child and grooms them over time with the intention of abusing them.

If contact had been made on a single occasion and the circumstances and other information that was available to us suggested that the contact was illegitimate, it would not be helpful if we were required to wait until another contact had been made or the person had travelled with the intention of meeting the child and for more evidence that the meeting was likely to lead to sexual abuse, before we could intervene. We seek a more wide-ranging ability to deal with situations on the basis of the circumstances that are presented, which would allow us to intervene at an earlier stage. Obviously there is the potential for us to intervene by seeking an order to impose a restriction on an individual, but that might not be the most appropriate approach. If someone is intent on committing a crime, we must consider whether we should report them to the procurator fiscal for possible prosecution rather than seek an order. That is the thrust of our thoughts on the matter. The conditions in the bill are very prescriptive and a number of elements would have to be satisfied to make the offence complete.

Douglas Keil (Scottish Police Federation): I did not recognise the words that Mr McFee quoted; they might come from a paper from ACPOS or another paper that I have not read. Our concern is that the bill proposes that the offence would involve a course of conduct: two meetings or communications, followed by a meeting or travel with the intention of meeting the child. That is too restrictive. A single communication could be of sufficient concern to constitute an offence of sexual grooming.

We would go as far as to say that the bill focuses too much on internet communication and should focus more on sexual grooming by any means. On Mr McFee's specific point, however, the provisions about the course of conduct are too restrictive. It would be very difficult to prove that there had been two previous contacts, which had been followed by a meeting or travel with the intention of meeting.

Mr McFee: I am not sure whether I was quoting from your submission or from the summary of written submissions that was prepared for the committee, so I might not have been quoting your submission accurately. It seemed strange that given that one contact plus one contact makes two contacts, you seemed to arrive at the same conclusion. I want to probe the matter a little further, because I think that we are getting to the nub of your argument. I accept that the bill is quite prescriptive. You are saying—correct me if I am wrong—first, that you want the provisions that say that the individual must meet or travel with the intention of meeting the child to be removed from the bill. We can return to the age of the child later. Secondly, you would prefer the bill to focus more on something along the lines of inappropriate contact, which might include contact on a single occasion.

Douglas Keil: I will be more specific. The person who drafted the bill followed section 15 of the Sexual Offences Act 2003, which applies in England and Wales. However, the anecdotal information that we receive from forces in England and Wales is that section 15 is not used to any extent, but that section 14 of the 2003 act is used. That moves the focus away from the course-of-conduct approach that is proposed in the bill and away from internet communication, to an approach that is based on inappropriate contact. I understand that that is almost equivalent to saying that the bill has to be entirely rewritten. If we were looking for an extremely useful new law, it would be along the lines of section 14 of the Sexual Offences Act 2003, rather than section 15, on which this part of the bill seems to be based.

Mr McFee: That is relatively clear. I agree that although much of the focus has been on the internet, the greater danger probably lies nearer home. It would be useful if we could have some form of appraisal of sections 14 and 15 of the 2003 act, as they are referred to in some of the submissions; I do not know whether that would be a job for the committee's staff or for the witnesses.

Margaret Smith: I turn to the ever-present issue of resources. As any of us who have been watching "The Commander" over the past few nights will know, the detection of such offences requires good intelligence. Is that work especially resource intensive? Are the resources that are available to the police adequate to address the problem of child grooming over the internet? What would be the resource implications of the passing of the bill?

Deputy Chief Constable Ovens: Mr Buchan will comment first; Mr Keil and I might add to what he says.

Chief Superintendent Tom Buchan (Association of Scottish Police Superintendents): Such work is resource intensive. I understand that a meeting is proposed

for next week, at which the committee will have the opportunity to engage with some of the practitioners. The three of us are not really practitioners. The people who are at the sharp end will tell you that dealing with the issue can be an immense drain on resources. That was shown by operation ore, even though that was not quite the same thing. I know that there were cases in my division that involved detective officers spending three weeks examining one individual's images.

From the ASPS's point of view, the bill seems to be geared more towards the reactive than the proactive. As Mr Keil said, that means that we must wait for something to happen and then must do research. A person tells us that they are aware that something has happened and that they would like us to investigate. That takes us into fairly difficult and lengthy discussions with the internet service providers, for example. Some of the people at whom the bill is aimed are very clever indeed and will have a significant number of contact addresses. In particular cases, such investigations could be extremely demanding on resources. That is the reactive side.

We share the Scottish Police Federation's view that monitoring must include online activity. As Mr Ovens said, the fact that children or young adults use chat rooms unsupervised for four or five hours means that a substantial amount of information can be exchanged. If we had access to that, it might cause us great concern. If we were in a position to be able to monitor what was going on in chat rooms, the experience in America shows that that would be massively demanding on resources. If we were engaged in such proactive action instead of waiting for something to be brought to our attention, as is the norm at the moment, we might be a step ahead of the posse.

Margaret Smith: Can you give us a bit more information about the experience in America?

Chief Superintendent Buchan: The other day, we had a meeting with one of our colleagues who is involved in this line of work. He tells me that, in America, there are up to 800 people who do nothing more than monitor online activity—of course, they need not be police officers.

Margaret Smith: Would the service providers do that, too?

Chief Superintendent Buchan: That is where we run into difficulties. Recently, there have been some well-publicised problems with ISPs. The committee might be aware of the case of the father who sought nothing more than to have access to the e-mail account of his son, who had recently died in Iraq. The ISP said no, on the ground that the account had died with his son. That is an example of the difficulties that can be encountered in trying to extract information from an ISP.

Margaret Smith: Both ACPOS and the Scottish Police Federation have suggested that the minimum age requirement for the adult perpetrator of an offence should be 16 and not 18. You are not alone in that belief; it is a view that is held by a number of people who have given us written evidence. Will you explain the reasons for your recommendation? How would you deal with the example of a 16-year-old who has a relationship with a 15-year-old? We have heard such a relationship described as "romantic note passing" via the internet.

10:45

Deputy Chief Constable Ovens: I will answer first, but I know that Mr Keil will want to comment. We have to separate clearly the intentions of a legitimate contact, whether romantic or otherwise, from one that is illegitimate. If a contact is made by an individual with an illegitimate purpose—sexual activity in particular—age is less of an issue. Whether that individual is over 18 or over 16 seems unimportant to us. If the individual is 16 or 17 and they are making contact with another young person who is under 16 with the clear intention of having a sexual relationship with them, the law needs to take account of that to protect the young person who is under 16. That is our responsibility. There is a danger in that age group and although it is not a large group, we all have experience of it in the service. I am sure that members know from other experience that there are predatory young people out there who are under 18. If they were to follow that course of behaviour, it would be unreasonable to exclude them from the impact of the legislation until they became 18.

We want the legislation to focus more on the intention and less on the age of perpetrators. We also want to ensure that the protection of young people is properly effected by the legislation. That explains our rationale, which is based on our experience of dealing with that small but nonetheless dangerous number of individuals.

Douglas Keil: I will add only one or two comments. The Scottish Police Federation thought that it would be more consistent with other aspects of Scots law to set the minimum age of an offender at 16 as opposed to 18. As Mr Ovens said, we are aware of people who are under 18 being involved in this kind of activity, so there should not be an age gap.

There is an element of choice in setting the age requirement. I know that other factors influence the age of a child and that we have to resolve the dilemma in the bill, but our preference is to keep

the age requirement in line with most other Scots laws.

Margaret Smith: Your submission mentioned that the age of the perpetrator should be relative to the age of the child. It would be good to cover that aspect in the bill. If a 16-year-old conducts a particular activity on the internet with a 15-year-old, it is a different matter from that 16-year-old grooming a seven-year-old.

Douglas Keil: The police would not get involved in a relationship between boyfriends and girlfriends of 15 and 16. However, the ultimate arbiter in such a situation would be the procurator fiscal who would decide whether a case could be made in the public interest. I am sure that the relationship between two such individuals would be at the forefront of his thinking.

Margaret Smith: I understand that at the moment, the Crown just has to prove that a victim was under a relevant age. The proposal here is that the accused would be able to say that they reasonably believed that the person was a different age. Is that another restriction that we should consider changing?

Douglas Keil: Many years ago, it used to be a defence for a male under the age of 24, in relation to the sexual offence known as statutory rape—of a female under the age of 16—if he reasonably believed that the female was over the age of 16. That is historical, going back to when I was a practising police officer; I am sure that it has now changed with the introduction of the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002. Nevertheless, it was recognised that the question arose of the relationship between the accused and the victim. I think that you would be looking for a modern equivalent of that.

Chief Superintendent Buchan: One of the vagaries of Scots law is that the definition of a child varies depending on the legislation. As far as I am aware, that has never been problematic in the past—although people outwith this nation might take exception to that. However, that is not a matter for us.

On certain occasions, whatever the offence, a reasonable defence might be that a person has reasonable cause to believe that another person was over a certain age. That defence has been accepted in the past in Scots law.

Mr Tam Baillie of Barnardo's gave evidence to the committee and pointed out that the bill would create a void for 16 and 17-year-olds. That void is not helpful. The definition of a paedophile can depend on the dictionary that you consult. The definition may suggest that adults have to be involved, or it may not mention adults at all. It may refer simply to sexual love towards children. Talking about ages can therefore be very difficult. For example, grooming can be upwards: a younger person can groom an older person if that older person is vulnerable. I think that the committee can appreciate that point. A 15-year-old—and there are some very proactive predatory young people—could be able to manoeuvre a potential victim.

The Convener: You have just suggested that we are presuming that it is older people who groom younger people, but that it could be the other way round. Are you arguing that the bill should not mention any age? That is the logical conclusion of your argument.

Chief Superintendent Buchan: I want a full appreciation of the difficulties in drafting legislation of this nature. You want to protect vulnerable people and, in my view, it would be unwise to do anything that did not recognise that a 14-year-old could target a vulnerable 16-year-old for grooming purposes. That can happen and the possibility should not be ignored.

I appreciate that there are difficulties in drafting, but we have to consider what is really happening. We have to consider intention and purpose; I think that that is more important than age. If a predatory 15-year-old sees an opportunity with a 16-year-old, I do not know that that is any less of an offence than a 19-year-old targeting that 16-year-old. The 15-year-old might be younger, but he might be much more of a sexual predator.

The legislation suggests that grooming can only be downwards—an older person grooming a younger person. However, I have experience that that is not always the case. It can be the other way about; the younger person can be the predator.

The Convener: I do not disagree with what you say—it has the ring of logic to it. However, the law often determines whom it considers to be vulnerable. Children are a group in society for whom we say that consent does not come into it. If a 14-year-old is raped, the law determines that that person was too young to give consent. The law makes such judgments for young people.

I want to ask about the scenario of a 15 and a 16-year-old. In your view, in what circumstances would the 16-year-old be a predator over the 15-year-old?

Chief Superintendent Buchan: Dougie Keil pointed out that we are focusing on this particular bill, which deals with meeting, contact and so on. It may be a helpful piece of legislation to deal with people in a particular category, but it would be more helpful to go further. That would be challenging. Why will it not be an offence for a 15-year-old to groom a 16-year-old over the internet? Obviously, the procurator fiscal would have a say in it and the circumstances would be considered. However, there may well be clear evidence in the

correspondence that that person did not need to meet that other person, that it was clearly their intention to meet them, and that the nature of the communication was such that there were good grounds for believing that that other person was at risk because of the grooming that was taking place by what could—possibly—be a younger person.

The Convener: I have some difficulty getting my head round that theory. I accept your point about vulnerable adults—it is a point that the committee will have to consider—but grooming carries the connotation of an adult using their power over a child and it would be quite easy to see that such communication is inappropriate. However, when the ages are closer, how will you judge whether the communication is inappropriate? You will be responsible for charging the person for that offence, and you will have to judge whether that communication is inappropriate and whether it constitutes grooming. What would you be looking for?

Deputy Chief Constable Ovens: A common feature for us, although it is not necessarily evidence that can be used in court, is the previous pattern of an individual's behaviour. That applies across all crimes. For example, the individuals who we will consider in relation to an offence are those whose modus operandi has been a certain course of activity that may have led to their conviction and subsequent imprisonment. If, on their release, the same offence happens, with the same modus operandi, that gives the police a starter on who is responsible for the offence.

The Convener: They have a course of conduct.

Deputy Chief Constable Ovens: I do not want to get sidetracked by the age issue—it is exceptional for a young person to be guilty of grooming. However, a young person could previously have followed a course of conduct that has led to an offence in which the police have been involved. If, at an early stage subsequent to that, the same course of action starts happening again, society would reasonably expect the police to intervene.

The function of the police service in society is not just to work with the Procurator Fiscal Service on the prosecution of offenders. What takes primacy is the protection of all people in society, but vulnerable people in particular, especially children. There has been a lot of focus on that. We are considering the new legislation from the point of view of the protection that it affords potential victims, as opposed to the ability of the new legislation to be used as a tool to prosecute those who may follow that course of action. Protection as opposed to just prosecution is an important issue. The police service has a strong view that we will never leave a victim in a situation of potential danger in order to get sufficient evidence to prosecute someone.

The Convener: I appreciate that protection is very much the role of the police, but I am trying to understand your position in relation to how the offence is constructed. You have mentioned a course of conduct in relation to 15-year-olds and 16-year-olds, but earlier you were not happy with the bill's requirement for a course of conduct—or, in other words, previous communication.

Deputy Chief Constable Ovens: What I am saying is that if a person's history showed a course of conduct that had started to manifest itself again—

The Convener: What is the difference between that scenario and a scenario involving an adult? Under the terms of the bill, two previous communications would be required, but I think that you argued that you would prefer for there not to be such a requirement.

Deputy Chief Constable Ovens: That is in dealing with the current offence. The course of conduct concerns previous conduct not relating to the current offence. The courses of conduct are quite separate. You asked what might cause someone to be concerned about a 16-year-old and I am trying to say that previous conduct is an influencing factor and that someone's action would suggest certain things to you. If you know that someone has previously broken into jewellers' premises and you see them loitering outside another jeweller's premises, you can take that as an indication that they might be about to commit a crime.

11:00

The Convener: How do you get that into court, if it is a previous conviction? For example, if a 16-year-old, who would not be not covered at the moment, is writing to a 15-year-old and the communication seems innocent because they are quite close in age, but you know that that 16-year-old has a history and perhaps even a previous conviction, what evidence will you present in court to demonstrate that that communication is inappropriate if you cannot bring to court the fact that there has been a previous conviction or a history? You have already said that you think that there are predatory young people.

Chief Superintendent Buchan: What Mr Ovens is saying is that, in the majority of cases, we will know little or nothing of the background of the individual. If it is brought to our attention that a parent believes inappropriate communication to be taking place, you would expect us to take cognisance of the fact that the individual had previously exhibited such behaviour, if that were the case. However, if the e-mails that formed the

communication were of an innocent nature, I do not know that we would be in a position to do anything. In terms of the legislation, it would have to be clear that there was an intention to groom the child. Obviously, if it was brought to our attention that someone who was potentially dangerous was involved in such communication, we would want to monitor the situation. However, that is perhaps muddying the age issue.

The Convener: I will leave the issue at that point.

Douglas Keil: Can I just go back, convener—

The Convener: No, we do not need to pursue the matter any further. However, I would like you to know what my problem with all of this is. I am listening carefully to what you are saying and I was initially persuaded that we need to re-examine the age issue. However, I am worried that what we are talking about would mean that we would have to be looking for communication of a sexual nature, which could be innocent. Both 16-year-olds and 15-year-olds will communicate in that way. The question is what makes the communication a grooming offence. If the legislation were to cover 16-year-olds, their innocent communication would not be so considered. In a case involving a 15-year-old and a 16-year-old, you would be able to bring to the court only such communication of a sexual nature, unless you had other evidence relating to the person's history. Would you accept that?

Chief Superintendent Buchan: Yes. What is suggested during the communication is the key matter, but clearly, a person's history could add weight to the case.

Mr McFee: This has been a useful discussion. You appear to be saying that you want the bill's emphasis to change. I gather that you do not want to sit around waiting for a certain number of communications before doing something. We are talking not about getting to a prosecution, but about intervening before the offence takes place. Is that a reasonable summary of what you are saying?

Chief Superintendent Buchan: Yes.

Mr McFee: There is a problem, however. Any line that you draw will be arbitrary, whether it is 18, 16 or two-and-a-half. I understand the argument about the benefits of harmonising the ages in various pieces of legislation but I have a concern about downward grooming, which is that a 15-year-old could be grooming a 12 or 13-year-old in extremely inappropriate circumstances. However, your suggestion would appear to be that it is okay to groom someone if you are 15, but you have had it if you are 16 or 18. There is a question about where that line should be drawn or, indeed, whether a line should be drawn at all. Do you believe that we should be setting an age for the perpetrator? I am sure that you know of young men of 14 or 15 who are active sexual predators.

Douglas Keil: That is what I said in our written submission. We believe that the age should be set at 16 for harmonisation purposes, but we are also aware that people under the age of 16 can be a problem. All that I can suggest is that the issue should be given further consideration.

The convener's proposal that the bill should perhaps make no reference to the age of the person committing the offence—if that was her proposal—has some merit. I do not know how the parliamentary draftsmen would achieve that, but that proposal might get round the problems that we have at the moment. We should also remember that the final decision on whether to prosecute lies with the Crown Office and Procurator Fiscal Service. The convener's proposal is worth further consideration.

Chief Superintendent Buchan: That would not rule out what the bill seeks to achieve. The downwards grooming of a child by an adult would still be an offence, but it would be broadened to include the possibility that such grooming—or inappropriate activity that could lead to circumstances that one would not want to be fulfilled—could be committed by a person of a younger age than is currently proposed in the bill.

The Convener: In answer to the question about the parameters of what we can do, let me say that it is clear that we could amend the age from 18 to 16. Given that the bill is about the protection of children, it is pretty clear that we could not make some of the other amendments that have been suggested. However, we will consider the legitimate point that has been raised.

Mr McFee: The protection of children does not necessarily imply that younger children could not be protected from older children.

The Convener: We can debate that at a future stage.

Margaret Mitchell: I accept that grooming can occur between people of any age and that it is possible for a minor to groom an adult. However, the bill's purpose is to protect children. If children—that is, people under the age of 16—were to be included as being able to engage in the offence of grooming, surely that would undermine your argument that it can be possible to be sure about someone's intentions from their first contact. If, whether on the internet or in some other manner, an adult tries to pass themselves off as someone younger in order to gain the confidence of a minor, it may be possible to determine that from one incident. In that instance, one might not need the two earlier communications that the bill currently requires for the communication to be an

offence. However, if the person doing the grooming was a child, one would need to give them the benefit of the doubt, unless a course of conduct could be established. That is where the proposal starts to muddy things and make things difficult.

I appreciate what you are saying, but it would not be helpful to incorporate that into the legislation. I only hope that the fact that we are raising awareness of what grooming is will address your reservations about the possibility of an adult being groomed by a minor. Is that a fair comment?

Chief Superintendent Buchan: Often, the child who is being groomed will not know until well into the affair that they are dealing with an adult because the adult does not purport to be such. From the outset, the child may have no idea because the adult may be very clever and may purport to be a child. Indeed, if the person who is doing the grooming is a younger person, they may purport to be someone older. Those difficulties exist. However, it is difficult to argue with the concept that it is right for society to see it as a serious issue for a 32-year-old to kid on that he is younger in order to try to meet with a 14-year-old. One would be very wary of that and it is right that we worry about it.

Margaret Mitchell: Let us move on. Given that the bill focuses very much on internet grooming, other witnesses have suggested that it does not pay sufficient attention to the grooming of children within the family. It would be useful to have on record whether you consider that to be a problem.

Deputy Chief Constable Ovens: Because I have responsibility for the management of sex offenders on behalf of the Scottish police service, and for deciding on disclosure checks within my own police force area, I have had to read all the files of registered sex offenders. From my reading, it is quite clear that, in the majority of cases, the individual has engaged in grooming a child and that has led to the primary offence. Usually, that happens through a relationship within the household, although there may not necessarily be a direct family relationship. The person may have been befriended by the family or may be someone who has stayed in the house temporarily, such as when they have been asked in to watch young children. They are then put in a position of trust and, over a certain period of time, a relationship is built up. We would describe that process, which leads to the primary offence, as grooming. That is by far the most common background of the offenders on the sex offenders register in Scotland. You have raised a major issue, and we must consider whether we should broaden things out and make it an offence to take such action in advance of the actual sexual offence.

Margaret Mitchell: It is very helpful to have those comments on record.

Do you think that criminal law can deal with this problem?

Deputy Chief Constable Ovens: I am sure that you appreciate that these issues are not black and white. Indeed, earlier discussions have shown that they are very complex and that each case has to be judged on its merits.

As I have said, our responsibility first and foremost must be to protect individuals, not to deal with the consequences of serious offending. As a result, it is reasonable for us to find out whether we can legitimately intervene before an actual offence takes place, either through making certain actions a criminal offence or through a more extensive use of orders.

Education is a major element in this respect, and parents must be made aware of their responsibility for looking after and safeguarding children and the questions that they must ask themselves when they leave their children with other individuals. That said, we think that we know family members and other people who are close to us and visit our homes and we are more trusting in such situations. I do not know how we address that matter, but education must be at the forefront. In that respect, the Executive has introduced a programme to support and improve parenting, to highlight parents' responsibilities and to assist families, particularly those in the vulnerable category.

My answer to your question cannot be an unequivocal, "We must criminalise these matters." Instead, I feel that we need to consider a range of issues. I should again point out that there is clear evidence of the commonality of grooming behaviour, particularly in the family situation.

Margaret Mitchell: It is useful to have that comment thrown in the pot. Obviously, the proposed legislation is supposed to act as a deterrent and to curtail such behaviour. However, as you have pointed out, there are other ways of dealing with this matter, and education is a primary one.

Some witnesses have suggested that it would be helpful to curtail potential offenders' activity through good liaison between criminal justice social workers and the police. How does that relationship work at the moment?

Deputy Chief Constable Ovens: There are strong requirements on us to work in partnership with colleagues in criminal justice social work, particularly with regard to known and registered sex offenders. We manage the matter jointly and meet to consider individual cases, carry out risk assessments and so on. For example, when I

consider any disclosure, that file contains comments not only from the police service, but from criminal justice social work. As a result, we have a very close working relationship.

We are also about to introduce in Scotland a new multi-agency software tool called VISOR—or the violent and sexual offenders register. Although that application is being rolled out to the police service, the intention is to roll it out to criminal justice social work and the Scottish Prison Service as well, to ensure that we are all using a common system. Such an approach will allow us to exchange information electronically, to look at the files and keep them up to date and to move quickly. After all, we know that offenders move around. If an offender moves from Edinburgh and Glasgow, the system will let us know that and we will be able to flag it up immediately to colleagues in the police service and criminal justice social work at the new location.

That is forcing us to work more closely than we have done in the past. Although I might paint a positive picture, we acknowledge that there has to be significant improvement. The underlying messages from the Bichard inquiry, our reviews of child protection, the announcements by the Minister for Justice on the arrangements in the police service for the management of sex offenders and the appointment of Professor Irvine to consider that will influence continued improvement and closer working in the future.

11:15

Margaret Mitchell: Is it fair to say although there is best practice, it is not necessarily replicated throughout Scotland? Are you hopeful that there will be more co-operation with the introduction of the VISOR system and what are the resource implications of that?

Deputy Chief Constable Ovens: There are resource implications of bringing the system into play. I hope that when it is in place it will save resources as opposed to requiring more, because we will be keying in information only once, rather than having people throughout the agencies involved key it into their own systems. Our having a system that runs across agencies means that the information will get built on, but not duplicated and replicated many times. The intention is that it will free up resources. There will be a resource implication for introducing the system and staffing it, but the Executive has supported us financially in that respect.

The system was developed in England and Wales and is being rolled out to the police service and the new agency that is replacing the former probation and prison service. It is therefore a UK system and will probably be the first step towards something that will, ultimately, be pan-European and might apply further afield as we recognise the issues involved.

Margaret Mitchell: So there are no artificial boundaries to it being implemented throughout the country?

Deputy Chief Constable Ovens: No, not at all.

Margaret Mitchell: That is encouraging. Thank you.

Mrs Mary Mulligan (Linlithgow) (Lab): Good morning. I want to move us on to considering risk of sexual harm orders. At least one of you has commented on them in writing, but, for the record, will you comment on the role of the chief constable in applying for RSHOs and whether you think that that will be resource intensive?

Douglas Keil: We welcome the proposal for RSHOs and think that they will be applied for. The nature of the offences that we are talking about is that there is often no corroborative evidence of their having taken place and there are no independent witnesses. The evidence often falls short of the requirements that the fiscal would make of us before he could bring a case to court. With that in mind, there could be circumstances in which an RSHO would be considered appropriate. It is difficult to give a more detailed example, but we believe that there is definitely a role for the orders. As with everything else in police work, one would assume that the more offences that are created the more people will be picked up for them. There will be more investigating time, more reporting time, more police time in court and, in relation to the offences that we are talking about, there will be monitoring time. All that will impact on police resources.

Deputy Chief Constable Ovens: I will respond to that on behalf of ACPOS. We welcome the potential introduction of the orders. We are happy to introduce a new set of skills into the police service, which we had not highlighted before, in relation to risk assessment and the alternative ways of dealing with situations in our communities that are not necessarily the traditional ones of considering prosecution or some other activity. We are considering that and we are re-evaluating how we train our officers and what skills we need. Risk assessment is a term that we are now using freely—it rolls off the tongue—but there is significant science behind it. Part of the work that we are engaged in with our colleagues in the Executive and in criminal justice social work is consideration of more detailed training for specialist staff on risk assessment and, particularly, on the role of the risk assessment authority that might be created.

We believe that there is a place for RSHOs and that they will make a difference. We think that their

use will increase gradually. Although it is the chief constables who will apply for them, we will need to work in close partnership with other agencies in relation to the information that we will consider. I return to the point that I made earlier: if there are actions that we can take to prevent something escalating, that is the course that we should reasonably take.

Mrs Mulligan: You have pre-empted my next question, which was about the work that will be carried out with other agencies to take RSHOs forward. Given that they will be civil orders, do you think that there is a risk that suspected perpetrators will not be given the opportunity to protect themselves?

Deputy Chief Constable Ovens: It is difficult to be clear about that. One recognises the rights of individuals and we need to be careful about how we use the powers, if they come to be. When orders have been brought in for other purposes, history shows that we have not gone on to use them with a cavalier attitude. One could argue that we have used them more economically than Parliament intended. There is a history of recognising that we need to be cautious. We may have been guilty in that we have not applied for a lot of sexual offences prevention orders, which were formerly sex offender orders. That is partially about our developing skills and a knowledge base; we have sought orders only where there is absolutely no doubt that the sheriff would be minded to grant an order.

I am not suggesting that we will change and become cavalier, but I return to the point about skills and training and the need to work with other organisations and recognise the rights of individuals. Much of what we and criminal justice social workers do involves working with offenders on their behaviour, their lives and issues in respect of their protection because—dare I say it—we have spent a disproportionate amount of time around issues such as vigilante action. We need to address issues carefully because of the consequences that flow from them.

Mrs Mulligan: ACPOS suggested in its evidence that police forces will monitor the use of RSHOs. How can we make sure that they will be effectively policed? You started to go into that, but will you say a little more about it? Perhaps some of your colleagues would like to comment on how we will know that it is worth while to have RSHOs, that they will be used effectively and that they will produce the results that we hope to see.

Deputy Chief Constable Ovens: We all accept that in any course of activity there is a need for robust inspection and audit arrangements to ensure that the powers, duties and responsibilities that have been given to us are monitored so that we are satisfied that they are being used effectively. That was highlighted in the Home Office response to the Bichard inquiry, which was published yesterday and to which I keep referring. We recognise that we have to enhance such arrangements.

That is not just about the role of HM inspectorate of constabulary for Scotland; it is about the role of the service itself. Under the current structures, people such as me carry specific responsibilities for areas of activity that cut across the whole service. Within the service, I am held accountable in relation to those areas and must report internally to the service and externally to the Executive on our activities and performance, and on how we are using the resources that are at our disposal. The regime that we are moving towards is much more accountable and responsible.

You are right to suggest that resources are not in themselves sufficient: it is about how we use them and how we evidence our use of them. There is a cycle: we always learn from experience, which may influence adjustments or amendments in our approach, in our training, in our skills and ultimately in legislation.

The Convener: You said that although you think that RSHOs would be useful, you cannot cite specific examples of situations in which they might be useful. I am a bit uneasy about the orders, for reasons that you probably know. It appears that the bill will allow us to try under a civil process, in which the burden of proof is lower, cases that we cannot try in a criminal court. I find it difficult to sign up to that without any understanding of the kind of cases that would be involved.

You will appreciate that much trust is placed in the police service and in its using the new powers responsibly. However, as a legislator, I am being asked to sign up to something that is far reaching in respect of human rights issues. Nobody has yet given us examples to illustrate how the orders would be used. I am not suggesting that you can do that today—you have said that you have some difficulty with the matter—but I ask you, possibly at our seminar next week, to give us sight of some potential cases or instances in which you feel the orders would be needed.

Douglas Keil: I find it difficult to give examples that detail the type of behaviour that occurred between one person and another person. I have given a general example in which, because of the nature of the offences, we might well report to the procurator fiscal all the facts and circumstances as we know them, and he or she might decide that there is not sufficient evidence for a prosecution. I understand your concern about something that is effectively a civil order being placed on someone against whom, at least in evidential terms, the case falls short of a criminal prosecution. To take that a stage further, if that person is to be

prosecuted for breach of an RSHO, that breach is to be a criminal issue. I can understand the legal principles involved in that.

We all know that the bill is about protection of children. At some point we must accept that to achieve that effectively we must go the extra mile. The bill contains a number of measures in respect of which the chief constable and the court must be satisfied before the process is gone through.

The Convener: Could I stop you there? I understand that the bill is about protection of children, but just because legislation involves children, that does not mean that we should give up our cross-examination of it.

Douglas Keil: No—indeed not.

The Convener: That is particularly true when we are trying to understand in what sort of cases the police are asking for such wide-ranging powers to go to a civil court. You are suggesting that there could be a scenario in which a procurator fiscal says that he or she does not have corroboration for something and the case might be swung back to one involving a risk of sexual harm order.

Douglas Keil: I think that is—

The Convener: I am quite prepared to concede the principle that we sometimes have to skew the balance to protect vulnerable people in society. However, at no time have I been given any examples, circumstances or details about cases in which you would use the orders, which I find difficult to accept. You are asking us to give you a blank cheque. Would it be possible to get sight of some details, even privately? I realise that any such cases will be very sensitive. It would, quite honestly, be remiss of us to say to you, "Have these powers and we will not question you further about what cases you would use them for."

11:30

Chief Superintendent Buchan: I was certainly not aware that the service had asked for a blank cheque or that it had sought your giving us the power—that was not my understanding. That said, we have discussed the matter. Next week, there will be a meeting of practitioners, which may be a more appropriate environment in which to discuss the issues.

I do not know whether this is covered by the powers, but might it be the case that, because court cases take forever and a day to come up, there could be a circumstance in which the fiscal was considering a case but it was going to take some time to refer the matter to the Crown Office or perhaps even to take it to trial, to a children's hearing, or wherever, although in the interim there might be benefit in identifying that there was a risk? It is not clear to me what the answer to that would be.

The Convener: That is what I am asking. I do not expect you to give the committee real examples on the record; I realise that it is a sensitive matter. I am asking you to consider whether there might be one or two cases that we might have sight of, even if we just get sight of the circumstances. That could perhaps be done at the seminar. All that I am asking is whether that would be possible.

Deputy Chief Constable Ovens: I apologise, convener, but I cannot give you the definitive answer that you are asking for; however, it is perfectly reasonable for you to seek that. I will arrange for some of the situations in which we think that the order would be used to be scoped out and mapped, and I will provide that information to the committee. You might want to get back to us after you have considered it.

The Convener: We would be very grateful for that.

Deputy Chief Constable Ovens: We will get the staff who are working in that area to answer the specific question that you asked and we will provide a written submission. The subject may also be something that we can pick up next week in general detail; I will brief the staff who are going to be at the meeting on that. We will provide you with a written paper on that specific issue.

The Convener: Stewart Stevenson might be able to help us out with an example.

Stewart Stevenson: I do not want to be specific, as I might identify someone. However, let us imagine that a person has, for child protection reasons, come to the attention of the children's panel and has not necessarily entered the criminal justice system per se. As the person approaches the age at which they will no longer be an appropriate subject for the children's panel, it becomes apparent that they would present a risk of sexual offending. In such circumstances, would a chief constable be prevailed upon to apply for an RSHO in the interests of protecting the potential victims of someone who is already in the system—probably through social work services, rather than through the criminal justice system—and who might present a risk? In such circumstances, there would in civil terms be an evidential background to justify application for and granting of an order. Would that be an example of a circumstance in which an order might be sought and granted?

Deputy Chief Constable Ovens: I am grateful to Mr Stevenson for providing that example, but I am reluctant to comment on it. My preference would be to ask my specialist staff to spend time considering what is proposed in the bill in respect of the specific question that the convener asked,

and mapping out some scenarios, bearing in mind the scenario that Stewart Stevenson described. My staff will give a considered view, rather than the sort of ill-considered view that I might give if I was to respond directly at this time.

Stewart Stevenson: I merely comment that the example that I have given is not necessarily theoretical.

Mrs Mulligan: I do not share the convener's concerns on the matter because I have accepted the principles of, for example, antisocial behaviour orders. However, in relation to the example that Chief Superintendent Buchan gave of circumstances in which, prior to a case reaching court, there was thought to be risk, the one thing that concerns me about the orders—and the thing that distinguishes them from antisocial behaviour orders—is the stigma that would attach to someone who had an RSHO taken out against them. That is also the convener's concern. It is a serious matter, and there is a risk in the community for somebody who has such an order taken out against them that would perhaps not exist for someone who was subject to an ASBO. What are your comments on that?

Chief Superintendent Buchan: I entirely endorse that. Of course, the committee would expect me to say that, given the experience to which Mr Ovens referred. The fact is that society in general and people in general will tolerate living next door to just about anyone but a sex offender. The sex offender is the pariah. People will live next door to wife beaters, house breakers and people who assault people—none of whom are nice people—but they are loth to tolerate in their vicinity anyone who may be a sex offender, once they are aware of that.

I understand the difficulty. However, as the committee would expect us to do, we take cognisance of that fact in making our judgments and going before sheriffs. I agree that an RSHO is not like an ASBO—the difference is the stigma that attaches to an RSHO and the potential danger for the named individual.

Stewart Stevenson: The Executive has indicated to the committee that it proposes to amend the bill to conform to the United Nations Convention on the Rights of the Child and the subsequent European Union framework decision to make the creation, possession or distribution of indecent photographs of children under 16 an offence. Given that article 1(a) of the EU framework defines the upper age limit for a child as being 18, should the age limit in Scotland also be raised to 18? Should there be exceptions, for example, where the person who has taken the photographs is married to the younger person or in is a relationship with them that has the general attributes of marriage?

The Convener: That is an easy one.

Douglas Keil: I received correspondence on the issue a short time ago, but I have not yet had an opportunity to circulate it to my colleagues for comment. I recognise the dilemmas that are raised and I would like more time to think about the issue. I recognise that there are a number of potential knock-on consequences. That answer is not very satisfactory, but it is the only one that I can give the committee today.

Stewart Stevenson: Can I take it that your response might be similar to that which you gave on payment for sexual services to someone who is under 18?

Douglas Keil: If I understand properly the implications, it could mean that the bill would make prostitution—which, as the member knows, is not in and of itself an offence in Scotland—an offence for 16 and 17-year-olds.

Stewart Stevenson: I am not clear whether the Executive's intention is for prostitution to become the offence. I think that its intention is that the offence would be committed by the person who uses the prostitute. I suspect that that provision would receive wide support, perhaps even in the more general sense of the offender being the user and not the supplier.

Douglas Keil: I want more time to think about this relatively complex issue.

The Convener: That is fair. We were advised only recently that the Executive has obligations under European law to implement the offence. We can provide you with information if you so wish.

Mr McFee: Previously, our discussions have focused on harmonising the age limit at the age of 16. We now face the prospect of a child being defined in two separate ways under the same legislation—as a 16-year-old and an 18-year-old. I fully understand Douglas Keil's reason for wanting to take away such a difficult issue and come back to us on it.

Chief Superintendent Buchan: Members of the legal profession will be very busy for the foreseeable future.

Stewart Stevenson: What a shame.

The Convener: We will be hearing from them shortly.

I thank the witnesses for their evidence this morning. The exchange of views with the committee has been extremely useful. We will see members of your organisations at the seminar next week. On behalf of the committee, I congratulate Douglas Keil on his appointment as a member of the Order of the British Empire in the new year's honours list. Well done.

Douglas Keil: Thank you.

The Convener: I propose that we take a brief comfort break.

11:39

Meeting suspended.

11:47

On resuming—

The Convener: I am sorry to have kept people waiting. I welcome our regulars from the Law Society of Scotland—Gerry Brown, Iain Fleming and Anne Keenan. We always look forward to having members of the Law Society here. You usually say interesting things and I am sure that you will not disappoint us this morning. Thank you again for attending the Justice 1 Committee to give evidence on the Protection of Children and Prevention of Sexual Offences (Scotland) Bill.

As usual, we will go straight to questions.

Mr McFee: Good morning—just. Your submission's second paragraph says that you support the general principles of the bill. Will you give us a quick outline of why?

In relation to section 1 of the bill, in what areas does existing legislation not cover the types of offences that we are talking about?

Anne Keenan (Law Society of Scotland): Thank you for having us here.

I will quickly run over some of the offences that are covered by common law and statutory offences. There is existing provision under offences such as lewd and libidinous conduct, which covers acts of indecency towards children under the age of puberty, and thereafter the statutory extension of those provisions in relation to girls in section 6 of the Criminal Law (Consolidation) (Scotland) Act 1995. Other offences include breach of the peace, fraud and potential offences under the Communications Act 2003 and the Civic Government (Scotland) Act 1982. There are therefore a range of offences that might cover contact where inappropriate sexual approaches have been made by adults towards children.

The Protection of Children and Prevention of Sexual Offences (Scotland) Bill appears to try to strike at situations in which there has been conduct that might not appear to be offensive; objectively, contact might appear to be innocent but may be followed up by travelling to meet the child with the intention to commit a sexual offence. In such a situation, the initial contact would be objectively innocent and therefore could not be covered by the law of lewd and libidinous conduct, breach of the peace or something of that nature. The new bill appears to plug that gap and will, I hope, cover any such offences.

Mr McFee: You probably heard the earlier evidence about the number of contacts that must be made for an offence to be committed. In your evidence, you say:

> "In these circumstances the Committee would recommend that the reference to two earlier occasions should be deleted from the offence provision."

I understand that when you say "Committee", you mean the Law Society of Scotland's criminal law committee. Do you mean that the number should be one or zero and not two, or is it just that the contact is inappropriate?

Iain Fleming (Law Society of Scotland): We believe that there need be only one meeting.

Mr McFee: One meeting?

Iain Fleming: Sorry—one communication. We take that view because first, in the case of children who are particularly vulnerable, it might be that that leg of the offence could be completed in one meeting only. Secondly, if there were a desistance after two communications, it would increase the risk of circumventing the legislation.

Mr McFee: So one communication could be the first communication.

Iain Fleming: Yes.

Mr McFee: You give reservations about the relevance of travelling to meet a child in section (b)—entitled "Completion of the offence"—of your submission. You ask what would happen if, instead of travelling, the adult arranged for the child to travel. Would an offence be committed if the child travelled but a meeting did not take place? Will you confuse us a little more about that?

Gerry Brown (Law Society of Scotland): Our concern is the extent to which preparation for commission of the crime becomes the actual crime. We ask in our written evidence whether the purchase of a ticket for either the child or the adult would fall within the ambit of section (1)(b). I am not convinced that it would, nor is our criminal law committee. Perhaps another form of words could be used to try to encapsulate that intention. I understand from some of the previous evidence that a form of words was proposed, for example, "arrangement to meet". Those words have the potential to cover the planning arrangements to take the offence one leg forward in the four legs that are referred to in section 1 of the bill.

Anne Keenan: In addition to what Gerry Brown said, our concern is about whether the policy intention behind the bill could be subverted in some way if, instead of travelling, the alleged

offender arranged for the child to travel rather than travel themselves. We highlight that point for further debate because it might be worthy of further consideration.

Mr McFee: I accept that the wording appears to be unclear and that there is a possibility that it could be challenged; we might want to look at it again.

You suggest that the defence of a reasonable belief on behalf of the alleged perpetrator requires some clarification—you want to it to be clear whether it is objective or subjective. Will you explain that?

Gerry Brown: Anne Keenan will deal with that. The issue has caused us a lot of concern, in view of previous bills. It is an important issue.

Anne Keenan: We have to consider whether reasonable belief involves a subjective view that the accused reasonably believed that the child was 16 or over or an objective test that a reasonable person would have reached that view on reasonable grounds. The offence might be difficult to prove because, as the bill is framed, we understand that the onus would be on the Crown to show that the accused did not have a reasonable belief that the child was 16 or over, whether that is subjective or objective.

Other legislation is not framed in that way. I appreciate that the analogous offence in England and Wales is framed in that way, but in other Scottish offences, particularly under the Criminal Law (Consolidation) (Scotland) Act 1995, the process is inverted. Instead of placing the onus on the Crown to prove the reasonable belief of the accused in relation to the victim, the provision is framed in the way of a defence—showing that the accused had a reasonable belief that the person was over the age is a defence to a charge. We have given this issue considerable thought and think that it might be easier to prove the offence if we use the formula that is used in the Criminal Law (Consolidation) (Scotland) Act 1995 and other existing Scottish offences.

If the onus for that element of proof is removed from the Crown and placed on accused persons, who have to say that they had a reasonable belief, we are back to the question whether the test for reasonable belief should be subjective or objective. From the 1995 act, existing case law shows that the accused has to have made due inquiry and cannot just rely, for example, on the appearance of the other person. There is a body of case law on which a judgment could be made.

Gerry Brown: The bill asks the Crown to prove a negative. We are concerned that proof in relation to section 1 is becoming more difficult because of that. The onus should revert to the accused.

Mr McFee: That is interesting, because I framed the question according to the traditional concept of reasonable belief being a defence, when, under the bill, it is not a defence—it is for the prosecution to prove that a person did not have a reasonable belief.

Gerry Brown: Yes.

Mr McFee: That is useful. Thank you.

The Convener: I want to clarify your view on section 1. In your paper, you refer to an adult who

"intends to commit one of the relevant offences against that child, either at the meeting or on a subsequent occasion."

How far do things have to go before an offence is committed? Is it inferred from the travelling to meet the child and the communication? Does the Crown have to specify which of the relevant offences the accused was going to commit?

Anne Keenan: Our understanding is that the relevant offence could be any of those that are referred to in the schedule. The court would infer that the accused intended to commit one of those offences. A specific offence would not have to be libelled.

The Convener: But it is correct to say that the offence is not complete until the Crown shows that the adult who is over 18 travelled to meet the child who is under 16 and communicated on two previous occasions.

Anne Keenan: Yes.

The Convener: Will that be enough?

Anne Keenan: Yes, if the accused had done that and intended to commit one of the offences listed in the schedule.

The Convener: The only way in which you could decide that is by inference.

Gerry Brown: Yes.

The Convener: Do you think that the bill makes it clear that that is the case?

12:00

Gerry Brown: Yes. The only way in which that could be decided would be by inference from the evidence that was led. That inference would be made from something that was in the communication or in any other correspondence, or something that was in the possession of the accused, that implied that one of the relevant offences was going to be carried out. To give an example off the top of my head, the accused could be in possession of certain clothing or other items that suggested that he or she was going to commit some sexual offence. There are certainly a number of hurdles to overcome. The reason for that is that we are talking about striking at the

preliminary stage of the activity. As Anne Keenan has said, we have a panoply of legislation to deal with more progressive sexual misbehaviour. The hurdles are there both to try to protect the innocent and to prevent the abuse that we are targeting.

The Convener: The principle is that we are trying to prevent that abuse from happening. The offence is based entirely on the preparation that is made to commit such abuse.

Gerry Brown: It is all based on a communication that, on the face of it, is innocent, but that seeks to subvert a child's will. That apparently innocent communication is linked to other elements that are not innocent—for example, the fact that someone is travelling from outwith Scotland to meet a seven-year-old child whom they have never met before. That might require an explanation, as might the other aspects on which you have already had evidence.

Mr McFee: I want to clarify whether it is your contention that the way in which the bill is written means that if the adult travels to meet the child with the intention of carrying out an unacceptable act, that is an offence, but if the adult gets the child to travel to their home, that is not an offence, even though the adult still has the intention of committing such an act.

Anne Keenan: Yes. That is what we are concerned about.

The Convener: The bill is specific about the fact that it must be the adult who travels.

Iain Fleming: The reason for that is that section 1(1)(a)(ii) says "travels".

Mr McFee: Yes, and it says who has to travel.

Gerry Brown: Stewart Stevenson raised the issue of when a person is an adult. That is another matter.

Anne Keenan: In relation to previous communications, there is the question of whether they would have had to have been made after the adult had reached the age of 18 or whether they could have taken place before then. Mr Stevenson has already mentioned that.

The Convener: We had a similar exchange about whether it matters who initiates the communication. Although the bill concentrates on the adult's behaviour, the same principle may apply even when the child has made the initial communication, of which the adult then takes advantage.

Margaret Smith: Before I move on to ask about the age of the offender, I will return briefly to the concept of reasonable belief, on which Bruce McFee sought clarification. You said that what was proposed in the bill was analogous to the situation that applies in England. What was the background to that situation from a case law point of view? Was the change in the way in which such matters are dealt with the same in England as the change that is proposed for us? If so, has the change presented any difficulties in England?

Anne Keenan: I do not have a detailed knowledge of the law and procedure in England; I simply checked the relevant act to ensure that the provision was the same and noted that it was. That is certainly something on which we could consult with our counterparts down south.

Margaret Smith: I am just worried that we may be going down the road of importing English law for no reason other than by mistake.

Anne Keenan: I would certainly be happy to write to the committee to clarify that, if we can get some information from colleagues down south about English law and procedure.

Margaret Smith: That would be helpful.

On the offence as set out in section 1, you recommend that the proposed minimum age of the offender, 18, be reduced to 16, which, as we have already heard, raises a number of questions. Will you explain more fully why you think that that should be done? Are you aware of any people in the 16 and 17 age group who groom younger people for sexual purposes?

Will you also elaborate on your views about what would be appropriate for criminal law intervention in terms of the relationships between 16 and 15-year-olds and so on? I think that it was Barnardo's Scotland that suggested that it might be more appropriate for the conduct of 16 to 18-year-olds to be referred to a children's hearing, rather to the courts system. That is a something of a can of worms.

Anne Keenan: We looked at the matter purely from the point of view of legal principle in relation to the bill's consistency with other areas of law. We do not have any research on the number of people who might commit offences in that age group. We suggested that the age could be reduced to 16 on policy grounds. We could envisage a situation in which a 16 to 18-year-old might be grooming younger children of perhaps seven or eight. On purely policy grounds, we did not see why such offenders should evade liability for prosecution, when other areas of the criminal law, particularly the Criminal Law (Consolidation) (Scotland) Act 1995, do not make that age distinction. A 16-year-old could, for example, be charged with having unlawful sexual intercourse with a child aged between 13 and 16 under section 5(3) of that act.

In Scotland, we are familiar with procurators fiscal making the decision and using their prosecutorial discretion as to whether it is

appropriate to initiate a prosecution in such circumstances. In some ways, the considerations that are applicable in other areas of the criminal law could also apply in relation to the offence that we are considering. That would also relate to the decision on whether to refer the offender or the case to the children's reporter for further consideration.

Margaret Smith: So you do not think that it would be necessary to include an extra provision, as alluded to by the Scottish Police Federation, on the age of the child relative to the age of the adult. Would you leave that in the hands of the prosecutor to assess on a case-by-case basis?

Anne Keenan: I would leave that in the hands of the prosecutor. There are situations all the time where policy considerations are taken into account, particularly in cases where there is a relationship between a 16-year-old and someone who is just under 16. In such cases, prosecutors make a decision about whether it would be appropriate and in the public interest to proceed. The prosecutor has the benefit of taking all the facts and circumstances of the individual case into account at that point.

The other aspect of the bill that concerns us relates to art-and-part guilt. We were concerned about situations in which a 16 or 17-year-old could be used as the instrument of an older person or third party to initiate contact with the child, with the person over 18 making the contact. We are unclear what the exact position would be. It was our understanding—although we are now not clear whether it is the case—that section 293 of the Criminal Procedure (Scotland) Act 1995 would apply. That section states:

"A person may be convicted of, and punished for, a contravention of any enactment, notwithstanding that he was guilty of such contravention as art and part only."

It is therefore read into every statutory offence that a person can be convicted of that offence on an art-and-part basis.

That provision is in the Criminal Procedure (Scotland) Act 1995, but we were interested to read the evidence that the Scottish Executive and the Crown Office gave about the question. We are not clear what the position would be and we seek clarification about whether or not that provision would apply.

Gerry Brown: I think that, in fact, we—that is to say, those of us in the Law Society—are clear. We are just being polite.

Anne Keenan: I was trying to be polite, at least.

Margaret Smith: You were being very polite.

Gerry Brown: Whereas I am gung-ho.

Throughout the consideration of the bill, the age of the child has been discussed. I heard the evidence about the European framework directive and the protocol relating to child prostitution, pornography and trafficking. We are sympathetic to that view, but we are bound by what has been said about ages in other places. We have to deal with a range of ages. I suggest that the question of age and the child in criminal law might have to be re-examined in general terms so that we can provide some sort of consolidation—perhaps the Scottish Law Commission could examine that. For the law to be effective, individuals have to be clear about where they stand.

Margaret Smith: At the risk of boring you even more, I want to talk about another issue relating to age. As introduced, section 1 of the bill would make it an offence for anyone who was resident in Scotland but validly married to a person under the age of 15 to meet her or him for sexual purposes. Do you think that there should be some sort of marriage exemption, or could that issue best be addressed by appropriate prosecutorial discretion? My understanding is that, in England, there is an exemption relating to marriage or relationships akin to marriage.

Iain Fleming: I would be inclined to the view that such circumstances should be left to prosecutorial discretion.

Stewart Stevenson: Why is an age specified at all in relation to the perpetrator, given that the 22 offences that are listed each have an age at which it is possible to commit those offences? Why does the bill need to specify an age that relates purely to the preparation to commit any one of those 22 offences? In law, what would be the difference if the bill made no reference to the age of the perpetrator?

Anne Keenan: That is a valid point. The Criminal Law (Consolidation) (Scotland) Act 1995 relates to a number of the offences that we have referred to but gives no age for the perpetrator in relation to some of the offences. Certain defences can apply, such as the fact that the perpetrator is under 24 and has not been charged with a previous offence, but no age is specified in relation to a number of the offences. The matter would be left to the discretion of the procurator fiscal, subject to agreed protocols between the Lord Advocate and the Scottish Children's Reporter Administration in relation to whether the prosecution was taken.

Stewart Stevenson: I am making the point in relation to the perpetrator. I think that there is a clear case for giving an age in relation to the person whom we are seeking to protect; that is an entirely different issue. However, the police told us of their experience of aggressive sexual predators of modest age—they talked of 14-year-olds. It is

interesting to hear you say that the substantive offences provide the necessary discrimination in relation to age.

The Convener: The question of age is interesting. You might be right in making the final decision just a matter for prosecution guidelines, but if we reduce the age to 16, in the case of a 16-year-old and a 15-year-old, what will be the difference between under-age sex and grooming? I admit that a similar scenario could arise whatever the age is, because the age gap between a 19-year-old and an 18-year-old is small. I wonder whether more needs to be done to define grooming.

I understand entirely Anne Keenan's point. It is clear that a 16-year-old or even a 15-year-old could prey on an eight-year-old or could be used in the commission of such an offence. That makes me think that perhaps the bill should drive at the intention behind behaviour, rather than at the ages of those who are involved. We have received written evidence about a worry of mine, which is the defining line between unlawful or under-age sex and grooming. You think that the prosecutors should ultimately determine that.

12:15

Gerry Brown: The prosecutor has wide discretion—some evidence referred to that—to take into account the nature of the offence, the circumstances, the accused's background, the victim's circumstances and the balancing act with the public interest. That is the stopgap and the safeguard that we should have.

Subject to the comments that we have made, I am reasonably comfortable—as is the Law Society's criminal law committee—that section 1 covers the preliminary step to the more active misbehaviour that is referred to in the relevant offences. I detect that the convener is not as comfortable.

The Convener: You suggest that if we lowered the age to 16 and there was some sexual content to the messaging on msn messenger between a 16-year-old and a 15-year-old, who agreed to meet, the offence would be committed if the 16-year-old travelled to meet the 15-year-old. The prosecutor would have to decide whether to prosecute in the public interest, but the offence would have been committed.

Anne Keenan: That would apply only if the person involved intended to commit one of the scheduled offences—if the 16-year-old intended to meet the 15-year-old to commit rape or engage in lewd and libidinous conduct, for example.

The Convener: You said that the inference must be drawn from going so far as to meet up and from the communication. Nothing else has to be shown.

Anne Keenan: No. Intent must still be proved. I am sorry; perhaps I did not make that clear. The intent to commit one of the offences would still have to be proved, but that could be drawn from the facts and circumstances of the case. Evidence might be led and the inference would be drawn from the facts and circumstances.

The Convener: It might be clear from their communication that they would have under-age sex, which could also involve an offence under the bill. That does not apply in relation to the similar age gap between a 19-year-old and an 18-year-old, because sex between them would be lawful.

Gerry Brown: The point is that, on one view, a sexual predator could equally be 16, 27 or 45. What matters is the facts that support the element of the intention to commit the relevant offence. The inference must be drawn from sufficient credible and reliable evidence and I think that it would have to be corroborated.

The Convener: I will soon leave the point. If we suppose that the evidence exists, the offence will have been committed. If one party was 14, under-age sex could be involved. The e-mail communication could show that that is why the parties were meeting up. However, if the age in the bill were reduced to 16, the prosecutor would have to make a decision about whether unlawful sex could be inferred because the parties were trying to have a relationship or whether the terms of the legislation were met because there was communication and it was clear what would happen. Consent will not come into it.

Gerry Brown: That is right.

Stewart Stevenson: In essence, section 1 of the bill is about creating an offence of preparation. To sustain that, it is necessary to show that the preparation is for one of the 22 offences listed in the schedule, that communication has taken place and that there is a Scottish connection.

Gerry Brown: There is also the travelling element.

Stewart Stevenson: Yes. As shorthand, I was using the word "preparation" to cover that. The parties do not have to meet; the travelling is a specific part of the preparation. I was intervening to ensure that, when you said that section 1 describes the offence, you were not reneging on the point about the lack of symmetry at section 1(1)(a)(ii), which states that the perpetrator is the one who has to travel. You are continuing to say that there ought to be, for the sake of argument, a section 1(1)(a)(iii) that says, "or arranges for the child to travel", or something like that.

Gerry Brown: Yes.

Stewart Stevenson: That is the substance of my intervention.

Gerry Brown: If we are going to renege, we will tell you.

Stewart Stevenson: It is just that the words that you used carried that risk.

Gerry Brown: Yes. I am sorry.

Mr McFee: We have used the expression "grooming", which is very much associated with the internet. Grooming suggests to me that there is a basic inequality between the two parties; it does not suggest to me a situation involving a boyfriend and girlfriend at the same school who are aged 15 and 16. In your experience, do the prosecuting authorities take such factors into account?

Gerry Brown: Yes.

Mr McFee: So the offence hinges on the inequality between the two parties. It is not the case that she is 15, he is 16 and that is an offence—boom.

The Convener: On what grounds? There is no definition of grooming.

Iain Fleming: On the one hand, there is a situation in which a 15-year-old and a 16-year-old are involved in an on-going consensual relationship. There is no doubt that a number of offences may be being committed in the course of that relationship but, in my experience, the likelihood is that the prosecutor would take the view that it would not be in the public interest to prosecute in such a case. On the other hand, when there is an adult of 45 and a child of 12—a situation in which there is a clear inequality—the view of the prosecutor is more likely to be that it is appropriate to prosecute.

The Convener: My concern is that, although that seems sensible, it is in fact arbitrary—an individual will have to make a decision about whether the age gap means that there is inequality. Would the gap have to be two years, three years or what?

Iain Fleming: I am not a prosecutor, but my understanding is that guidelines are given to each of the various offices of the Procurator Fiscal Service. The guidelines will instruct the prosecutors on what matters should be taken into account when making such decisions.

The Convener: The point that occurs to me is that there has to be some definition of inequality to enable the Lord Advocate to draw up guidelines. Otherwise, he would be drawing up guidelines for legislation about which Parliament's intention was unclear in relation to the offence of grooming, which is the term that we are attaching to the offence.

Margaret Mitchell: The police are keen for us to consider whether the content of the communication could be such that it could be viewed as the grooming offence, without there being a necessity to prove an intent to meet. If we amended the bill so that the contact or communication happening once showed that grooming was taking place, would there be a need for corroboration? In other words, would we then have to look for two occasions on which those actions had happened, without necessarily having moved on to the second stage, which relates to—as the bill stands—the intent to meet?

Iain Fleming: My understanding is that the whole crime has to be corroborated. There have to be two separate sources pointing to the commission of the crime. If there are two separate sources relating to that one meeting, that would be enough.

The other concern that we had about the requirement for two meetings was the difficulty in defining what constitutes two meetings. I am not terribly familiar with internet chat rooms, but I understand that it is possible for someone to go on for a day in an internet chat room. Is that one meeting or two meetings? The concern is that there is a possibility of circumventing the bill if we insist on a requirement for two meetings. The evidence tends to suggest that there may be only one, terribly prolonged meeting.

Margaret Mitchell: I presume that there would have to be something in the communication about travel, if nothing else, if the police did not have the ticket saying that the parties were going to meet or if the adult party did not turn up at the meeting. I am getting confused about the evidence that would be needed if, as the police want, the requirement for evidence of travel to meet is taken out of the bill. Is the communication itself enough?

Anne Keenan: Do you envisage needing only the communication as evidence of the offence, with no further action having had to take place?

Margaret Mitchell: Yes. The communication would contain inappropriate language or be obviously abusive.

Anne Keenan: I think that what you are getting at is that the communication would not be innocent but would, in itself, be indecent in some way. There has been case law on that point; the High Court ruled on it in the case of Webster v Dominick—2003 SCCR 525. Talking about lewd and libidinous conduct, the Lord Justice Clerk said:

"In the modern law, where indecent conduct is directed against a specific victim who is within the class of persons whom the law protects, the crime is that of lewd, indecent and libidinous practices … It may be constituted, in my opinion, by means of any lewd conversation with the victim,

whether face to face or by a telephone call or through an Internet chat room. In each case, the essence of the offence is the tendency of the conduct to corrupt the innocence of the complainer."

Therefore, a conversation between two parties through the internet, for example, would be all that was needed to prove the offence. That would be lewd and libidinous conduct in any event.

However, in my view and in the view of the criminal law committee, the bill is trying to address a situation in which the communication is not lewd or indecent but appears to be innocent. That is why the further aspects of a meeting or arrangements to travel to meet the person are needed. It is that further action with the intention of committing the sexual offence that consolidates the offence.

Margaret Mitchell: So if the communication said, "I will meet you at such-and-such a place," would that be enough even if the tickets were not purchased or the person did not turn up? Would it be sufficient for someone to say that they would meet and for there to be only one communication?

Anne Keenan: If we leave the number of communications out of it, the adult would—as the bill is drafted—have to travel. I do not think that we have discussed whether the attempt to commit the offence would be an offence. A provision in the Criminal Procedure (Scotland) Act 1995 allows one to read into any statutory offence the attempt to commit an offence. Whether an attempted commission of this type of offence would be an offence in itself is another matter on which we would need clarification.

Margaret Mitchell: Would that constitute grooming?

Anne Keenan: We would need to go back to the Executive on that and check its intentions and whether it agrees that the provision would apply in such circumstances. As the bill is currently drafted, it appears that there needs to be travel, not just intention.

Margaret Mitchell: I understand that, but if that element is removed and we go back to what the police want, I wonder whether we are really covered.

The Convener: Let us move on to risk of sexual harm orders. It is back to you, Margaret.

Margaret Mitchell: On risk of sexual harm orders, do the witnesses wish to comment on the fact that we are using a civil order to address conduct that is, in effect, a criminal offence?

Anne Keenan: Our written evidence indicates that we can see some merit in having those orders available as a child protection measure under civil procedure. We question how they will interact with the criminal law and our position is that the criminal law should be given primacy so that, if there are suspicions about whether conduct is inappropriate, the first port of call should be to ask whether there is sufficient evidence to go down the route of criminal law. If there is, the matter should be passed to the procurator fiscal for a decision on whether prosecution is in the public interest. Only when there is a clear indication that a criminal prosecution will not go ahead should consideration be given to whether a civil order would be appropriate. There is a pecking order, if you like; the criminal law should be the first port of call and the orders should be a secondary measure.

Our concerns are primarily in relation to contamination of evidence and the fact that evidence that could be used in a criminal trial should not be rehearsed initially during civil proceedings. We want to ensure that any evidence that will be led in a criminal trial is led in that forum first.

12:30

Gerry Brown: The right to a fair trial is paramount. When civil and criminal processes run together, every effort is made to deal with the criminal process first. If that cannot happen, an undertaking should be given by the prosecution or any of the other parties not to use that evidence or any finding of the civil process during the subsequent criminal process.

Mr McFee: As you probably heard, the police said in evidence that there was a suggestion that civil proceedings could be used when there would be an unreasonable delay in bringing a criminal case to court. Your evidence suggests that that could prejudice the outcome of a prosecution when it came to the criminal court. Is that correct?

Gerry Brown: Yes. However, all the explanatory notes and evidence that we have at this stage show that we are not talking about huge numbers. Our general view is that such matters should be dealt with expeditiously. If we are talking about a criminal prosecution and a civil process, both should be dealt with expeditiously and we suggest that there should be a strict time limit, with the criminal prosecution taking the primary role when there is sufficient evidence. When the case goes to the procurator fiscal, the decision might be that there is not enough evidence and then the chief constable would state that he would like to take out a risk of sexual harm order. The issue is important and there might be questions to be asked in connection with safeguards for the individual who is served with the papers.

The orders should go through the Court of Session process so that they are valid throughout Scotland. The practice appears to be that if a risk of sexual harm order were to be dealt with in

Edinburgh sheriff court, for example, that order would be granted within the jurisdiction of the sheriffdom of Edinburgh but would not cover other areas of Scotland. An order that applied to an individual and which involved a child or children might not have effect if the child were to move from Edinburgh to Lochgilphead, for example. Although we have other reservations about the orders, our view is that because they are important, they should apply Scotland-wide. The only way to do that in practice would be through the Court of Session.

Mrs Mulligan: I will show my ignorance by asking whether evidence that has been led in a civil case can be led again in a criminal case. Are you saying that such evidence should be able to be used?

Gerry Brown: A number of different issues are involved. In a civil case there is a different onus of proof, which is the balance of probability. Hearsay evidence is admissible and corroboration is not required, although the individual might have to respond to the evidence. The normal practice is that an individual should not be prejudiced if a criminal process is pending and that because of the implications of the criminal process, he or she should have the right to have that process dealt with first.

Margaret Mitchell: On the standard of proof, do you have concerns that the test would be the balance of probability rather than beyond reasonable doubt?

Iain Fleming: We have a number of concerns, but given that the RSHO would be a civil order, we cannot articulate real concern about the point that you raise. However, we are concerned about the procedures for the leading of evidence and, in particular, about the various safeguards for the person who would be the subject of an order.

Margaret Mitchell: Your submission suggests that one way of safeguarding the rights of the person who would be the subject of the order would be to allow them to have representation. Would that automatically be covered by article 6 of the European convention on human rights?

Iain Fleming: I do not profess to be an expert, but my understanding is that we must first consider the interim order. Interim orders are regularly granted in courts throughout the land without the individual being represented. We are concerned about the granting of interim orders without the benefit of representation and all that might flow from that. Given that we are talking about a civil order, I am not convinced that article 6 would be contravened at the interim stage. In relation to more permanent orders, I think that article 6 would be contravened if the opportunity to obtain representation were not given to the person who was to be the subject of the order. We must make a distinction between the two types of order. The criminal law committee of the Law Society of Scotland has real concerns about interim orders and the use to which they might be put.

Gerry Brown: A reason for our concern is that a number of tests would have to be satisfied before a decision could be made to grant a full-blown order, but the bill makes no such provision in relation to interim orders. I think that the police organisations that gave evidence touched on the fact that the RSHO would not be like an ASBO—I mean no disrespect to anyone who was involved with the ASBO legislation. The RSHO would have implications in relation to imprisonment, disclosure and, potentially, the sex offenders register.

Margaret Mitchell: Will you comment on the retrospective effect of section 2(4), which you mentioned in your submission?

Anne Keenan: We considered the matter with reference to article 7 of the ECHR and we are fairly satisfied that given that the RSHO would be a civil order, article 7 would not apply. We are concerned that the provisions on orders are widely drafted. For example, the "acts referred to" that are listed in section 2(3) are set out in very broad terms. We must consider section 2 in its entirety, to examine the checks and balances that would apply. For example, the court would have to be satisfied that it was

"necessary to make such an order for the purpose of protecting children generally or any child from harm from that person".

There is an overriding view that the court would have to act proportionately to satisfy its obligations under the ECHR. From that aspect, we think that any action that was taken in relation to the order would have to be proportionate. However, we felt that it was important to flag up the need for proportionality, particularly when we are considering a situation in which conduct that occurred prior to the commencement of the bill—or the eventual act—is taken into account. The courts need to be aware of proportionality. If we were talking about conduct that occurred 15 years ago, for example, it may not be proportionate in those circumstances for the order to be given. We just want to flag up that the order, more than anything else, is a real one in which there should be checks and balances. As Iain Fleming has indicated, the right to representation—to put the case before the court before an order is given—is very important, and should be contained in section 2.

Section 4 deals with variations, renewals and discharges, and there is provision in section 4(3) for the sheriff to vary the order or to renew it. However, the section says:

"after hearing the person making the application and (if wishing to be heard) any of the other persons mentioned in subsection (2)".

If express mention can be made in that context, should not specific reference also be made in section 2?

Another aspect that we were concerned about related to the granting of the orders. I appreciate that there are distinctions between RSHOs and ASBOs, but the procedure in the Antisocial Behaviour etc (Scotland) Act 2004 makes express provision for the sheriff to explain to the person in court the effect of an ASBO, and the consequences if the person breaches the order. There are also provisions about notification, so that there is an onus on the clerk of court to intimate the granting of an order either by serving it on the person in court or by sending out a letter by recorded delivery or the like. None of those provisions appears to be replicated in section 2 of the bill, or indeed in relation to interim RSHOs. As Gerry Brown has indicated, given the stigma that could be attached to RSHOs, is it not all the more important—if we are to achieve a balance—that similar protections should be included in the bill?

Margaret Mitchell: If we take that literally, it could go way back. Where do we put that proportionality? Where do we flag it up? It is common sense, but—

Anne Keenan: It is implicit that there is a duty under the ECHR for a court to act in a proportionate manner. We just felt that it was important to get it on the record that that was how that proportionality should apply.

The Convener: I am slightly uneasy about the provision. You seem to be content that the legislation should indicate simply that the court has to be satisfied that proportionality is necessary. I thought that the provision was not that prescriptive and that, if we did not know the grounds on which a sheriff would consider an order, it was in fact quite wide.

Iain Fleming: I hate to harp on about the interim RSHOs, but I have real concern about them. The test for an interim RSHO is whether it is just that it should be granted. That seems to be a lesser standard than whether it is necessary. If we envisage that, on the one hand, there is that test, and that, on the other hand, there may not be representation, it seems more likely that interim RSHOs will be granted. That is what causes the criminal law committee some concern.

The Convener: I agree. Too many comparisons have been made between RSHOs and ASBOs. That is the line that we got from the Executive officials and now, after hearing the exchange round the table, I think that it is inappropriate to compare the respective models. The discussion that we had on the ASBOs and the interim ASBOs cannot simply be lifted and applied in this case. I agree that we have no indication of what guidance the court would use for the interim orders, which are an even thinner provision. I would be happier if the legislation were to say that the action that the sheriff takes ought to be proportionate. That would nail down that provision a bit more. As it is, we as legislators do not know what grounds sheriffs could use to grant orders, as long as they can justify that they felt that an order was necessary.

12:45

Gerry Brown: Sheriffs are obliged to comply with the Human Rights Act 1998 and to make proportionate decisions. It is not normal practice to specify that in a bill.

The Convener: If it were to be specified in the bill, somebody who wanted to challenge a decision to grant an order could challenge the bill. If it is not specified in the bill, they would have to challenge the decision under the ECHR.

Gerry Brown: First, if someone were to challenge the bill, they would have to say that it was incompatible with the ECHR.

The Convener: If the word "proportionate" was included in the bill—if the bill said that the sheriff had to be satisfied that it was necessary to grant an order and that any decision had to be proportionate—any person who wanted to challenge the proportionality of the sheriff's decision could rely on the bill. However, if it is not in the bill, they would have to rely on the relevant article of the ECHR, which would be slightly harder.

Gerry Brown: It would be. They might, for example, have to raise a devolution issue or something of that sort.

The Convener: Exactly. However, if proportionality was mentioned in the bill, we could keep the case within our own courts.

Gerry Brown: Yes. If you were unhappy with the test that is provided in the bill, you could use another form of words. You could say, for example, that the granting of the order must be in the interest of justice or that the sheriff must take into account all the facts and circumstances. As usual, I am talking on the hoof.

The Convener: ACPOS suggested that, in cases in which the police could not corroborate the offence and the case got as far as the procurator fiscal but could not get to court, we might go for a civil order. Is it a just course of action, having tried the criminal route, to go for a civil order? I can get my head round the idea that the police might sense a crime but want to protect the child and therefore go for the civil order and justify the

decision, but I am less comfortable with the idea that, if they have a go at a criminal prosecution but do not get any further, they can say, "Hey, we've got this order that we can use."

Gerry Brown: To take an analogous situation, the three of us find that, in practice, if a case does not prove in a criminal court, that is normally because of lack of credibility or reliability on the part of witnesses, lack of corroboration or insufficiency of evidence. In the case of insufficiency of evidence, there is nothing wrong with going ahead with the civil process, because we would be trying to safeguard an important situation, but in the case of lack of credibility, reliability or corroboration, the chief constable might think twice, because the two complainers have been disbelieved.

Stewart Stevenson: During the passage of the Antisocial Behaviour etc (Scotland) Act 2004—I am sorry to return to ASBOs—one of the changes that I wished to make, which the Executive resisted strongly, was to ensure that ASBOs could not be granted for an indefinite period. That act allows ASBOs to be granted for an indefinite period, but section 2(5)(b) of the bill states that risk of sexual harm orders must be granted "for a fixed period". Is there any particular legal or ECHR reason why RSHOs could not be granted for an indefinite period?

Anne Keenan: We raised the same concerns as you did on the granting of ASBOs for an indefinite period and gave evidence to that effect, so it would be inconsistent for us to say that it would be all right for an RSHO to be granted for an indefinite period. We have concerns from an ECHR point of view about the granting of orders for indefinite periods.

Stewart Stevenson: When I looked at the bill, I wondered whether the Executive had had a rethink.

Iain Fleming: One of my concerns is that nothing in the bill would prevent an interim order from going on for an indefinite period.

Stewart Stevenson: Section 5(4)(a) states that an interim RSHO

"has effect only for a fixed period specified in the order".

The Convener: Yes, but the orders can specify whatever period they like.

Iain Fleming: That is right.

Gerry Brown: The point is that sheriffs might never choose to grant a full order.

The Convener: A full order runs for a minimum of two years, but it could be—

Margaret Smith: But "indefinite" cannot be a fixed period.

Stewart Stevenson: Could the term "indefinite" be defined as a fixed period in law?

Iain Fleming: We might specify that such a period would last, say, for 10 years. However, that move would mean that the interim order would remain in place without the evidence ever being tested. We felt that there should be some provision that stipulated that the interim order should be allowed to exist only for a fixed period until the matter was brought to court. Obviously, that would put pressure on the various agencies involved to air the matter in court. The worry is that once the interim order has been granted—

Stewart Stevenson: The pressure is off.

Iain Fleming: Exactly, but the pressure is not off the subject of the order.

Margaret Smith: You said that the interim order should be for a fixed period. However, that is already stated in the bill. Are you saying that that period should be fairly short?

Iain Fleming: Yes, indeed. We would suggest three months.

Mrs Mulligan: Most of my questions about the balance with ECHR and the interim orders have been answered. However, I will be really cheeky and ask Mr Fleming whether he thinks that the interim orders will have any advantages.

Iain Fleming: Yes. They will have advantages in urgent situations in which a child is perceived to be at real risk. However, we must ensure that the application of an interim order is accompanied by various rights of representation and the subject of the order's right to be heard.

I am not saying that this is likely to happen, but a child might make a complaint to a police officer about an individual's conduct. That child might be perfectly credible, and the police officer might entirely accept their evidence. After that, the interim order might be granted. Once a full investigation has been carried out, it might transpire that the evidence is utterly unreliable and should not be used as the basis for sustaining a court order. However, the individual in question has already been legally and socially stigmatised by the granting of the interim order.

On the validity of such orders, the committee has taken a view that this provision is worthy enough to be set out in proper legislation. As I have said, I see some advantages in having interim orders if they are used in emergency situations and not as a substitute for the full-blown process.

Mrs Mulligan: That comment is useful. I understand your concerns, but I do not want members to think that you believe that the interim orders should be abandoned. You think that they can play a specific role.

Iain Fleming: That is right.

Stewart Stevenson: Given the EU framework decision to define a child as being under the age of 18, do you think that that age limit is appropriate with regard to indecent representations or photographs? Should there be any exemptions for people who are married or are in a relationship with those characteristics?

Anne Keenan: I should preface my comments by saying that they are based on a brief discussion of what has happened. We would welcome sight of any amendments that the Executive might lodge, at which point we would provide the committee with some more detailed comments.

That said, we have had the benefit of reading Chris Gane's very helpful note on the subject. As Gerry Brown has indicated, we can understand why it might be seen as desirable in such cases to extend the protection that is given to children under 18. However, we also appreciate that there are problems with making that fit with other areas of consent in law and we understand why it might be necessary to provide exemptions in certain situations for those who are lawfully married or in a civil partnership. We think that due cognisance should be taken of the Civil Partnership Act 2004 to ensure that there is no discrimination on that basis.

Stewart Stevenson: Similarly, are there any issues with the age limit in the proposal that it would become illegal to pay someone under the age of 18 for sexual services?

Anne Keenan: We would want to see how the provision is drafted. As the police indicated, we want to find out exactly what is being criminalised by the provisions. Ostensibly, if such protection is to be extended one would extend it to the child in relation not only to sexual intercourse but to the payment for that sexual intercourse. We understand why that protection would be necessary but, again, we do not want to say exactly what—

Stewart Stevenson: I do not think that the Executive proposes to make the sexual act that is concerned illegal.

Anne Keenan: It is the payment that would be illegal.

Stewart Stevenson: The payment to someone under the age of 18 would be the illegal act. That is my understanding of the proposal

Anne Keenan: That is right. That is our understanding, too.

The Convener: We do not have the amendments yet, but when we get them we will make sure that you see them. That brings us to the end of our questions.

Gerry Brown: May I make one brief point, convener?

The Convener: Yes.

Gerry Brown: I draw the committee's attention to section 7(4), on the breach of an RSHO or interim RSHO, which states:

"it is not open to the court by which the person is convicted to make a probation order in respect of the offence."

With respect, it seems to us that that provision ties the hands of the court, and I fail to understand it. One would have thought that when there is a breach of such an order but the court deems the breach not to merit a fine or imprisonment, the provision closes one of the options, namely a three-year probation order. Our experience is that when someone breaches a drug treatment and testing order, for example, there may be a function for probation, especially if the person is off drugs but there are other issues.

The Convener: Thank you for drawing that to our attention. It seems extraordinary.

Gerry Brown: That is why I drew it to your attention.

The Convener: Thank you very much for your evidence, which has been useful. I am sure that we will have further exchanges on the subject in the future. As members know, unfortunately David Feldman could not be with us because he could not travel today. We will see whether we can reschedule his appearance.

I remind members that unless there is an issue with the land reform provisions that we discussed earlier, the committee will not meet formally next week because we will have a seminar with various organisations to examine the policy and practical implications of the Protection of Children and Prevention of Sexual Offences (Scotland) Bill. Members should check their e-mail for any response that is received from the minister on the land reform provisions.

Meeting closed at 12:58.

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