JUSTICE 1 COMMITTEE

Wednesday 20 April 2005

Session 2

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JUSTICE 1 COMMITTEE
11th 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)
*Mr Jamie Stone (Caithness, Sutherland and Easter Ross) (LD)

COMMITTEE SUBSTITUTES

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

*attended

THE FOLLOWING GAVE EVIDENCE:

Hugh Henry (Deputy Minister for Justice)

CLERK TO THE COMMITTEE

Callum Thomson

SENIOR ASSISTANT CLERK

Douglas Wands

ASSISTANT CLERK

Lewis McNaughton

LOCATION

Committee Room 4

Scottish Parliament

Justice 1 Committee

Wednesday 20 April 2005

[THE CONVENER *opened the meeting at 10:25*]

Item in Private

The Convener (Pauline McNeill): Good morning and welcome to the 11th meeting in 2005 of the Justice 1 Committee. First, I apologise for the late start. We had a number of late papers and I wanted to check that members have everything that they should have and understand everything that they should understand. I will say no more about that.

All members of the committee are in attendance, so there are no apologies.

To deal with item 1, I invite members to agree to take in private item 5, which is consideration of written evidence on the Family Law (Scotland) Bill. Is that agreed?

Members *indicated agreement*.

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

10:26

The Convener: Item 2 is on the Protection of Children and Prevention of Sexual Offences (Scotland) Bill. I welcome Hugh Henry, the Deputy Minister for Justice, and his team from the Scottish Executive: Hugh Dignon, Kirsten Davidson and Paul Johnston.

I refer members to the correspondence from the minister that has been circulated. I clarify that because of the Executive's delay in lodging amendments on child prostitution and child pornography, the timetable for stage 2 will be slightly different from the timetable that was previously intimated to the committee. So that we are all clear, I put it on the record that the committee will consider sections 2 to 8 of the bill at its next meeting, on 27 April, and amendments to the remaining sections on 4 May. That represents a slight rejigging of the order to ensure that we have enough time to consider the bill.

Minister, I invite you to make an opening statement and speak to your letter to the committee.

The Deputy Minister for Justice (Hugh Henry): Thank you for this opportunity. I apologise for the delay in providing these amendments and for the non-availability of the other amendments.

The purpose of our proposals is to protect young people from sexual exploitation. Of course, children under 16 are already protected from those who would wish to engage in any form of sexual activity with them, but when they reach what is for us the age of consent, it is a different matter. In Scots law there is no offence of purchasing sex. Whether our laws on prostitution should be changed so that the purchase of sex is an offence is another issue and, as the committee knows, it is one that we are considering separately through the work of the expert group on prostitution.

Notwithstanding that consideration, I am sure that the committee would agree that where sexual activity is concerned it is right to treat young people as a separate case and give them additional protection. The amendments that the committee is considering today therefore create new offences in relation to the purchase of sexual services from young people who are under 18. They criminalise the purchase of sex from young people and they criminalise those who arrange for young people to become involved in prostitution or pornography. By doing that, we are introducing added protection for our young people.

As I indicated previously, we are still considering our amendments on the taking, possession and distribution of indecent pictures. I explained some of the background to that in my letter to the committee and we hope to get the amendments to you as soon as we can. I realise that the committee is interested in the detail of the amendments, but I hope that my letter highlights the principal issues that we are considering.

The Convener: Thank you. I appreciate that you have attempted to give us as much information as possible, albeit that we do not have the amendments. Given that the detail of amendments is sometimes different from the general principles, that causes difficulty for the committee in consulting others, but we are certainly alive to getting our heads round that. We may have to consult or take advice once we see the amendments.

10:30

Hugh Henry: The line of thought that is followed will influence the number of amendments that will be required. Some amendments are more extensive than others. Essentially, the committee will be right to take evidence on the general principles in order to try to work out whether a particular line of thought is the right one to pursue.

The Convener: We will explore matters with you now.

Margaret Mitchell (Central Scotland) (Con): I have a general question about the drafting technique. The drafting looks fine on paper, but it becomes very cumbersome and confusing when it is read. For example, saying in the proposed new section that

"(1) A person ('A') commits an offence if—

(a) A intentionally obtains"

is confusing. Given that quite a lot of time has been spent considering the proposed new section, why was that approach adopted? I am surprised by the format.

Hugh Henry: You will see that we use a similar procedure in defining "A" and "B" in the amendments that we will consider later. In a sense, we want to avoid using the words "adult" and "child" because we think that there could be unintended consequences in defining categories as "adult" and "child". Someone who would otherwise be defined as a child could be engaged in criminal activity but might not be able to be pursued as a result of the definitions in the bill. Using "A" and "B" for shorthand purposes when we are talking about a person who commits an offence against another person—irrespective of who those persons are—leaves the position flexible enough for those who are engaged in a particular activity to be pursued.

Margaret Mitchell: Do you agree that such things are a little confusing when they are read out loud? I agree that things look fine and are clear on paper, but there will be situations in which a judge is directing a jury and will have to read the act out loud. Bearing in mind such circumstances, there does not seem to be any particularly good reason for adopting the format, other than that it can be taken straight out of the English version. As I said, we have waited many months for the proposed new section and I would have thought that a little more attention could have been paid to the matter.

Hugh Henry: I do not agree with you at all. We considered different formulations, including being more specific, which you seem to be suggesting that we should be, but none of the other formulations worked as well as the one in question. The main aim is to have law that is precise, that meets the intended objectives as far as is humanly possible, and that is capable of delivering the required results. We would make a mistake if we were to go back and construct something that sounds good when it is read out but leaves us vulnerable in how it can be interpreted.

Margaret Mitchell: Rather than being more specific, I suggest that "E" or another bland term could be used. That is not impossible. The bill does not need to be specific—it simply needs to be not confusing when it is read out.

Hugh Henry: Are you suggesting that "E" rather than "A" should be used?

Margaret Mitchell: Something else, such as "X", could be used.

Hugh Henry: I am willing to go away and deliberate on whether "E" and "F" rather than "A" and "B" should be used. That is certainly worthy of further thought.

Margaret Mitchell: That would be helpful. Given that judges and sheriffs will read this out, if it is indeed your intention that the law should be clear and unambiguous, as you say that it is, it would be good if you were prepared to take this opportunity to improve the wording.

The Convener: Minister, could I have further clarification on the drafting technique? You said that you wanted to avoid using the terms "adult" and "child" and would use "A" and "B" instead. Is that because you are worried about defining in the legislation the age of a child or what a child is?

Hugh Henry: The issue is not so much about defining the age of a child but more concerned with the amendments on grooming. We are trying to avoid a situation where someone capable of committing an offence might otherwise be defined

as a child. This is a matter that I know the committee looked at.

As I explained to Margaret Mitchell, we looked at a number of formulations. It is possibly not as much of an issue at this stage as it is later on but, nevertheless, the principle is still the same. We are trying to leave the legislation open enough so that we are able clearly to define someone as committing an offence against a victim, while excluding people from being either an offender or a victim simply because a certain form of words has been used.

The Convener: I understand. You are saying that because someone is a child does not mean that they cannot be an offender.

Hugh Henry: That is correct.

The Convener: That is helpful.

Stewart Stevenson (Banff and Buchan) (SNP): I will take this in little bites to make sure that I understand as we go along. My questions are on Council framework decision 2004/68/JHA, which the minister attached to his letter to the committee. In relation to the United Kingdom and, hence, to Scots law, what is the status of that framework decision? Is it one that we are required to place into Scots law or are we doing so voluntarily?

Hugh Henry: We are required to bring that decision into Scots law. The member will note that article 12.1 of the framework decision reads:

"Member States shall take the necessary measures to comply with this framework Decision by 20 January 2006 at the latest."

The potential to introduce certain exemptions is also available and that is an option that we are looking at. However, the framework decision must be applied here.

Stewart Stevenson: Thank you. I wanted to get that on the record so that we know exactly where we are coming from.

Before addressing the framework decision itself, I note that the last sentence of the 13th paragraph of the preamble refers to fighting violence against

"children, young persons and women".

What does the term "young persons" mean in that context as distinct from "children" and "women"?

Hugh Henry: We are specifically concerned with children. To continue on from that paragraph, article 1 of the framework decision reads:

"For the purposes of this framework Decision:

(a) 'child' shall mean any person below the age of 18 years".

For the purposes of constructing our legislation, we are focusing very much on that definition. I am not sure that the issue about a young person being beyond the age of 18, or a different age, has any legal significance as far as I can see, although I am prepared to be corrected on that.

Stewart Stevenson: I accept that the decision itself does not refer to young persons but, before starting to engage in some of the issues involved and how they are translated into Scots law, I wanted to see—without any particular side to the question—whether the reference in the preamble meant anything that we should be taking into consideration. What you have said is basically that the answer to that question is no, so I shall move on.

Other colleagues will look at other parts of the Protection of Children and Prevention of Sexual Offences (Scotland) Bill in relation to the framework decision, but I am particularly interested in article 2, on the offences concerning sexual exploitation of children. I think that it is relatively clear, but I just want to be absolutely sure about how that relates to people who have a relationship that we recognise in law or in practice—in common law or in statute law—as a relationship of marriage or a relationship having the characteristics of marriage. Article 2(c), refers to

"engaging in sexual activities with a child, where … money or other forms of remuneration or consideration is given as payment in exchange for the child engaging in sexual activities".

How does that exclude the situation of a married couple who are a 19-year-old and a 17-year-old? The 19-year-old male, for example, may be the only breadwinner in the house. How can they avoid being caught in the first instance by the European framework decision, and in the second instance by the translation of that into law as expressed in your amendments?

Hugh Henry: From what I understand of your description, a 19-year-old being a breadwinner in a marriage does not constitute buying sex.

Stewart Stevenson: Are you quite certain about, and prepared to put on the record, the fact that the provision of food, bed and lodging to a 17-year-old within a normal relationship—whether it is a marriage or a relationship having the general characteristics of marriage—does not, and under no circumstances could, constitute remuneration or consideration as payment in exchange for sex?

Hugh Henry: Yes. Within the context of a marriage or relationship, someone sharing the money that they earn and making a contribution to a household is an entirely different proposition from someone selling sex as a commercial or other activity. We are not saying that there can never be circumstances within a marriage where coercion, force or threats are used. We know that

there have been cases in this country where that has been an issue. Equally, I would not anticipate that, in a marriage, as we understand the term, in which only one party is earning, the party who does not work will be considered to be selling sex. That is not the intention and I do not think that it could be construed as such.

Stewart Stevenson: To build further on that example, let us suppose that the same couple are neither married nor in a relationship having the characteristics of marriage. On a one-night stand or a blind date, the man buys a meal for the 17-year-old girl, and that is followed by sexual activity. Is that covered? If that is not intended to be covered—I hope that it is not necessarily intended to be covered—how do we ensure that it is not caught by the law as drafted, both in the European framework decision and in the amendments that you are lodging?

10:45

Hugh Henry: Whatever happens in the construction of the European framework decision or in what we put into law, we have other safeguards in the application of our law. Activity needs to be deemed worthy of a charge by the police, who would have to approach the procurator fiscal, who would determine whether to pursue action. Therefore, all the circumstances of a case would be examined before it reached court.

In each case, analysis and determination would be needed of whether a payment was made—whether remuneration changed hands—directly in return for sex. The fact that the one-night stand, the purchase of a meal and the consensual activity that you described took place would not by definition mean that sex had been bought. That would depend on what occurred in the course of that brief relationship and of that contact and what was said. Determining whether an offence took place would be a matter for the proper authorities.

Stewart Stevenson: Do you accept that whether the sexual activity is consensual is no longer an issue in the legislation that we are considering?

Hugh Henry: That is correct. However, I tried to explain the other matter, which is the wider nature of that brief relationship. Did the availability of sex depend on the remuneration? The provisions would not make it an offence for someone aged 16 or 17 to have sex, but if that person sold sex or someone had bought the sex, whether with cash or other forms of remuneration—if the appropriate authorities deemed an action to be a purchase—that would be an offence. However, that does not mean that someone who went out for a meal or a few drinks and decided to have sex later would necessarily commit an offence in the circumstances that you described. The decision would depend entirely on the circumstances.

Stewart Stevenson: I will make clear where I am coming from. I would be happy for an offence to be created and I would prefer it to become an offence for a person of whatever age to pay for sex. However, we are leaving that matter for another time. If I pursue the issue, it is not because I resist what you are trying to achieve—on the contrary, I am trying to ensure that what you are doing delivers what you want.

Given that the relationship is consensual, I still have difficulty. You say that simply the process of prosecution will protect people from being prosecuted in some circumstances. However, that appears to leave open the question that an offence has prima facie been committed.

Hugh Henry: Subsection (2) in the first draft amendment says:

> "In subsection (1)(b) above, 'payment' means any financial advantage, including the discharge of an obligation to pay or the provision of goods or services".

That comes down to the notion of a contract—albeit one with a weak and vague set of conditions. The notion is that to obtain sex, someone has had to pay or provide remuneration or financial advantage. If one element was not conditional on the other, no offence would be committed. However, if one was conditional on the other—if the availability of sex was conditional on that financial advantage—then, yes, there would be an offence.

Stewart Stevenson: So, you are saying that, in the example that I have given, the expenditure by the 19-year-old male, which creates the circumstance that leads to sexual activity taking place between the 19-year-old and the 17-year-old, is not, in itself, a contractual or quasi-contractual arrangement that inevitably leads to sex, although that expenditure creates the circumstances in which that sex happens.

Hugh Henry: That is correct. It would not necessarily lead to an offence. It would be for the relevant authorities to determine whether the circumstances were appropriate. However, I presume that if someone said at the beginning, "If I buy you a meal, will you engage in sexual activity?" and there was an agreement, that would be an entirely different proposition from someone going out for a meal, having a few drinks and deciding, later in the evening, to engage in sexual activity. For an offence to be committed, there must be an element of commercial activity—an element of payment by whatever means—that provides a financial advantage and the provision of sex as a result of an agreement to provide that financial advantage.

Stewart Stevenson: Therefore, a young man should be very careful, in inviting a young lady out to dinner, not to suggest that the outcome of that social activity might be sexual activity.

Hugh Henry: If it was in relation to a person of 16 or 17 years of age, I think that that would be responsible. It would be reprehensible of someone to try to induce someone of that age to have sex in return for some financial advantage, and I hope that the law will protect young people. It must be remembered that other considerations would apply, which the prosecution authorities and the procurator fiscal would look closely at. However, it is right that we apply the law in this way, not just so that we implement the framework decision but so that we protect young people.

Stewart Stevenson: I have a final, slightly different point to raise under the same heading before I surrender the baton to someone else. Paragraph 1 of article 5 of the framework decision requires that the offences

"are punishable by criminal penalties of a maximum of at least between one and three years of imprisonment."

However, in relation to summary conviction, your amendment provides only

"for a term not exceeding 6 months".

Would you care to comment?

Hugh Henry: There is a difference between a minimum range and a maximum range of sentences, and article 5 relates to a maximum range. What we propose is entirely consistent with the framework decision. Subsection (5) in amendment 1 states:

"A person guilty of an offence under this section in respect of a person aged under 16 is liable—

(a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;

(b) on conviction on indictment, to imprisonment for a term not exceeding 14 years."

The way in which we are constructing the offence is entirely consistent with the framework decision.

Stewart Stevenson: It is based on the ability of the sheriff court to refer a case for sentencing to the High Court, where the sentence that can be passed falls within the range that is required by the framework decision.

Hugh Henry: Yes. I think that alternative court procedures are being outlined.

The Convener: Let me ask you in a bit more detail about the construction of the crime. You say that the key test is whether the payment or financial advantage is conditional on the provision of sexual services. Is there a requirement to have that in the drafting?

Hugh Henry: Subsection (2) of the new section that would be inserted by the draft amendment in the name of Cathy Jamieson states:

"In subsection (1)(b) above, "payment" means any financial advantage, including the discharge of an obligation to pay or the provision of goods or services (including sexual services) gratuitously or at a discount."

That should cover the issue that you raise.

The Convener: I thought that the draft provision was quite broad, because it refers to "any financial advantage". I did not think that it was clear that the Crown must prove that the goods, services or payment were in exchange for sexual services. If it cannot prove that there was such an exchange, there is no crime. You talked about the commercial context.

Hugh Henry: It comes back to some of the issues that Stewart Stevenson raised. We are not saying that, if sex takes place after a person has bought a meal for a girl of 16 or 17, that will ultimately lead to the person being convicted of a crime. A crime will have been committed if it was made very clear that the intention was for sexual services to be exchanged for something that has a financial connection.

The Convener: I am clear about what you are saying. However, proposed subsection (2) states:

"In subsection (1)(b) above, "payment" means any financial advantage"—

that could be payment for a meal—

"including the discharge of an obligation to pay or the provision of goods or services (including sexual services) gratuitously or at a discount."

I can see the scenario that you have described coming under that provision, but it needs to be clearer that the financial advantage is conditional on the provision of sexual services. If not, it does not fit the definition of the crime.

Hugh Henry: We have time to consider that issue. However, if proposed subsection (2) is examined with reference to proposed subsection (1)(b), it is clear that, before obtaining the services, A, E, F, G or H would have to promise the other party payment for them. There must be some indication that an agreement, promise or quasi-contract has been made before the financial advantage is delivered.

The Convener: What would the Crown have to prove in such a case? I presume that it would have to prove that the person involved was a child as defined in the bill.

Hugh Henry: That is correct.

The Convener: Would there be the usual defence against that charge—namely, that the accused could not reasonably have known that the person was a child? The Crown would also have

to prove that sexual services were provided in exchange for a payment or financial advantage.

Hugh Henry: Broadly speaking, that is correct. Proposed subsection 1(c)(i) refers to the issue of reasonable belief, which the convener mentioned. The issue of payment being made in return for a sexual service has been covered in my answers to questions from both the convener and Stewart Stevenson.

The Convener: Presumably, you would have to show not only that payment took place, but that it was a condition.

Hugh Henry: Yes.

The Convener: Those are the elements that the Crown would be required to prove.

Hugh Henry: Yes. Before obtaining the services, a person would have to make or promise payment for them or to know

"that another person has made or promised such a payment".

11:00

Mr Bruce McFee (West of Scotland) (SNP): Picking up again on the point that Stewart Stevenson made, I am concerned about how explicit the contract needs to be before an offence is committed. The minister gave an example of a chap saying to a girl, "If I buy you dinner, will you have sex with me?" Although that is not the best chat-up line in the world, it is an explicit one.

Let us say that a man is buying dinner in the hope and expectation that he will receive sexual services somewhere down the line. I suspect that that does not constitute an offence. How explicit does the contract need to be before an offence is committed?

Proposed subsection (2) would insert:

"In subsection (1)(b) above, "payment" means any financial advantage, including the discharge of an obligation to pay".

That is a pretty wide definition. Could that simply be inferred?

Hugh Henry: No.

Mr McFee: Surely, at a later stage, the clear intention of the male could be inferred. Where in the draft amendment is it made clear that the contract, for want of a better word, has to be explicit in the way that you suggested earlier?

Hugh Henry: I do not believe that inference would be sufficient. That said, there are people who will always be capable of suggesting that there was an inference. In such a matter of dispute, the proper authorities would have to determine whether what was said was more than an inference.

You also asked about where in the draft amendment the contract is specified. If you look at proposed subsection (1)(b), you will see that the offence is created if someone

"makes or promises payment … or knows that another person has made or promised such a payment".

It is clear that not only does a financial advantage have to be involved but that that has to be agreed beforehand and be clearly related to that activity—to sexual services.

Mr McFee: So, just to clarify matters, proposed subsection (1)(b) says:

"before obtaining those services, A"—

for the avoidance of doubt, I mean person A—

"makes or promises payment for those services to … a third person".

It is pretty clear that if one individual does X, the other person will do Y, or at least will know that another person has made a promise of payment. However, what if the individual has simply proposed to the person with whom he is having dinner that if he pays for dinner, such and such a thing will happen? That does not involve a third party.

Hugh Henry: It involves "B".

Mr McFee: The draft amendment says:

"knows that another person has made or promised such a payment".

Hugh Henry: But before that, it says:

"before obtaining those services, A … makes or promises payment for those services to B"—

Mr McFee: Okay. I see that: "B", or a third person.

Hugh Henry: Yes. It says:

"or to a third person".

Mr McFee: What corroboration will be required? We are talking about two people in a restaurant. I know what the Executive is driving at with the bill, and everyone agrees with putting a stop to child prostitution and so on. However, I am still concerned that the bill may have unintended consequences.

Let us say that person A is simply having dinner with person B and, at a later stage, person B says, "He said that if I slept with him he would write off my £300 rent arrears." What corroboration would be required in such circumstances?

Hugh Henry: The Crown would have to prove beyond reasonable doubt not each and every part of what had happened but that the entire offence took place. Of course, the problem—if, indeed, it

can be called that—exists at the moment, in which an offence of a sexual nature takes place with only two people involved. Clearly, issues of corroboration need to be determined in such cases and I am sure that the Crown looks carefully at them. Indeed, it would need to be satisfied that a case was capable of being proved beyond reasonable doubt.

The Convener: Let us say that an exchange of money for sexual services takes place in the street and a young girl or boy is involved. In that instance—which is not uncommon—the circumstances that give rise to suspicion are obvious.

To go back to the scenario that Bruce McFee described, let us suppose that a 16-year-old girl and a 30-year-old man are simply having dinner, although there is consent to sex, and that a parent starts making accusations. I realise that the case would come down to the evidential test, but there would be nothing to prevent the Crown from proceeding if it could show that there was some financial advantage, such as the payment of a debt, for example. Perhaps we need something more to ensure that we do not give rise to such cases.

Hugh Henry: You underestimate the degree of diligence that the Crown would apply in determining whether the case was capable of being pursued. It would not be sufficient for a parent to make that allegation because, without evidence, there would be no reason to pursue the complaint. The simple purchasing of a meal would not be sufficient; the Crown would have to be satisfied that a promise of some reward had been made before sexual activity took place and that the reward was conditional on the sexual activity taking place.

On the issue of wider corroboration, with older people who may have a habit of acting in such a way, the Crown could reasonably look to other cases as part of the corroboration of one particular event. We are clear that an agreement that there will be some payment or financial advantage must have been made ahead of the sexual activity taking place.

The Convener: That will be difficult to prove in all cases.

Hugh Henry: We accept that, but, however we constructed the measure, it would be difficult to prove that. Even when there is an exchange of money between two individuals, someone could argue that the transfer of money was for some allegedly benign reason and that it just so happened that sexual activity took place after that. I am sure that those who are potentially guilty of the offences will deploy fairly imaginative arguments to deny that criminal activity took place. We are faced with that situation, but, as I said earlier, we are required to introduce legislation that is consistent with the European framework decision. We believe that, in constructing the measure in the way that we have done, we are making it clear that, before the sexual services are provided, there must be the making or promising of a payment. We have described payment as "financial advantage", because it would be hard to include every conceivable type of activity. If we said that buying a drink or a meal was included, how many drinks would that be and what would the value of the meal be?

The Convener: When cases get to court, the court often has to explore such issues.

Hugh Henry: Yes, but it is for the Crown to decide whether the matter can be proved beyond reasonable doubt and, ultimately, it is for the court to determine whether the offence took place.

Stewart Stevenson: Until the last couple of paragraphs, you were using the phrase "sexual activity".

Hugh Henry: I beg your pardon—I meant sexual services.

Stewart Stevenson: Perhaps you were right, because the framework decision uses the words "sexual activity", whereas the draft amendments mention "sexual services". I raise the issue because I want to test whether certain activities would fall within the definition of sexual services in exchange for reward, but not within the definition of sexual activity in exchange for reward. I will give two examples.

The first example is that of a 17-year-old purchasing condoms. I know that soldiers put condoms over the mouths of their rifles to stop sand getting in them in the gulf, but in general terms—

The Convener: Only Stewart would know that.

Stewart Stevenson: We could get into another discussion about that.

The Convener: No thanks.

Stewart Stevenson: The purchase of a condom, possibly from a slot machine that is provided by a company rather than from an individual person, is the provision of a sexual service in exchange for money, albeit that it is not the provision of a sexual activity.

Secondly, a young lady of 16 or 17 may purchase on prescription, for which she has to pay, the contraceptive pill or the morning-after pill. Does that constitute sexual services and would it be caught by the use of the phrase "sexual services" in the bill? It would probably not be caught by the European framework decision, which uses the phrase "sexual activity".

Would you care to lighten our darkness, minister?

Hugh Henry: Whether I care to or not, I suspect that I will have to try. I honestly do not think that what you are describing is particularly relevant. For example, if a young girl obtains the contraceptive pill through her general practitioner, it could be for a number of reasons that are not necessarily related to contraception. That type of medication has a wider applicability, as I am sure you know. If someone buys condoms, whether to fit them over their rifle or air gun, to fill them with water or for any other reason, that in and of itself is neither a sexual activity nor a sexual service.

The draft amendments talk about sexual services, saying that

"services are sexual if a reasonable person would, in all the circumstances but regardless of any person's purpose, consider them to be sexual."

The Crown and, ultimately, the court would need to determine whether that definition would apply, but I do not think that the purchase of contraceptives for whatever purpose would necessarily be sufficient to lead to an offence under the draft amendments.

Stewart Stevenson: What about the use of spermicidal foam, which is used in connection with a contraceptive cap?

Hugh Henry: Perhaps I will pass on that.

Stewart Stevenson: I am only asking why the draft amendments say "sexual services" rather than "sexual activities".

Hugh Henry: Whether a girl, you, I or anyone else purchased such foam, the amendments are about a person intentionally obtaining, as the proposed new section says, sexual services. They are not about whether that person bought foam or whatever other accoutrements might be construed as capable of being used for that purpose in whatever shape or form.

Stewart Stevenson: It is just—

The Convener: I think that it is clear. We will move on from that topic.

Marlyn Glen (North East Scotland) (Lab): It is important that we be clear about the point that Stewart Stevenson has raised, because he is talking about sexual health services and there is no intention behind the bill or anything that the Executive or the committee is doing to stop sexual health services. It is really important that we be clear about the difference.

Mr McFee: I am glad of that, because I was starting to think that I was in an Ann Summers shop.

I have a question on financial advantage, which I ask because of the way in which some younger people are coerced into prostitution. Would "financial advantage" include a loan—albeit a high-interest loan such as one would get from the local loan shark—or the supply of drugs?

Hugh Henry: Yes. Potentially it could.

11:15

The Convener: I will turn to another issue. Under the bill, an offender could be aged 16 or above but the victim could be aged up to 18. Could there be a 16-year-old offender and a 17-year-old victim?

Hugh Henry: Yes, potentially.

The Convener: Do you see a problem with that?

Hugh Henry: No. That is one of the reasons why we have tried to be careful in our construction of the description of the committing of the offence and of the victim.

The Convener: Is the Executive comfortable with the concept that the offender could be younger than the victim?

Hugh Henry: If the person who is the victim is a person as described in the European framework decision, they are a victim irrespective of whether the perpetrator is a year younger than they are. One could be 17 and one could be 16. The issue is whether payment has been made in return for sexual services.

The Convener: I understand that that is the obligation under the framework decision and the United Nations protocol. I do not have a particular view on the issue, although it strikes me as a wee bit of an odd concept that we are trying to protect children up to the age of 18, yet we could have that scenario.

Hugh Henry: That is no different from the concerns that the committee expressed in relation to grooming.

Stewart Stevenson: That is exactly the point that I was going to ask you about. Given that you are creating a sexual offence that applies to someone under the age of 18 in this context, are you minded to reconsider—in the light of concerns that several members of the committee have expressed—the provision in section 1, which makes grooming an offence for someone who is over 18 but not an offence for people who are 16 and 17? Section 1 states:

"A person aged 18 or over … commits an offence if".

Hugh Henry: I thought that amendments had been lodged on that matter.

Stewart Stevenson: Sorry. In that case, I withdraw my comments.

The Convener: We have not exhausted the issue yet, so I move on to Marlyn Glen.

Marlyn Glen: I will ask a question about the right to privacy. Is there any incompatibility between article 8 of the European convention on human rights, on the right to privacy, and the provision in the bill?

Hugh Henry: I do not think that there is a problem. As you know, the provision relates to the Council framework decision, which we are obliged to implement. It is a pan-European issue, as is the issue of the right to privacy. We are saying clearly that we are extending, in an appropriate way, protection against people who buy sex from those persons. That does not contravene any right to privacy.

Mrs Mary Mulligan (Linlithgow) (Lab): I will move on to the incitement of prostitution or pornography. I ask for a few points of clarification. The first is what you mean by pornography. Committee members have discussed exactly what we think it means. I want to be clear about what the Executive is saying.

Hugh Henry: I ask the committee to look at our proposed amendment 5, which begins "After section 8, insert—". I think that the definition in that amendment covers what Mary Mulligan is asking about.

Mrs Mulligan: Would the recording of an indecent image of a 17-year-old be described as pornography?

Hugh Henry: As far as child prostitution or pornography is concerned, this provision deals with individuals or others who catch people up in the commercial activity of pornography and encourage and engage them in certain activities that could be exploited. We are still examining the question of taking the image or a photograph of a 16 or 17-year-old.

Mrs Mulligan: I appreciate that you are still examining the matter, but I want to push you a little bit to find out whether you have resolved your thinking on it. Would the image of a topless 17-year-old woman used for commercial purposes in a newspaper constitute pornography? What would be the difference between that image and a similar image of a 17-year-old woman taken on her holidays?

Hugh Henry: There is an overlap between that issue and the issue of the taking of an indecent image, and we need to examine that matter. However, it would be for a court to decide the very specific example that Mary Mulligan has raised. People can refer to a significant body of case law on these matters. Even leaving aside the question of exploitation, I think that the matter would come down to the definition of indecency and whether a certain image would be construed as indecent. That definition is covered elsewhere, and court cases have been brought on the matter.

Mrs Mulligan: Can you point us to that definition of indecency?

Hugh Henry: The bill itself does not contain that definition. We draw such definitions from common law, which refers to material that is

"likely to deprave or corrupt".

Over the years, cases have been brought on that issue.

Mrs Mulligan: I shall return to a point that was raised earlier. Does incitement with regard to prostitution or pornography apply where B—I shall use these terms—is the spouse or registered partner of or has a recognised relationship with A? Are there any exemptions in that respect?

Hugh Henry: As far as exploiting someone for the purposes of pornography is concerned, there are no such exemptions. As I have said, we are still looking at the different issue of the taking of pictures.

Mrs Mulligan: I share your feeling that it would be difficult to introduce exemptions, because doing so might be a problem in some cases. I recognise why you do not want to go down that road, but it is important to put that on the record.

My final point is about the term "incitement" and whether the Executive intends its common-law meaning or whether you wish to go beyond that meaning.

Hugh Henry: We intend the common-law definition.

Mrs Mulligan: Purely and simply.

The Convener: I ask you about the thinking behind the provision. I appreciate that you did not do the thinking; it was done elsewhere.

Hugh Henry: I will take that as backhanded compliment, convener.

The Convener: You know what I mean.

Hugh Henry: You know me too well.

The Convener: I mean that it is European Union thinking that I cannot follow. The framework decision states:

"This Framework Decision should contribute to the fight against sexual exploitation of children and child pornography by complementing the instruments"

blah, blah, blah. In this country, we are crystal clear about how we view child pornography and we have stiff laws with stiff penalties. What will the framework decision add to what we already

criminalise, except for telling us that we have to extend the age range for which we do it?

Hugh Henry: All that the framework decision adds is the age thing.

The Convener: That was my conclusion.

Hugh Henry: We are not changing any of our other definitions; we are adding protection for 16 and 17-year-olds.

The Convener: Our common-law definition of pornography is anything that is

"likely to deprave or corrupt".

Corrupt who—the person looking at the image?

Hugh Henry: That is correct, but none of that changes the provisions that we have just now. We are extending the age range because we believe that protection should be given to 16 and 17-year-olds. Whether we believe in it or not, we are required to extend that protection to 16 and 17-year-olds.

Although this has nothing to do with definitions and more to do with the process, we are also adding in the ideas of "controlling" and "arranging or facilitating".

The term "incitement" is still defined under common law, as is "corruption".

The Convener: I find it confusing that we rely on the current definition of pornography, which is that it is

"likely to deprave or corrupt"

the person looking at the photographs, but that the policy intention behind the framework decision is to protect those who are in the image.

Hugh Henry: I presume that the argument would be that if an image is not

"likely to deprave or corrupt"

then the person of whom the image has been taken is probably not in need of that protection. For example, a picture of a semi-clothed woman would cause no offence in some cultures, but in other societies it might cause offence and be regarded as

"likely to deprave or corrupt".

As far as we are concerned, the issue is not necessarily the taking of the image, although we need to come back to that, but whether the use or distribution of the image is likely to have other effects such as depraving or corrupting. Certain pictures could be taken that are not likely to deprave or corrupt and would therefore not be caught within the definition.

The Convener: I understand. The likeliness to deprave or corrupt is the test for who needs protection.

You used the word "commercial" a few times, although it does not appear in any documents. The only relevant point that I can find in the framework decision articles is about the production of child pornography. Do you assume that the production of child pornography is commercial?

11:30

Hugh Henry: If I have given you that impression, I apologise, convener. You are probably thinking of the previous discussion. There are circumstances, as we know from much of the evidence that this committee has taken, in which the distribution of pornography is not done for commercial advantage. For example, there are some people who obtain some satisfaction from taking and exchanging such photographs.

The Convener: Would a man who transmitted through a mobile phone an indecent photograph of his wife who is under 18 be caught by this legislation, providing that the image passes the test of being likely to deprave or corrupt?

Hugh Henry: What you describe could be caught by the legislation, but other aspects would have to be considered by the Crown. To some extent, we have dealt with child prostitution. As far as pornography is concerned, the issue is partly to do with somebody being used or drawn into a wider lifestyle.

The issue of the taking of pictures within a relationship is one of the things that we have said that we will come back to you on because we need to resolve the various complications that arise, depending on which route is taken.

Stewart Stevenson: Are you going to consider further article 3.2(b) of the European framework decision? In respect of children who have reached the age of sexual consent but who are still children, it makes a limited exemption in relation to pictures that have been produced with their consent and are solely for private use. The example that the convener gave would seem to fall within that area. Is there further room for you to express that limited exemption within what you are planning to put into Scots law?

Hugh Henry: That is exactly the dilemma that we are trying to resolve. The third page of my letter to the committee describes the options that are available to us. We will come back to the committee on that issue.

The Convener: Does anyone else have a question?

Stewart Stevenson: My brain hurts.

Mrs Mulligan: We are wrestling with this issue because of the need to include in legislation those who are above the age of consent but are still under 18. From evidence that we have had, we are aware that other European countries have an even bigger age gap than we have in that regard. The decision says that everything must be in line by January 2006. Are we aware of the deliberations that are taking place elsewhere on this issue?

Hugh Henry: No, we are not. We take our responsibilities seriously and have drafted the amendments that we are discussing to ensure that the legislation is consistent with our obligations. We have further thought to give to the question of what further exemptions, if any, should be considered in respect of the parts of the decision that Stewart Stevenson referred to.

The Convener: I thank you for your attendance, minister. As you are fully aware, the situation is not ideal from our point of view but at least we have had a chance to air some issues before the final text of the amendments is produced.

We will take a short comfort break.

11:34

Meeting suspended.

11:45

On resuming—

Protection of Children and Prevention of Sexual Offences (Scotland) Bill: Stage 2

Section 1—Meeting a child following certain preliminary contact

The Convener: Item 3 is our first day of stage 2 consideration of the bill. Amendment 1, in my name, is grouped with amendments 12, 13, 14, 3, 15, 16, 18, 4, 19, 20, 5, 21, 22, 6, 23, 26, 8, 27, 9, 28, 29, 10, 30, 31, and 32. There are several pre-emptions. Amendment 14 pre-empts amendment 3; amendment 18 pre-empts amendment 4; amendment 20 pre-empts amendment 5; amendment 22 pre-empts amendment 6; amendment 26 pre-empts amendment 8; amendment 27 pre-empts amendment 9; and amendment 29 pre-empts amendment 10. I think that everyone knows what a pre-emption is, so I need not go through the procedure.

Amendment 1 relates to the age of the offender, which, under the bill, is 18 or over. I will speak to the committee position and say why I believe that it is necessary to remove that age limit. I am sure that other members will want to speak in the debate.

I understand why the Executive put the minimum age of the offender at 18 in trying to protect an age group where people tend to be vulnerable. Some people thought that we should bring the age down to 16, but there is a variety of opinions as to what we should do. For example, the national hi-tech crime unit told the committee that evidence shows that those who are likely to display unhealthy behaviour towards children would be doing so by the age of 18.

Barnardo's Scotland, a children's organisation, was also keen that we lowered the minimum age of the offender to 16. However, the Scottish Children's Reporter Administration pointed out that people of that age would be dealt with through the children's hearings system rather than through the criminal justice system.

We should maintain the existing arrangements relating to the age of the offender, so that those cases that would normally be dealt with through the children's hearings system would continue to be dealt with in that way, whereas people who had reached the appropriate age—those over the age of 16 where there is no supervision order—would be dealt with by the criminal justice system, albeit that the court would continue to have some discretion about whether to send the case back to the children's hearings system. In our report, the

committee took the view that it would be best to remove the words "aged 18 or over" from the bill and mention no age limit, so that the normal rules could apply.

Several of the amendments in the group seek to do the same thing as amendment 1. I understand from our earlier discussions that the Executive is trying to do the same thing by replacing the words "adult" and "child" with the letters "A" and "B". Notwithstanding Margaret Mitchell's earlier comments, which are worthy of consideration, I believe that we should remove the words "aged 18 or over" from the bill—on balance, I think that that is the best way forward. However, I am open-minded about how to achieve our aim, so I will listen to what the Executive has to say.

I move amendment 1.

Hugh Henry: We have some sympathy with the committee's proposition and we agree that we require to consider removing the age qualification for the accused in connection with the grooming offence. Our original position was that creating the offence was about strengthening the law to deal with the perceived problem of adults seeking to win the confidence of children and to take advantage of them—the process that we describe as grooming.

However, we have taken note of the evidence that was presented to the committee at stage 1, when a number of organisations said that teenagers can and do manipulate younger children and that the risk of damage to those younger children is considerable. We have reflected on some of the concerns expressed by the committee and we agree that the grooming offence should catch such behaviour. We are confident that prosecutorial discretion will mean that normal teenage romantic pursuits will not fall foul of the legislation and that the offence will be used only where there is evidence of predatory behaviour and the intention of committing a sexual assault.

Where our amendment differs from yours, convener, is that we think that the use of letters—I will not go into whether they should be "A" and "B" or other letters—is helpful in differentiating and clarifying in the bill the position of the accused and the intended victim, particularly as there could be situations in which the accused is a child. There is no difference in policy or effect between our amendments, so I hope that you will agree that what we are doing is helping to remove any potential weakness or anomaly.

Removing the reference to "child" also allows us to cater for the situation where attempts to groom a child have come to the attention of the police. We understand that it is normal practice in those situations for an undercover police officer to continue communications with the suspect, in order to ensure that the child is not exposed to any further potentially abusive communications. The police officer would assume the role of the child, or a friend of the child, having first been authorised to do so. The problem is that that practical step could subsequently mean that the accused could argue in court that he was not in fact grooming a child but was communicating with an adult.

We therefore propose that the bill should be amended so that the requirement of the offence is that the accused should have communicated either with someone who is under 16 or with a constable. That has to be read alongside section 1(1)(c), which requires the Crown to establish that the accused person did not reasonably believe the other party to be 16 or over.

We are conscious of the dangers of legislation that might be seen to encourage entrapment, but we are confident that the highly specialised police officers who undertake such work are properly trained in what is permissible in the context of that undercover work. Furthermore, the courts will continue to be responsible for determining what evidence is admissible and what is not. We think that the balance is clearly in favour of recognising the realities of policing what is a complex area. We believe that our amendments are a necessary addition to the bill and reflect the concerns of many organisations that gave evidence. I think that they also reflect the concerns expressed by the committee and the legitimate demand that you have made, convener, on behalf of the committee.

Stewart Stevenson: I welcome the amendments in the names of Pauline McNeill and Cathy Jamieson. I shall listen to what is said and decide which set to support. I am not unduly concerned at stage 2 about the use of the alphabetic letters "A" and "B", because I am sure that, if we accept the minister's amendments but want to substitute other letters, we can do so at stage 3.

The introduction of the words "a constable" in amendment 21 is welcome. However, I would like the minister to use his summing-up remarks to address the issue of authorisation. I agree with him that any such investigation should be properly authorised, but the bill does not make any reference to the circumstances in which, or the source from which, such authority might be derived. It would be useful to put on record some further explanation in that regard, so that the provision does not become—as I am sure the minister would not wish it to—simply a licence for any constable to take action. Such work requires the training, skills and supervision that can be found, for example, in the national hi-tech crime unit.

Marlyn Glen: I support the change in the definition of the age of the offender. In evidence, Barnardo's Scotland pointed out the importance of recognising inappropriate behaviour as early as possible in order to effect change. If we are to effect change, it is important that we do not simply criminalise behaviour, but ensure that appropriate treatments are available for young people who display such behaviour. That is the main reason for my support for the amendments. Behaviour can be changed, but it is essential to do that as early as possible, so appropriate treatments must be available.

Margaret Mitchell: The minister said at stage 1 that he would consider the issue. I welcome the amendments, which improve the bill and make it stronger.

Mr McFee: At stage 1, the committee took the general view that it was incorrect to require the perpetrator to be over 18 and that it would be a worthwhile change to remove that measure and accept that children can be offended against by children, particularly those who have predatory behaviour as one of their traits. On the use of the terms "A" and "B" compared to the convener's recommendation, I would not say that the issue is neither here nor there, because there are differences.

Amendment 21 is extremely loose. I appreciate the idea behind it and I have no problems in this instance with legislation allowing the potential for entrapment, because the medium with which we are dealing is difficult to police and, at present, the predators whom we are seeking to stop have the advantage in that medium. However, the problem is that if the bill simply mentions "a constable", a police officer who engages in predatory behaviour would be exempt from the measures. It must be absolutely crystal clear in the bill, even if that means further amendments at stage 3, that the police officer must be authorised to carry out the task, otherwise the bill might have the unintentional consequence that a police officer who engages in such predatory behaviour would be outwith the scope of the bill. I want it to be absolutely crystal clear that the officer must be authorised to carry out such work.

The Convener: Before I wind up, the minister is welcome to comment on any of those points.

Hugh Henry: In one sense, it is not helpful to have the stark juxtaposition of the Executive's amendments and the convener's amendments. We believe that our amendments meet the aspirations that the convener has articulated, but we have sought to build in further safeguards and to build on the existing measures. I have explained why we believe that it is right not to include the reference that the convener seeks to put in.

Stewart Stevenson and Bruce McFee raised the issue of authorisation, but it is clear that police constables would have to apply for authorisation to become a covert human intelligence source under the provisions of the Regulation of Investigatory Powers (Scotland) Act 2000. Furthermore, Bruce McFee's interpretation of amendment 21 is not correct. The word "constable" has a clear meaning in Scots law; it means a police constable under the Police (Scotland) Act 1967. We do not need to say anything further in the bill on the matter.

I disagree with Bruce McFee's suggestion that the police constable could be doing the grooming. In effect, it is the police constable who would be being groomed, as he or she would have substituted themselves for the child. The bill is perfectly clear and concise on the matter. The provision gives a degree of added protection; it allows perpetrators to be caught without the child having to be exposed to further danger.

12:00

The Convener: Let me wind up. I endorse what other committee members have said. We are pleased that the Executive has responded to the views that we expressed in our stage 1 report and, given its response, I will seek the committee's agreement to withdraw amendment 1.

I am sure that the minister will accept in good faith that the committee did not want to get into a ridiculous argument about whether the letters "A" and "B" or "E" and "F" should be used. That said, it is worth considering how we can ensure that everyone is absolutely clear about who is subject to the provision. With that comment, I seek the committee's agreement to withdraw amendment 1.

Amendment 1, by agreement, withdrawn.

Amendments 12 and 13 moved—[Hugh Henry]—and agreed to.

The Convener: Amendment 2, in my name, is grouped with amendments 7 and 24.

Again, I am speaking to the committee's position at stage 1. Amendment 2 relates to the number of communications that are required under the bill to demonstrate that a crime is complete. Under section 1(1)(a), communication on "two earlier occasions" is required. I have sympathy with the Executive's original position—I believe that it is important that, in attempting to prosecute criminal behaviour, we do not catch people in innocent situations. However, the bill would not allow us to prosecute someone where only one communication had taken place yet there was a clear intention to groom a child with the purpose of meeting them. That is the deciding factor for me. On balance, I take the view that we should reduce the number of communications to one.

I move amendment 2.

Mrs Mulligan: I agree with the convener. Concern was expressed that someone can build up the confidence of a child even in one communication. Unless we press amendment 2, we will be unable to move on the issue. It is important that the bill refers to one and not two communications.

I appreciate that the Executive is trying not to catch in the bill communications that are made accidentally or as a result of a misunderstanding. However, the bill includes enough protection to ensure that that will not happen. As the minister said earlier, people will act sensibly in their interpretation of the legislation. Amendment 2 is a sensible amendment to the bill.

Mr McFee: I, too, agree that amendment 2 is a sensible amendment. The evidence that we took from Rachel O'Connell in particular was conclusive on the matter. She showed—as did the practical demonstration that the committee witnessed—how quickly a situation can develop in an internet chat room. In some instances, we are talking about a matter of minutes.

We wrestled with the problem of whether, under the bill as drafted, one prolonged communication in a chat room would count as being two communications if the person signed off mid-way through the conversation and logged back on again. I think that courts and the Procurator Fiscal Service would have the common sense to be able to consider cases that might be borderline—cases in which the content is not particularly explicit. However, the stuff that we saw was explicit in the extreme and we should not say that there has to be a second deluge of explicit material before judging that the offence has been committed. Therefore, I agree with the convener's amendment.

Margaret Mitchell: In my member's bill, I suggested that there should have to be two communications, as the Scottish Executive has done. However, having listened to the evidence—particularly that of Rachel O'Connell, who made us realise that an internet communication could go pretty far down the line and that we would want to curb it quickly—I and, I think, the rest of the committee have been persuaded that the bill should require there to have been only one communication. That would make the legislation as strong and effective as possible.

Hugh Henry: As has been suggested, our original intention was to ensure that we did not catch innocent or unwitting behaviour. The requirement for two communications was included to ensure that we targeted deliberate and considered actions. However, we recognise that it is possible that a calculating sex offender might tailor their actions to ensure that there was only one communication. The convener and others have referred to the evidence that the committee has heard about the possibility of the sex offender extending the first communication until they had persuaded the child to meet them. It is right that we properly consider the significance of that.

We also note that the offence would still require other deliberate steps to have been taken by the accused that would clearly indicate criminal intent. Having said that and having listened to the arguments, we are content with the changes that the convener is suggesting and think that they will strengthen the bill.

The Convener: We welcome the Executive's position.

Amendment 2 agreed to.

Amendments 14 to 16 moved—[Hugh Henry]—and agreed to.

The Convener: Amendment 3 is therefore pre-empted.

Amendment 17, in the name of Mary Mulligan, is grouped with amendments 25 and 33.

Mrs Mulligan: Section 1 of the bill refers to the adult intentionally meeting the child or travelling to meet the child, but it does not mention the issue of communication. Amendment 17 would ensure that all aspects were covered. Initially, it might have seemed unlikely that people would either travel worldwide or communicate worldwide for the purposes that we are discussing. However, as we heard more and more evidence, we realised that that was possible. That is why I hope that the committee will accept the amendment.

I move amendment 17.

Mr McFee: Mary Mulligan neglected to mention what, for me, was the most important part of the issue—luckily, however, amendment 17 deals with it. The glaring hole in the bill is that, although the offence is completed if the adult travels to meet the child, it is not completed if the adult gets the child to travel to meet him or facilitates some sort of travel arrangements for the child. Amendment 17 will rectify that situation, which is why it is worthy of support. If that glaring hole in the bill is not closed, paedophiles will be presented with the opportunity of escaping possible conviction simply by arranging for the child to travel to meet them. I welcome the closing of that loophole.

Margaret Mitchell: The Law Society of Scotland pointed out the loophole. It had not occurred to us before then that the bill should refer to the child travelling to meet the adult. Amendment 17 would close that loophole.

Hugh Henry: As members have suggested, it is clear that there is a potential loophole that could

allow a sex offender to seek to evade the requirements of the grooming offence by having a child travel to meet them. If a meeting had taken place, it would not matter who had travelled, although, in cases where the police were running an undercover operation, it would be unlikely that they would allow a child to meet a potential abuser.

Mary Mulligan's amendments are helpful and would allow a prosecution to proceed where the accused had clearly arranged for the intended victim to travel to meet him without the requirement for the accused to travel or for that meeting to have taken place. It is important that the accused has to take active and deliberate steps—in this case, arranging for an intended victim to travel to a meeting at which the accused intends to commit a sexual offence. It is clear that it would not be sufficient if the child decided of their own volition to travel to meet that person. However, the situation is properly catered for in Mary Mulligan's amendments 17, 25 and 33 and we are happy to support them.

Mrs Mulligan: I am pleased that members recognise the loophole that my amendments attempt to close.

Amendment 17 agreed to.

Amendments 18 to 23 moved—[Hugh Henry]—and agreed to.

The Convener: Amendments 4 to 6 are therefore pre-empted.

Amendments 7 and 24 moved—[Pauline McNeill]—and agreed to.

Amendment 25 moved—[Mrs Mary Mulligan]—and agreed to.

Amendments 26 to 32 moved—[Hugh Henry]—and agreed to.

12:15

The Convener: Amendments 8 to 10 are therefore pre-empted.

Amendment 33 moved—[Mrs Mary Mulligan]—and agreed to.

Section 1, as amended, agreed to.

Schedule agreed to.

The Convener: That ends the consideration of amendments at stage 2 for today. I thank the minister and his team for attending.

Subordinate Legislation

Act of Sederunt (Fees of Solicitors and Witnesses in the Sheriff Court) (Amendment) 2005 (SSI 2005/149)

12:16

The Convener: We come to item 4 on the agenda. I refer members to the note from the clerk that sets out background information on the Act of Sederunt (Fees of Solicitors and Witnesses in the Sheriff Court) (Amendment) 2005. The instrument is subject to the negative procedure. Do members have any comments, or shall we simply note the instrument?

Stewart Stevenson: Paragraph 3 of the clerk's note states that

"the fees recoverable by solicitors in all cases"

are to increase by 4.8 per cent. I compare and contrast that with the most recent update of inflation in the cost of living, which was 1.9 per cent, and thereby observe a difference of 2.9 per cent in excess of the rate of inflation. I propose that we ask the Lord President's office, which seems to be the appropriate office, to explain to us what steps are being taken to improve efficiency in solicitors' offices so that the rise in their costs is no higher than the prevailing rate of inflation. I am uncomfortable about seeing in legislation an increase of nearly 3 per cent in real terms in fees for solicitors without there being any obvious justification for that in the information that has been put before us. I note that it will be possible to move against the statutory instrument until 10 May.

The Convener: Are you not satisfied with the letter from the Lord President's office that is attached to the act of sederunt, which explains the method of calculation of the percentage increase?

Stewart Stevenson: No. To amplify, I entirely accept that the figure is based on statistical analysis of the increase in the cost of solicitors' time during the preceding year. However, I question why solicitors are not, in common with other people, seeking to contain their costs and to manage them down by improving the efficiency of their operations, so that their costs rise by a percentage that is no higher than the prevailing rate of inflation.

Mr McFee: That is the point that I want to come in on. In the letter that was signed by the legal assistant to the Lord President, in the second paragraph the reason that is given for the increase is that it was based on statistical analysis of the increase in the cost of solicitors' time over the

preceding years. Frankly, I think that we require something better than that to justify an increase of two and a half times the rate of inflation. We must wonder why solicitors should be exempt from the rules that apply to the rest of us. It would be useful to have some form of analysis of exactly why solicitors' costs have gone up by that amount.

Margaret Mitchell: I seem to recall that the Justice 1 Committee has examined solicitors' fees—in particular, itemised billing. However, I cannot remember just how far down that line we got. Could you advise me on that? I think that it is quite relevant to the overall picture.

The Convener: Does that relate to the correspondence that we received from Margo MacDonald's constituent, when we started to examine the transparency of legal fees?

Margaret Mitchell: Yes.

The Convener: We have been trying to schedule a meeting with the Scottish legal services ombudsman for some time but—for reasons that members can probably work out—we have not been able to do that, although there has been some correspondence. The intention was to find a slot for Linda Costelloe Baker to come to the committee so that we could talk to her about transparency in legal fees. I will update the committee when we know the date. We had fixed a date, but we have had to move it.

Stewart Stevenson: I am reminded that it is just a couple of weeks since we had before us an instrument that revised the fees for counsel. Its purpose was to reduce the overall bill—by 0.85 per cent, as it turned out. That is another part of the legal profession in which we can see something happening. If we compare and contrast the margin between what is suggested for solicitors and what appears to be happening in relation to overall costs in legal aid for counsel, we see that the difference is 5.5 per cent.

Mrs Mulligan: Bruce McFee referred to the second paragraph of the letter. I think that I read that paragraph wrongly, so I would like clarification. I think that I read the paragraph as referring to a three-year period and thought that that was why there was such an increase, but perhaps I was wrong. Am I right in thinking that the increase that is being sought is an annual increase, that it was changed last year and that it will be changed again next year?

The Convener: Yes. Stewart Stevenson will clarify the question that he wants the committee to put.

Stewart Stevenson: We have before us an instrument that would put up fees by 4.8 per cent, which exceeds the increase in the cost of living—which was 1.9 per cent—and the rise in average earnings, so we should be utterly convinced that solicitors who are spending public money in that context are doing everything that is expected in the rest of the public services similarly to contain and reduce costs. I do not believe that we are in the business of simply writing blank cheques without our being convinced. At the end of the day, 4.8 per cent might be the right amount; if so, the increase is fair enough. However, I am not in a position to say that at the moment. I accept that if they have been measured, the costs may well have gone up, but I am not in a position to accept that they should have risen by 4.8 per cent.

That is all I want to say. In the first instance, I would like to focus on what steps the legal profession—in common with other areas where public money is spent—is taking to contain costs, to create efficiencies and, as is happening in the case of advocates, actually to reduce costs. Why is that not happening for solicitors as well? Why are they exempt?

The Convener: That question would really have to be put to the Law Society because the Lord President has accepted the work that has been done by the Law Society.

Stewart Stevenson: I would be content if it were the Law Society that sought to answer for its sins, should there be any.

The Convener: Paragraph 1 of the clerk's note states:

"The Table of Fees is used to determine the fees recoverable by a successful party from an unsuccessful party in Sheriff Court Actions."

Does that mean that the issue is primarily about solicitors? When first I read that sentence, I thought that the fees in a civil case would be recoverable from the side that lost the action, which would mean that the issue concerns a wee bit more than just fees for solicitors.

Stewart Stevenson: At the end of the day, the figure is in excess of either the increase in earnings or the cost of living. I simply want to know why.

Margaret Mitchell: In that case, perhaps it is important that we get more information. Often, people are put off going to court because of the potential consequences of losing. The increase is sizeable, so we want to be extremely sure that it is justified. I agree with Stewart Stevenson that we appear to be a little short on detail.

The Convener: Furthermore, the instrument will increase the level of expenditure that is recoverable by a witness who suffers loss of earnings or profits.

I am not against pressing for more information, as long as we make it clear that the Lord President

will have to get that information from the Law Society. We have to understand that the issue is about the fee that solicitors charge in relation to fees that are recoverable, and that there is also an issue about expenses that are recoverable by witnesses. If we are to test the level of fees, we also need to be alive to the fact that there might be issues in relation to fees that are recoverable by witnesses. I have absolutely no idea whether those fees are generous or not.

If the committee supports Stewart Stevenson's proposal, we will simply write to ask for more information from the Lord President, who will direct us to the Law Society.

Do we agree to do that?

Members *indicated agreement.*

Act of Sederunt (Fees of Shorthand Writers in the Sheriff Court) (Amendment) 2005 (SSI 2005/150)

The Convener: I refer members to the clerk's note on SSI 2005/150, which is also subject to the negative procedure.

Stewart Stevenson: I make the same point again, although with less force because the increase is only 3.7 per cent in this case. Although an explanation is provided—the increase is the mid-point between inflation and average earnings over a 12-month period—I ask simply whether the spending of public money in this way is justified, given that we have not had it demonstrated to us that attempts are being made to make savings and to increase the efficiency of the operation. I should add that I am not entirely convinced that 3.7 per cent is the mid-point between 3 per cent and 4 per cent, but I will leave that arithmetic niggle to one side.

I am more cautious about going in hard in this case because, in many respects, the processes that are undertaken might be determined by legislation, which would mean that, without changing the relevant law, they are not susceptible to efficiencies that might be introduced. I would nonetheless like to ask what attempts are being made to introduce efficiencies in this area of public expenditure.

The Convener: I have absolutely no knowledge of the salary of a shorthand writer. If I knew that the background to the instrument was that the pay of shorthand writers had dragged behind that of others, I would be happier.

12:30

Margaret Mitchell: You make the point well, convener. We simply do not know the background, so it is reasonable to ask for further information. That would be consistent with our approach to the previous instrument.

Mr McFee: There is a chance that you might know about the matter somewhere in your subconscious. I hope that the matter was previously considered when I was not a member of the committee, so that I cannot be accused of forgetting about it. The second paragraph of the letter from the Lord President's private office states:

> "The method used to calculate this percentage increase was explained to the committee at the time the Acts of Sederunt increasing the fees of sheriff officers and messengers-at-arms were considered by your committee."

Does anybody recall that and do they recall whether I was here? I am sure that the clerks have the information at their fingertips.

The Convener: I certainly recall the correspondence; it is likely that you were here because you joined the committee at the same time as Stewart Stevenson, who proposed that we write to seek more information on the matter.

My only reservation is that I do not want the committee to write to the Lord President with another question every time we consider an instrument of this kind. At some point, somebody will say to us, "Why don't you just do the work on it?"

Margaret Mitchell: Bruce McFee pointed out the method that is used to calculate the percentage increase, which is different from the reasons for imposing the increase; we are seeking more information about the latter point.

Mr McFee: I accept that distinction.

Stewart Stevenson: I would prefer not to be asking questions on each such instrument that comes before us. I will cease to ask such questions if, in the first instance, information is provided that enables me to understand that there is justification for the increase and that efforts are being made in this area where public money is spent, as in others.

I have examined the issue considerably and am sure that if the Minister for Finance and Public Service Reform has not yet turned his mind to achieving efficiencies in this area, he is likely to do so—the matter is part of an overall picture. If we were provided with the information in the first place, extra work would not be generated. It is part of our duty to justify such increases, which are relatively—although not excessively—substantial.

The Convener: I take it that the committee is minded to seek further information from the Lord President about the fees of shorthand writers.

Mrs Mulligan: On the general point that Stewart Stevenson just made, is it possible to mention to the Lord President that it would be helpful if we had that information in the first instance so that we do not have to keep going back to his office to ask about each case that comes before us? That would preclude this happening each time we consider such increases in fees.

Mr McFee: Following on from that, we assume that the Lord President asked for such information in the first case in order to reach his decision. Perhaps more explanatory information than we currently receive would be useful and would not cause too much extra work.

The Convener: I apologise, Bruce—I did not hear the last part of what you said.

Mr McFee: Okay, I will let you read it in the *Official Report*.

The Convener: I am sure that it was dead important. The clerks were pointing out to me that correspondence from the Lord President would not normally be attached to our papers. However, because we have been asking questions, the correspondence is his office's pre-emptive attempt to give us the information that we seek. Is the committee saying that it is not satisfied, but wants more information?

Mr McFee: I think that we should give the Lord President's office a "could do better" on its report card. Let us hope that we never appear before him.

The Convener: You accept that his office has given us the method that was used to calculate the percentage increase, but do you want the office to justify the increase being slightly higher than inflation?

Mr McFee: We accept the method that the Lord President has used to calculate the increase, but we do not know the rationale for the level of the increase.

Stewart Stevenson: The bottom line is that there is now a focus on improving efficiency in public services—it is one of the Executive policies that I support in broad terms and which has broad support throughout Parliament. It is part of our duty to ensure that when such instruments come before us, that policy is addressed. I do not accept that that is the case in respect of the two instruments that we have considered today. It might be that that policy is being addressed, but the evidence does not show us that.

The Convener: So—you just want to check that the Lord President's method of calculation is not wildly out of step with the approach to public sector pay in general.

Stewart Stevenson: The important point is that the sheriff courts, like everyone else, should seek to make their operation more efficient and to show us that they are doing that. If, in doing that, they then say that they need to increase fees, that is fair enough.

The Convener: Okay.

Members have agreed to discuss agenda item 5 in private.

12:36

Meeting continued in private until 13:12.

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