JUSTICE 1 COMMITTEE

Wednesday 4 May 2005

Session 2

£5.00

Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by Astron.

CONTENTS

Wednesday 4 May 2005

JUSTICE 1 COMMITTEE
13th 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 1

Scottish Parliament

Justice 1 Committee

Wednesday 4 May 2005

[THE CONVENER *opened the meeting at 10:09*]

Item in Private

The Convener (Pauline McNeill): Good morning and welcome to the 13th meeting in 2005 of the Justice 1 Committee. It would be helpful if members switched off their mobile phones.

I invite members to agree to take agenda item 4, which is a briefing on the Family Law (Scotland) Bill, in private. Is that agreed?

Members *indicated agreement*.

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

10:09

The Convener: Agenda item 2 is stage 2 of the Protection of Children and Prevention of Sexual Offences (Scotland) Bill. I welcome for the final time to discuss the bill at stage 2 the Deputy Minister for Justice, Hugh Henry, and his legal team, which consists of Hugh Dignon, Kirsten Davidson and Paul Johnston.

As usual, members have a marshalled list of amendments. However, the procedure will be slightly unusual, as I thought that, in considering the first group of amendments, committee members should have the chance to explore each of the component parts of the proposals to do with pornography and prostitution. Therefore, I propose to break down the debate on the first group into three mini-debates. The first debate will be on the new offence of paying for sexual services; the second debate will be on the new offences that relate to prostitution; and the third debate will be on the new offences relating to pornography.

After section 8

The Convener: Amendment 56, in the name of the minister, is grouped with amendments 57 to 61. I invite the minister to speak about amendment 56 and the new offence of paying for the sexual services of a child.

The Deputy Minister for Justice (Hugh Henry): Members have already seen an earlier draft of the amendments. The proposed provisions differ only slightly from the versions that we sent the committee a few weeks ago. The amendments will create four new offences: paying for the sexual services of a child; causing or inciting child prostitution or pornography; controlling a child prostitute or a child involved in pornography; and arranging or facilitating child prostitution or pornography.

The effect of the first offence is clear—it will be an offence for someone to pay for the sexual services of a person who is under 18. In other words, we will make it an offence to purchase sex from a child. The provisions are drafted to ensure that we catch those who purchase sex from children in whatever way they do it—whether by making a direct payment to that child, by paying someone else to allow them to have sex with the child or by providing goods or services in exchange for sex with the child. If a person promises some reward in exchange for sex with a child, that person will be committing an offence.

I move amendment 56.

Stewart Stevenson (Banff and Buchan) (SNP): I entirely support the policy objective behind the amendments, but I want to explore how amendment 56 deals with the purchase of sexual services from a 16-year-old or a 17-year-old. What thought has been given to casting the amendment differently? Specifically, it seems to me that the issue can be looked at as involving person B providing sexual services conditionally, the condition being that a benefit—payment—is provided by person A to person B, rather than as involving person A providing payment that is said to be for sexual services, which is how the amendment is cast.

Has the minister considered casting the amendment on that basis? The question is simply a drafting question—it is not meant to be anything other than that—and I ask it because the timing of a payment from person A to person B could in some circumstances allow legitimate doubts to be expressed by the defence agent for person A in a criminal trial. I wondered whether considering the matter the other way round might avoid that difficulty. I am genuinely interested to hear what the minister has to say; indeed, we could well have an animated discussion on the matter. Perhaps something interesting will emerge from that.

Hugh Henry: I fear not, convener. The short answer to Stewart Stevenson's point is that we have not considered that construction. We think that our construction properly focuses on the person whom we believe commits the offence. However, I am not sure about the line of argument that Stewart Stevenson took at the end of his contribution—it might be interesting to explore his example a little further.

10:15

Stewart Stevenson: For example, person A might settle person B's debts and subsequently suggest that sexual services be provided. Can a legal link be made between the two actions? Although, in person A's mind, he might have acted to create an environment in which person B could provide sexual services, no such agreement had been made at the point at which the financial or beneficial transaction was completed. I am genuinely interested in finding out whether the proof can break down in court when it should not.

Hugh Henry: If I understand him properly, Stewart Stevenson is referring to a scenario in which someone had cleared a debt or made a payment in advance of seeking to obtain sex. In such circumstances, there would be no offence. The question is whether a promise of payment has been made for sexual services, so if a payment was made in relation to something else at a point in time that was far removed from the attempt to obtain sex, a proper link could not be made.

It would need to be clear that payment was made because of a promise of obtaining sex or a condition that sex would be obtained. If, out of the goodness of their heart or for some other reason, someone had decided to make a payment then suggested some months later that a sexual act should take place or that there should be a sexual relationship, I do not think that one event could be linked with the other.

In that respect, subsection (1)(b)(i) of the new section that amendment 56 seeks to insert is very specific. It stipulates that person A commits an offence

"if … before obtaining those services, A … makes or promises payment for"

sexual

"services to B".

As a result, I do not think that the situation that Stewart Stevenson describes could easily be construed as an offence.

Stewart Stevenson: Perhaps we should look at the same scenario of activity and relationships from person B's point of view. What if person B had provided sexual services to person A, but would not have done so had the debt in question not been settled or the payment not made in advance? I am not going to make a meal of the matter beyond this, minister; I simply want to test the provision.

Hugh Henry: Sure. In any case, it is for the procurator fiscal and, ultimately, the courts to determine whether there was a sufficient link between the two events. However, I cannot see any causal link in the current description of the situation.

Margaret Mitchell (Central Scotland) (Con): I say at the outset that I support amendment 56, but I would welcome further clarification of what exactly it covers. For example, does it cover unlawful intercourse with a girl under 16 per se? In other words, there may not be any financial advantage or payment involved. I suppose that I am asking about that specifically because of amendment 62, which seeks to repeal the Criminal Law (Consolidation) (Scotland) Act 1995 provision on unlawful intercourse with someone under 16. Could you clarify whether that is covered?

Hugh Henry: The latter point to which Margaret Mitchell has referred is to do with repealing the time limit. On the first point, there is a separate offence in any case and the bill does not seek to substitute anything for that offence.

Margaret Mitchell: That is helpful, thank you.

The Convener: I note that subsection (1)(b) in amendment 56 contains the phrase

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

Does that cover payment by a third party for a third party? I take it to mean that payment to a third person in exchange for sexual services is not allowed, but there could be an exchange between two parties relating to sexual services for a third party.

Hugh Henry: The wording would cover a third party. The amendment criminalises someone who obtains from a child sexual services that have been paid for by a third party. Whether the purchasing of sexual services to be provided to someone else is an offence would clearly depend on the circumstances of each case. For example, if the person is deliberately arranging for a child to become involved in prostitution, proceedings could be taken under the provision relating to arranging or facilitating. It would be for the Crown to decide in each case whether proceedings would be taken.

The Convener: So when we come to the question of exchange of financial advantage for a third party, that is dealt with not by amendment 56, but by the provision that concerns arranging or facilitating. Is that correct?

Hugh Henry: That is correct. That would be dealt with under the provision on arranging or facilitating.

The Convener: Does that mean that only prostitution is covered as far as the third party is concerned, given that amendment 56 is about paying for sexual services? Presumably that is broader than prostitution.

Hugh Henry: What we are trying to get at is that the person who pays for the sexual services of a child, whether to a third party or not, knows that they are committing an offence. You may be touching on a slightly different issue, convener, although it is an interesting one. Amendment 56 is about paying for the sexual services of a child and amendments 57, 58 and 59 and other amendments are about child prostitution. I suppose that it could be argued that amendment 56 contains a wider definition than the definition in the other amendments, which are about child prostitution.

The Convener: That was one of my points. Amendment 56 is about a wider offence of paying for sexual services—the definition of that is what a reasonable person thinks would be a sexual service. I hear what you are saying about references to a third party being dealt with in the provisions on controlling or facilitating, but as those provisions refer exclusively to prostitution, might the Executive want to expand the third-party elements of the provision covering paying for the sexual services of a child?

Hugh Henry: I think that what we are talking about in relation to amendment 56 is specifically about the person paying for the sexual services. We will move on to the point that you raise about third parties causing, inciting, controlling or being involved in certain activities when we consider the next batch of amendments. You touched on a difference in emphasis; you compared the provision of sexual services with prostitution and said that the definition of the former is based on how it would appear to a reasonable person. It will be a matter for the Crown and, ultimately, for the courts to determine what payment for sexual services would entail, because that is wider than prostitution. I would guess that it could cover a range of matters that we would not specifically construe as prostitution.

The Convener: We should have that debate—either now or when we discuss amendments 57 to 61—so that we are clear about the difference between payment for sexual services and prostitution.

Hugh Henry: There are two separate debates. One is about the definition of payment for sexual services and the difference between that and prostitution, and the other, which we can have later, is about whether the phrase "child prostitution" is sufficient, particularly in relation to third parties.

The Convener: I accept that. To be absolutely clear, amendment 56 covers

"Paying for sexual services of a child",

which is wider than prostitution. The amendment refers to payment that is made to a third person for services. There is no reference to the wider offence of payment for a third person. A payment that is made to a third person for anything that is outwith prostitution but that would be regarded as a sexual service is covered, but a payment that is made for a third person would not be covered. Is that right?

Hugh Henry: No, because subsection (1)(b)(ii) of the proposed new section refers to a situation in which a person

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

Your line of argument has been covered. The definition is another matter.

Mrs Mary Mulligan (Linlithgow) (Lab): On the point about payment for sexual services being wider than just child prostitution, the note that we received from the Law Society of Scotland suggests that the definition in the bill is narrower than the definition in section 78 of the Sexual

Offences Act 2003. Will you explain the difference between those definitions? You said that the definition in the bill is wider. If you could give an example, we might better understand the difference.

Hugh Henry: I am trying to locate what the Law Society said.

The Convener: In relation to the objective test, the English position seems to be a bit wider.

Hugh Henry: In our bill, a sexual activity is

"an activity that a reasonable person would, in all the circumstances but regardless of any person's purpose, consider to be sexual".

That means that activities that are not objectively sexual to most people but that a particular person finds sexual are not covered. The definition in the 2003 act, on the other hand, includes activities that are considered to be sexual by the person who carries them out. Our reason for not including that subjective definition is that we think that something that is simply in the mind of the accused, which would not appear to be sexual to a reasonable person, is unlikely to harm a child. If the committee thinks that it would be helpful to extend the definition, we will consider that before stage 3.

Whether a reasonable person would consider certain activities, other than prostitution, to be harmful to a child is a moot point. If a 16-year-old were engaged in lap dancing, would a reasonable person think that that activity was sexual in nature and could harm that child? I suppose that my perception is that, given the nature of lap-dancing establishments, that activity could be construed as being sexual in its nature and harmful at that age. The committee might want to think about other activities to which the same considerations would apply. We could have a debate on that and on whether the words "sexual services" are sufficient to cover those activities or whether another form of wording is needed.

10:30

Mrs Mulligan: Given that we are discussing the Protection of Children and Prevention of Sexual Offences (Scotland) Bill, we would want to ensure that, if an activity could be harmful to a child, it is included in the bill. However, that might be something on which we would want to consider lodging amendments at stage 3.

Hugh Henry: Mary Mulligan raises a valid point. Most reasonable people would be alarmed if 16-year-old girls were involved in the provision of telephone sex services or were employed in lap-dancing or strip clubs. As I understand the situation, legally, there is nothing to stop them being so employed, certain elements of civic government legislation notwithstanding. Would those activities be described as "sexual services"? I think that it is possible that most reasonable people would see them in that way. I suppose that we can come back to the issue of causing or inciting child prostitution, which the convener raised, but, as far as those activities are concerned, I think that the definition that we are discussing is sufficiently wide to cover them.

If amendment 56 is accepted, I will consider carefully whether we need to do something at stage 3 to clarify the situation. From your comments, convener, and the way in which members around the table are nodding, I take it that there is concern about those types of activities and a feeling that they need to be addressed. I think that the current wording is sufficient to address them, but, if that is not the case, we can revisit the issue, if that is what the committee wants.

The Convener: We are testing you this morning on what the Law Society is saying about the English position. I am not sure that, if we adopted that position, it would help us in the situation in which we are in, because the question relates to what a reasonable person would regard as being a sexual service.

You have used the example of lap dancing, pole dancing or whatever we want to call it, but I am not sure that, in the 21st century, everyone would agree with your view of that activity. I think that I am a reasonable person and I think that it should be covered by the definition of "sexual services". However, I say that as the representative of Glasgow Kelvin, which is fast becoming the lap-dancing capital of Scotland—although not if I can help it—and I know that some people would say that, in this day and age, it is an unreasonable view to say that lap dancing is not a normal activity. That is certainly the argument that is put forward by those who provide lap dancing as a service or a business in cities in Scotland. We need to be clear about the intentions behind the amendment and whether it would cover the provision of such services by a 17-year-old, as seen by a reasonable person.

Hugh Henry: You are right that there is a difference between what we propose and what exists in English legislation. If the committee is in broad agreement that the intention of the amendment needs to be clarified, I will certainly ensure that it is clarified. However, we are talking specifically about such activities in relation to what we now define as children for these purposes. You said that reasonable people might think that certain activities were okay, but reasonable people might think that the taking or distribution of certain types of pictures and images—particularly of women, but not necessarily—is reasonable. We

are saying that, when it comes to children, those activities are not acceptable. Although some people might argue that no offence would be committed if older women or men engaged in such activities, we are talking about making an offence specifically in relation to children.

The Convener: I hear loud and clear what you are saying, but we are being asked to debate the definition of "sexual services". At the moment, the objective test is what a reasonable person would think. It has been suggested that we consider the English approach, which brings into the equation the more subjective test of the circumstances of the child or the accused. However, having a subjective rather than an objective test might not take us any further forward.

You said that we are trying to decide what we mean by paying for a sexual service in relation to what we now define as a child—for these purposes, someone up to the age of 18. Perhaps we need to clarify the definition of "sexual services" according to a reasonable person in the context of legislating to cover children of 18 years or under.

Hugh Henry: You are right that the subjective test would not take us any further forward.

The Convener: My point is that, when the courts come to interpret the bill as it stands, they will have to use the reasonable person test to define a sexual service. Is there any way in which the test involving the definition of a sexual service could be made more objective for the courts in the context of protecting children? At the moment, all that the provision asks for is a test based on what a reasonable person defines as a sexual service. Do you see the distinction that I am trying to make?

Hugh Henry: I do. Subsection (3) of the proposed new section says:

> "For the purposes of subsections (1) and (2) … services are sexual if a reasonable person would, in all the circumstances but regardless of any person's purpose, consider them to be sexual."

That would probably allow sufficient grounds to deem as sexual such activities for 16 and 17-year-olds with regard to the circumstances.

The Convener: There is nothing to say that, however. When the court comes to define sexual services, it could interpret the subsection literally—I presume that it is entitled to do so—unless you are saying that "all the circumstances" means that the provision is to protect children.

Hugh Henry: Yes, but you should remember that "all the circumstances" would mean that the court would take into account the fact that it was dealing with a child and not an adult in relation to the activities in question. Before I know what I must provide the committee with by stage 3, I need to get an understanding of members' feelings about the other services that we are talking about. Does the committee believe that they should be covered by a definition of sexual services?

The Convener: The answer to that is yes.

Hugh Henry: That means that I must give the committee an assurance that we will be able to cover such activities. My worry about providing lists is that we might exclude certain activities, simply because we had not thought of them or because technology or social entertainment tastes might move on, which could leave children vulnerable. I believe that amendment 56 adequately deals with the issue, but I give the committee a commitment that we will reflect on whether we need to clarify matters so that everyone is assured that children as defined in the bill are adequately and properly protected as regards a wider definition of sexual services.

Margaret Mitchell: I want to move on to consider the penalties that are proposed in the new section that amendment 56 seeks to insert. If the offence that is committed involves someone who is aged 16 or over, the maximum sentence that can be imposed is seven years, but if it involves someone who is under 16, the maximum sentence is 14 years. Why is such a distinction made? Is age a factor?

The proposed new section refers to an offence involving someone who is under 13. At present, under separate legislation, if there is just unlawful sex with someone of that age—in other words, if there is no payment element—that can attract a life sentence. What would happen if there was a payment element in such circumstances? It appears that the penalty would be less; it would be 14 years.

Hugh Henry: We need to bear it in mind that the distinction in the tariff applies not to the age of the person who commits the offence, but to that of the victim. We believe that a person who commits the offence should be considered for a higher tariff if the victim is under the age of 16, rather than 16 or over. That reflects the way in which we have dealt with many offences in other pieces of legislation. Although we are in the process of changing the definitions—we are extending the bill's provisions to include 16 and 17-year-olds—we still believe that offences against younger children should be taken more seriously. That said, I acknowledge your point that if we are changing the definitions, we might as well reconsider the sentences, too.

10:45

Margaret Mitchell: That is helpful, but I wondered whether you had thought about not

specifying a term of 14 years and just leaving sentencing to the court to determine. A case could involve a very sheltered 16 or 17-year-old, whereas some people mature more quickly, and perhaps it should be up to the judge to make the decision. Would not it be better for the law to leave it to the judge to decide?

Could you reassure me on the point about payment for unlawful intercourse with a 13-year-old? According to the bill, if a case were prosecuted under the provisions that would be inserted by amendment 56, the maximum sentence would be 14 years—I presume that we are sending out a strong message. However, if the sex was unlawful under section 5 of the Criminal Law (Consolidation) (Scotland) Act 1995, the sentence could be up to life. Would there be any problem with going for a life sentence? I am confused that there should be a lesser penalty for what seems an even more invidious crime.

Hugh Henry: If the victim is under the age of 13, the accused could be prosecuted in a number of ways, one of which could attract the longer sentence of life imprisonment that Margaret Mitchell referred to, so that protection is still available for younger children.

Marlyn Glen (North East Scotland) (Lab): I want to follow up on Margaret Mitchell's point on the use of different penalties, depending on the age of the child. It is not really about whether the offence occurs before or after the child's 16th birthday; it is about the defendant's knowledge of the age of the child, which complicates matters. Could you say a bit about consistency and the bill's approach to the defendant's knowledge of the age of the child, and whether that has to be proved beyond reasonable doubt?

Hugh Henry: We have attempted to reflect the fact that with younger children there should be no defence of reasonable belief. If the victim is a young child—which we have defined as under 13, having regard to other legislation—the accused cannot come back and say, "I reasonably believed that the person was older." It is right that we build in as much protection as possible for younger children.

We recognise that there can sometimes be difficulties as children grow older. A protection is built in, because it has to be established that the defendant did not reasonably believe that the person was older. It is right that we reduce that defence element with younger children, so that it cannot be used. Of course, the Crown must be able to prove the case.

Stewart Stevenson: I found it useful to have the distinction between prostitution and sexual services explained, because I was not clear about that. From where I am sitting, the range of activities that has been described constitutes sexual services and should fall within the bill. I welcome the minister's commitment to consider further the legal advice and to determine what is required to make the measures watertight at stage 3. I encourage his efforts.

The Convener: I want to ask about the proposed new subparagraph (1)(c)(ii) that would be inserted by amendment 56, which refers to the situation in which the victim is under 13. Which act does that tie in with?

Hugh Henry: It ties in with section 5 of the Criminal Law (Consolidation) (Scotland) Act 1995. Of course, our discussion has to take place within the context that it is for the Crown to prove the case.

The Convener: We seem to have exhausted that line of questioning so we will move on to discuss amendments 57 to 59 and 61, on new offences as they relate to prostitution.

Hugh Henry: The three offences covered by amendments 57 to 59 are slightly different from the offence that we have just been speaking about. I shall focus for the time being only on the prostitution-related aspects of the offences. Whereas the offence that we have just been speaking about is aimed at the person who is actually purchasing sex for himself, these three offences seek to tackle the situation in which someone is organising child prostitution and is arranging for children to be involved.

The offence created by amendment 57 criminalises those who intentionally cause or incite children to become prostitutes; amendment 58 creates an offence of controlling a child prostitute; and the offence created by amendment 59 criminalises those who arrange or facilitate child prostitution. The offences therefore target the pimps, the recruiters and those who make the arrangements for people to purchase sex from children. All three offences have a maximum penalty on indictment of 14 years' imprisonment.

Clearly, if someone is committing one of those offences, they might also be committing another. For example, someone might arrange for a child to become involved in prostitution and might also purchase sex from that child. Amendment 61 therefore ensures that proceedings can be taken against that person for both those offences. We are ensuring that the law can deal appropriately with those who would wish to harm our children through prostitution.

In light of the discussion that we have just had, both the committee and I will have to consider whether we should deal only with those who organise and recruit children for prostitution, or whether we should deal also with those who

organise and recruit children for other activities that would be deemed sexual services.

Stewart Stevenson: Will the minister point me and other committee members towards the definition of prostitution in Scots law? That question balances the one that I asked about sexual services.

In light of what the minister has just said, and because I feel that this is the right time to raise this point, I want to stray outside the immediate topic that we are discussing. Referring to the proposed new sections that would be introduced by amendments 56 and 59, the proposed new subsection (2) that would be introduced by amendment 61 says:

"But nothing in those sections or this section enables a person to be punished twice for the same offence."

What overlap is there between the offence in amendment 59 and offences in existing legislation that amendment 61 seeks to ensure does not cause a problem?

Hugh Henry: In amendment 61, we seek to ensure that there cannot be double jeopardy—in other words, that a person cannot be punished twice for the same offence. However, a person could be punished for a range of offences. If the offences were different, the person could be punished for each one.

Stewart Stevenson asked about the definition of prostitution. We rely on the common-law definition. The word "prostitute" is not defined in the soliciting offence under section 46 of the Civic Government (Scotland) Act 1982, but case law makes it clear that the word refers to

"someone who offers her (or his) services to all and sundry".

We are not persuaded that the offences need to be amended so that the offence of paying for the sexual services of a child is dealt with differently. However, in light of the first part of our discussion, we may need to reflect on having a different definition.

Stewart Stevenson: One reason that I asked about double jeopardy is that it applies to amendment 59 but not to amendments 57 and 58, unless I misunderstand the amendments. In relation to double jeopardy, what is the distinction between the three amendments that we are discussing in this mini-debate? This is a technical issue that I do not understand.

Hugh Henry: I hope that I can give Stewart Stevenson the assurance that he seeks. The double jeopardy provision applies to the new sections that would be introduced by amendments 57 and 58, although we have not listed them.

Stewart Stevenson: I apologise—I now see the word "to" in subsection (1) of the new section that amendment 61 would insert, which means that all the amendments are covered. I made the mistake of reading only the two headings.

The Convener: Subsection (2) of the new section that amendment 61 would introduce states:

"nothing in those sections or this section enables a person to be punished twice for the same offence."

Is that not already the law? Why does the provision need to be included?

Hugh Henry: It is there purely to ensure that there is no doubt.

The Convener: That is fair enough. However, often when we say that, for the purposes of clarity, we would like the Executive to accept an amendment, we are told that the amendment is not necessary because it restates the existing law. The inclusion of this provision is contrary to the Executive's previous practice. I am not getting just at you, minister.

Hugh Henry: I am broad enough to take it, convener.

The Convener: In the many years during which I have sat in the convener's chair, I have repeatedly had to hear that an amendment is unnecessary. Is there a special reason why this provision must be included?

Hugh Henry: I cannot answer the question immediately. I will look again at whether the provision is required. If we decide that it is not necessary, it can be removed. If it is required, I will explain clearly to the committee why we believe that it is necessary.

Margaret Mitchell: I seek further explanation of what you mean by "involved in pornography" in the new section that would be introduced by amendment 57. Does the provision apply to situations in which someone causes a child to become involved in pornography verbally and through an image? Could it cover a communication in a chat room that is perceived to be of a pornographic nature?

The Convener: In this mini-debate, we are talking about prostitution.

Margaret Mitchell: And pornography.

The Convener: I thought that we should get the prostitution issues out of the way first. I will come back to you when we debate the pornography issues.

Marlyn Glen: Stewart Stevenson asked about the definition of a prostitute in the new section that would be inserted by amendment 57, which is about inciting another person to become a

prostitute. I find that a bit loose. [*Interruption.*] I did not mean to use that word. The definition of a prostitute in common law, to which you referred, minister, is not good enough to protect children in the situations that we are discussing. You said that the common law defines a prostitute as a woman who offers sexual services to "all and sundry". Does that definition cover a 17-year-old who is being incited to go with a small group of men?

11:00

Hugh Henry: There are two issues. If we simply use the term "prostitution", the common law is sufficiently clear and the courts would have no doubts as to what would constitute prostitution. However, we have now had a discussion about widening what should be covered and, having regard to our discussion on amendment 56, in which we talked about paying for sexual services from a child, we have to reflect on whether we are talking about prostitution alone or also about some of the activities that were mentioned earlier. If it is the latter, we will have to come back with another definition that might say something like "causing or inciting a child to be involved in the provision of sexual services", knowing that that would include prostitution and might also include the other activities that we described earlier. However, that will have to be addressed at stage 3. If prostitution is all that we are talking about, it would be acceptable to use that term, but I will have to come back at stage 3 on the wider issues that were mentioned earlier.

Marlyn Glen: Thank you.

The Convener: I have a probing question on proving the complainer's age. The Law Society of Scotland has highlighted to us the contrast between the different approaches towards that in amendments 56 and 63. Amendment 56 creates an offence and places the burden of proving that the accused did not reasonably believe that the complainer was 18 years or over on the prosecution, whereas amendment 63, which concerns indecent photographs of 16 and 17-year-olds, creates a defence to the principal offences that are contained in sections 52 and 52A of the Civic Government (Scotland) Act 1982. Why is it necessary to adopt two different approaches?

Hugh Henry: One of the main parts of the offence that amendment 56 creates is that the offender

"does not reasonably believe that"

the child

"is aged 18 or over".

Therefore, we think that it is right that the burden to prove all the relevant facts that constitute the offence should be on the Crown. However, when it comes to claiming the benefit of a specific exception to an offence—as in the case of the indecent pictures exceptions—it is right to require the accused to raise an issue on the different elements of the exception. The burden of proof is on the Crown under the main offence on indecent pictures and shifts only when it comes to the exception.

The Convener: I think that I understand that.

The third and final mini-debate on group 1 concerns the new offences as they relate to pornography.

Margaret Mitchell: I seek a fuller explanation of the phrase "involved in pornography" in paragraph (1)(a) of the new section that amendment 57 would insert. Would it include involvement in verbal activities as well as images and would it cover a communication in an internet chat room?

Hugh Henry: Amendment 60 provides the definition that Margaret Mitchell seeks:

"a person is involved in pornography if an indecent image of that person is recorded; and similar expressions, and 'pornography', are to be construed accordingly."

Do you want me to talk generally about the offences as they relate to pornography or do you want me to stick to answering that specific question, convener?

The Convener: I am happy for you to continue, if you so wish.

Hugh Henry: I will do so. If there are any further questions, I will get back to Margaret Mitchell.

By creating these offences, we are trying to tackle the situation in which someone is organising activities related to child pornography and is arranging for children to be involved. The offence created by amendment 57 criminalises someone who "intentionally causes or incites" children to become involved in pornography. Amendment 58 creates an offence of controlling a child involved in pornography. The offence created by amendment 59 criminalises those who arrange or facilitate child pornography. Therefore, these offences target the pimps, recruiters and those who make the arrangements for children to become involved in pornography. All three offences have a maximum penalty on indictment of 14 years' imprisonment.

Amendment 61 also applies to these offences. That means that prosecution for one of the offences does not exempt that person from any proceedings for any other offence. In effect, that means that someone who recruits children into pornography and also takes indecent photographs of them would be liable to proceedings under the causing or inciting pornography offence and under the offence of taking an indecent photograph of a

child, which I will speak to later. However, the provisions also ensure that the causing, inciting and arranging pornography offences do not inadvertently catch those who would otherwise fall within an exception to the indecent photograph offences. The indecent photographs amendments provide certain exceptions for people who are over the age of 16 who are married or in a relationship. I will deal with those amendments later.

However, I mention that, for example, we propose that someone who takes an indecent photograph of a 16 or 17-year-old would not commit an offence if they can show that the person gave consent for the photograph to be taken and that they were either married or in a relationship with that person. In certain circumstances, taking an indecent photograph of a 16 or 17-year-old could be construed as arranging that person's involvement in pornography. In such circumstances, it is right that proceedings should be taken under both offences. However, if the circumstances are such that the activity is excepted from the indecent photographs offence, it seems sensible that the person taking the photograph should not be liable to prosecution for that activity under any other provision. Amendment 60 therefore provides that a person does not commit one of the offences in the group solely by committing one of the indecent photographs offences.

Margaret Mitchell: This is still not clear to me. We seem to talking about a photographic image all the time. Could a verbal communication be pornographic in nature and be covered by the legislation?

Hugh Henry: I doubt it very much. I cannot think of any circumstances in which verbal communication could be construed as pornographic for the purposes of the bill. Stewart Stevenson raised questions about the differences between images and photographs, and we are quite clear that the interchangeable use of the words in various areas is such that images would be covered.

Margaret Mitchell: Given the evidence of Rachel O'Connell and the Scottish high-tech crime unit, we are aware that explicit communication—a reasonable man might consider it to be pornographic in nature—can happen very quickly in a chat room on the internet and that it can be verbal. Would you be prepared to reconsider the matter?

The Convener: Before you answer, minister, I should point out that we will continue to press you on the point that Margaret Mitchell raises, as we have been advised that such activity would be charged under breach of the peace, even though it relates to conversations. Our question is whether the activity would be covered by the Sexual Offences Act 2003. Although we think that the point may be covered, there is also the question whether controlling, inciting or facilitating would be covered.

Hugh Henry: I was going to respond to Margaret Mitchell on exactly the point that you raise. I believe that breach of the peace and lewd and libidinous behaviour would cover such behaviour. However, for the purposes of defining pornography, I am not sure that it would be easy to include the type of activity described by Margaret Mitchell.

The Convener: Perhaps I should have raised this earlier in the debate, but if a 16 or 17-year-old is involved in a sex telephone line, would that constitute a sexual service? I think that Margaret Mitchell was referring to that category of pornographic conversation.

Hugh Henry: I intended to come back on that point. If we agree to the definition of sexual services that we have been discussing, and if the activities raised earlier can be construed as being defined under the heading "sexual services", such conversations, or the words involved in them, would certainly be caught by this part of the legislation. However, it would be difficult to legislate on the basis that a comment from one person to another, whether over the telephone or otherwise, should be sufficient to be regarded as involving pornography. Other offences exist that would cover such behaviour. We can reflect on the point, but I doubt whether anything could easily or sensibly be done to widen that part of the definition.

Margaret Mitchell: That explanation is helpful and welcome. Some internet activities may fall more within the definition of a service as opposed to being individual communications. I hope that we can consider the matter further, perhaps at stage 3.

The Convener: To go back to the starting point, some of the amendments amend the Civic Government (Scotland) Act 1982, section 52 of which refers to any person who takes, permits to be taken, distributes, possesses or publishes indecent photographs of a child. That provision is to be amended to extend the definition of a child to people of 18 years of age. There are a number of exceptions. The European Council framework decision allows an exception for pornographic material depicting a child or a person who has reached the age of consent. Therefore, although the Executive has chosen to amend the 1982 act, it could have chosen not to do so.

Hugh Henry: That is correct. We could have stuck with the framework decision and made no exceptions.

The Convener: The Executive could have stuck with the framework decision, given that the age of consent in Scotland is 16 years of age. If it had done so, exceptions would not have been required.

Hugh Henry: We would have been required to make exceptions because the framework decision is very specific and refers only to exceptions in relation to private use. Therefore, we could not just leave the age limit at 16.

The Convener: I understand. There has been a lot of emphasis on the point that the Executive could not do that.

One of the exceptions that I want to debate with the minister is that in relation to marriage or partnership relationships.

Hugh Henry: That relates to the next group of amendments.

The Convener: I will leave it for now in case I confuse matters.

If no other member wishes to speak, I will ask the minister briefly about language—it may or may not be a similar point to the point that we discussed in relation to sexual services and prostitution. The Civic Government (Scotland) Act 1982 talks about indecent photographs and the amendments talk about pornography. Are those terms interchangeable? Do they mean the same thing?

11:15

Hugh Henry: Pornography is defined as being an indecent image. There is no difference in meaning between the words "image" and "photograph" in the context of the provisions. Different words have been chosen at different points for drafting reasons. We do not intend there to be any difference in meaning, and we do not believe that there is any difference in meaning.

The Convener: Do you wish to say anything to wind up?

Hugh Henry: While I commend the amendments to the committee, I recognise that, in light of our discussion, there will have to be a further reflection on certain aspects of the amendments and that those issues will need to be addressed at stage 3. The best way to do that would be to agree to the amendments and to build on them for stage 3, rather than have to come back at stage 3 with a whole batch of new amendments.

Amendment 56 agreed to.

Amendments 57 to 61 moved—[Hugh Henry]—and agreed to.

The Convener: Amendment 62, in the name of the minister, is in a group on its own.

Hugh Henry: The purpose of amendment 62 is to remove the time limit in relation to the offence at section 5(3) of the Criminal Law Consolidation (Scotland) Act 1995, which allows for the prosecution of any person who has, or attempts to have, unlawful sexual intercourse with any girl of, or over, the age of 13 and under the age of 16. Section 5(4) directs that no prosecution shall commence for an offence under section 5(3) more than one year after the commission of the offence.

The apparent purpose of section 5 is to act as a safeguard that will prevent prosecution for offences long after they have occurred. However, the Crown Office has advised that the time bar does not take into account the reality of how long it can take victims in such cases to disclose fully the circumstances of what happens to them. As a result, the time bar has frequently left the Crown unable to prosecute such cases. The Crown has informed us that there are cases in which it has considered prosecution for rape but, because of the nature of the relationship between the accused and the victim, it has not been in a position to establish that sexual intercourse occurred without the victim's consent.

The alternative offence for victims aged between 13 and 16 is the one under section 5(3), but by the time evidence has been gathered and the Crown finds that it is unable to prosecute for rape, it is often too late to take proceedings under the section 5(3) offence. It is clearly unacceptable that cases that may have involved abuse of girls by adults should escape prosecution because of a time bar. The normal rules on delay in relation to a fair trial would, of course, still apply. I hope that the committee agrees that the time bar should be removed.

I move amendment 62.

The Convener: How will that affect custody cases or cases in which a person has been remanded and the 110 or 140-day rule applies? I assume that the proposal will not affect such cases because the time limits apply from the time of committal, by which time the victim has already reported the crime.

Hugh Henry: Amendment 62 will not affect those time limits in any way. The time limits are clearly set out elsewhere.

Amendment 62 agreed to.

The Convener: Amendment 63, in the name of the minister, is in a group on its own.

Hugh Henry: I apologise for the difficulties that we have caused the committee through our delayed lodging of amendment 63. I realise that the committee wanted to consult more widely on

the matter, but we wanted to ensure that we had the right definitions and that our amendments were adequately and properly constructed. I hope that the amendment can at least be the starting point for further deliberation. Even if the committee accepts amendment 63, it will have time to reflect further, if it so wishes, before stage 3.

Amendment 63 will amend the indecent pictures offences at sections 52 and 52A of the Civic Government (Scotland) Act 1982 so that they apply to young people under 18. The offences currently apply only to children under 16. However, given that the age of sexual consent is 16, I believe that it is only right that there should be some limited exceptions to those offences for young people who are in consensual relationships and who consent to photographs being taken or possessed by their partner.

The amendments that we have lodged are an attempt to create a set of exceptions in relation to the offences at sections 52 and 52A of the 1982 act. The exceptions will be created by setting out a number of issues that the accused requires to raise and which the Crown would then have to disprove in order for the offence to be proved.

Let us take, for example, the offence of taking or making an indecent photograph. If the accused argues that either the person in the photograph was 16 or over, or that the accused reasonably believed that to be so and that, when the offence was charged or the accused took the photo, the accused and the child were either married or were partners in a relationship and the child consented to the photographs being taken, or the accused reasonably believed that the child consented, then the Crown must disprove at least one of those elements in order for the offence to be proved. In other words, unless the Crown establishes beyond reasonable doubt the contrary to one of those issues, raised by the accused, the offence has not been committed.

All the indecent pictures offences have similar exceptions, except the offence at paragraph 52(1)(d) of the 1982 act, which creates the offence of publishing an advertisement that conveys that the advertiser distributes or shows indecent photographs of children. I cannot see any circumstances in which we would want an accused person to be exempt from committing that offence.

I hope that the committee agrees that there is a balance to be struck between maintaining the civil liberties of young people while strengthening protection of them from people who would exploit and abuse them. I would very much welcome the committee's views on whether we have struck that balance and found the best way to proceed.

I move amendment 63.

Margaret Mitchell: On the reference to partners in a relationship, could you make that provision a bit more precise? The Law Society of Scotland suggested that that could almost mean partners in a commercial relationship and that a better definition might be that in the Family Law (Scotland) Bill, which refers to people who are married, cohabiting, civil partners or two persons who are living in a relationship that is similar to that of a husband and wife. Such a definition might be more precise and would avoid any loophole such as references to commercial relationships, for example.

Hugh Henry: Of course, it is for the courts to define the word "relationship". Proposed new subparagraph 52B(2)(b)(i) of the Civic Government (Scotland) Act 1982 uses the word "married", so that relationship is covered. Proposed new subparagraph 52B(2)(b)(ii) of the act refers to alternative relationships to marriage; such a relationship would have to be construed as a personal or emotional relationship. It is certainly not our intention that commercial relationships be covered by the bill but, as I say, that would be a matter for the courts.

I would welcome the committee's views on whether we are right to consider the exceptions, whether they are right and whether they are sufficiently robust.

The Convener: I am ambivalent about the exceptions. In the previous debate on grooming, I was persuaded that making marriage an exception is not a good idea. Marriage should not be a defence for doing something wrong. However, I am not going to make a major argument here; I do not feel strongly one way or the other.

On Margaret Mitchell's point, the provision that covers partners in a relationship seems to be exceptionally wide and open to misinterpretation and could be construed as meaning any relationship. I would be happier if the definition was tighter. I appreciate that it is difficult to define a thing when we are trying to narrow its scope, but I feel that the definition is too wide. We are trying to protect children, but we know that there are all sorts of people out there who will manipulate children and collaborate with others and that they will find a way around the provision, especially because it is so wide.

Proposed new paragraphs 52B(2)(a), (b) and (c) of the Civic Government (Scotland) Act 1982 would all have to apply. A photograph would have to be of a child aged 16 or over, the people would have either to be married to each other or be partners, and there would have to be consent before we could say that no offence was committed. We might want to debate consent later on, but new section 52B needs to be clearer that all three criteria would have to be fulfilled together.

However, my main point is that the provision about partners in a relationship is too wide.

Stewart Stevenson: I have an example that might cause a legal difficulty, which is that of two men and a girl who live in a house together. It is perfectly possible that the girl could have simultaneous relationships with both men. Is it envisaged that that is a relationship that would be excluded when, for example, one person took a photograph of the other two? The question is almost rhetorical because I do not think that we think that such a case ought to be excluded, but is there a risk that such a situation would be excluded?

Marlyn Glen: I am considering the matter from two different points of view, which is strange. If we pursue Stewart Stevenson's point, amendment 63 could almost be interpreted as making an exception for partners in a sexual relationship, which would offer a defence for everyone. If there is to be an exception for people who are married, the bill should also provide an exception for people who have entered into a civil partnership.

11:30

Margaret Mitchell: Two factors would have to kick in: the consent of the 16 or 17-year-old; and the existence of a relationship. If there was no relationship, could a person who kept such material for private use still be subject to prosecution?

Hugh Henry: Yes. That brings us back to the convener's point. We are saying that if an exception is to apply, three clearly linked facts must be established, which are set out in paragraphs (a), (b) and (c) of subsection (2) of proposed new section 52B of the 1982 act. All three paragraphs must apply, notwithstanding that there is no "and" between paragraphs (a) and (b)—that is just how the language works. Margaret Mitchell is right to say that there can be no exception if there is no relationship.

People who had entered into civil partnerships would be regarded as "partners in a relationship". However, I take it from what the convener said that she is concerned that the phrase "partners in a relationship" is too wide and might be open to misinterpretation—I do not know what other members of the committee think about that.

Stewart Stevenson asked what would happen if a person was in a relationship with two people. If we accept that a girl is involved in two relationships and a photograph of her is taken with one of the people with whom she is in a relationship, the defence on the ground that the two people in the photograph were partners in a relationship could apply. Of course, that defence would not apply to the third person, because that person would not be a partner in that relationship. However, there might be a defence for the third person if that person were photographed. I hope that I understood Stewart Stevenson correctly.

Subsection 6 of proposed new section 52B of the 1982 act would also have to be considered, because an offence would be committed if a photograph was distributed or shown to anyone other than the child. Therefore, if the photograph was shown to the third party who was in a relationship with the child, an offence would be committed, because the third party was not involved in taking the picture, even though they were in a relationship with the child. In Stewart Stevenson's scenario, two different relationships are going on. Although the exception might apply to the second and third parties in relation to their respective relationships with the girl—if that could be properly established—the defence could not be widened to include a third party, because new section 52B(6) of the 1982 act would provide a defence only if the photograph was being kept to be

"distributed or shown only to the child."

Therefore, if the photograph was shown to a third party who was not involved in the photograph, an offence would be committed.

The Convener: However, "partners" might refer to more than two people.

Hugh Henry: Yes, but the other partner would not be regarded as a partner for the purposes of a defence in relation to the photograph. They would be regarded as a partner in relation to other photographs—if we accept that definition of a relationship.

Stewart Stevenson: The difficulty is that we do not have a definition that is solid. I accept what you are saying, and I think that it is useful to have that on the record. Nevertheless, I think that you should consider the matter further.

Hugh Henry: Do you mean the definition of "partners in a relationship"?

Stewart Stevenson: I am just making a general point. The phrase that I have used previously—the one that we had in our minds—is "marriage or a relationship having the general characteristics of marriage". That is what we were all thinking about, and it appears to offer the opportunity to draw the definition more broadly. However, it is useful to have what you have said on the record.

Hugh Henry: Because of the delay in putting amendment 63 before the committee, I welcome the opportunity to hear what each member of the committee has to say, especially as the committee may want to reflect further on the matter ahead of stage 3. In reconsidering what we need to do—I have heard from most members of the

committee—it would be useful to know the general view of the committee.

Marlyn Glen: This debate underlines the difficulty in our not looking at the matter in depth before this stage. I urge the minister to reconsider the amendment from an equal opportunities point of view. I do not accept what he said about proposed new subparagraph 52B(2)(b)(i) of the 1982 act—"married to each other"—and about civil partnerships being included in proposed new subparagraph 52B(2)(b)(ii). I am also not entirely comfortable with what Stewart Stevenson said about relationships that are like marriage. I do not think that the bill's intention is to make rules about relationships that are much more casual than that. We will have to be very careful in choosing which line to go down, recognising that we are talking about under-18s. We must watch that we are not being hugely prescriptive about the behaviour of people who are above the age of consent.

Mrs Mulligan: I share the concerns that other members of the committee have expressed with regard to how we define relationships. I have some concerns about the opportunity for exploitation with the use of a relationship as a defence. Some of the points that Marlyn Glen has just raised might lend themselves even more to that possibility, and I would have concerns about that.

In the context of defining a relationship, did the Executive give any thought to whether some element of time should be involved? If somebody has been in a relationship for two weeks, is that an established relationship or does the relationship have to have continued over a period of time? Does it have to display certain characteristics? I am not sure how we can answer such questions, but I am interested to hear whether the minister has any views on them. My main concern is that we should not allow the range of options within a relationship to be used as a defence when a child is being exploited.

Hugh Henry: We spent some time trying to get the balance that I mentioned between protecting the civil liberties of young people and giving protection to those who could be exploited. It would be for the courts to determine whether the definition could apply to a relationship of two weeks or whether the relationship would have to have been established for two months or longer. I note what the committee has said in seeking a clearer definition. There must be an element of stability, and we must try to avoid the possibility of exploitation based on vulnerability, which can happen in some relationships. I will reflect on those issues.

The Convener: It would be helpful to reflect on that whole debate. If we were to tighten up the question of marriage and what partners we want to give exceptions to, would we be happy to exclude from those exceptions 17-year-olds in a casual relationship such as a one-night stand? We need to be clear that that scenario would not be exempt and that it would be criminalised.

Hugh Henry: Most members of the committee seem to be saying that they accept the principle of exceptions, but that they want more clarity and better definition in relation to those exceptions, particularly with regard to the involvement in a relationship.

Margaret Mitchell: The definition of "partners in a relationship" could be clarified.

Stewart Stevenson: I am happy with what the minister said. A final thing that the minister might consider, in relation to the exception, is whether the rights to any such images cease if the relationship ceases. Is that otherwise covered? It looks like it might be.

Hugh Henry: It would depend what happens at the end of the relationship. However, if we consider subparagraph (6)(c)(i) in amendment 63, the child would have to consent to the photograph being in the possession of the accused. Paragraph (6)(d) in amendment 63 says:

> "the accused had the photograph in his possession with a view to its being distributed or shown only to the child."

I suppose we could argue that, at the end of a relationship, the child—as defined for this legislation—could be content for that person to be left with a photograph, but without the child's consent it would become an offence to retain possession. Whether the consent had been withdrawn would be a matter of fact to be determined by the court.

The Convener: That raises a different point, which we wanted you to clarify. However, it clarifies Stewart Stevenson's point. We are now on to the question of consent. What happens if consent is withdrawn? You said that that is a matter of fact. When is consent not consent? Is it when someone consented at the time but later withdraws that consent?

Hugh Henry: If the person who has the photograph knows that the consent has been withdrawn, they should dispose of the photograph.

The Convener: Right.

Marlyn Glen: I have a question that is connected to the Prohibition of Female Genital Mutilation (Scotland) Bill, which the Equal Opportunities Committee—of which I am a member—is considering. That committee has been considering informed consent, forced consent and the word "consent" itself. We have been talking about over-16s, and it appears that in some cases we do not accept that there can be

informed consent by over-16s; in this committee, however, we do. Are we talking about consent that has not been forced in any way?

Hugh Henry: Scots law is quite clear. I do not think that it would cover the concept of forced or enforced consent because, for the purposes of Scots law, consent must be freely given by a person who is capable of understanding the implications of doing so. Case law has already been established that consent should not be the direct result of violence, or of the accused having taken advantage of an age difference between himself and the victim or of a position of responsibility over the victim.

11:45

The Convener: As members have nothing more to say about consent, I ask the minister whether he wants to say anything further to wind up.

Hugh Henry: No, other than to say that if amendment 63 is agreed to as a starting point for another discussion at stage 3, the Executive will reflect on the points that members have made.

Amendment 63 agreed to.

Section 9 agreed to.

Before section 10

The Convener: Amendment 64, in the name of Cathy Jamieson, is grouped with amendments 65 and 66.

Hugh Henry: The amendments in the group will create a new schedule that makes minor and consequential amendments to other legislation. First, new offences will be added to section 16B of the Criminal Law (Consolidation) (Scotland) Act 1995 in relation to indecent pictures of children, paying for the sexual services of a child and arranging or facilitating child prostitution and pornography. As a result, any act that is done by a British citizen or United Kingdom resident in a country or territory outside the UK that constitutes an offence in that country and which would also be one of the new offences if it had been done in Scotland will constitute that offence, and proceedings can be taken in Scotland. That means that people cannot escape prosecution simply by travelling to another country to carry out the offences. As long as the behaviour is also an offence in that country, we can prosecute them here.

Secondly, the new grooming offence and all the new child prostitution and pornography offences will be added to schedule 1 to the Criminal Procedure (Scotland) Act 1995 for cases in which the victim of the offence is under 17 years old. That will have a number of benefits. The 1995 act provides additional powers of arrest without warrant in relation to those who are suspected of committing those offences, but more important, a number of child protection procedures can result from the offences being included in the schedule. A convicting court will have the power to refer a child who is the victim of any of the offences to the reporter to the children's panel. That additional protection would also extend to any child who lives in the same household as the victim, any child who lives in the same household as the offender and any child who comes to live in any of those households in the future. Any specific compulsory measures that are needed to protect or support the child could then be arranged by the children's hearing.

Of course, whether a child needs support or protection as a result of the offences will depend on the circumstances of the particular case, and referral to the reporter will be at the discretion of the court. Even when the court refers, it will be for the reporter to consider the circumstances of individual cases and to determine whether compulsory measures are needed and a children's hearing should be convened. To maintain consistency in schedule 1, those procedures will be triggered only when the victim of the offence is under 17 years of age.

Finally, the amendments will add all the new offences to schedule 3 to the Sexual Offences Act 2003, which lists offences that result in referral to the sex offenders register. Members will see that automatic referral will occur only in cases in which the victim is under the age of 16 and the offender is either over 18 or has been sentenced to at least 12 months' imprisonment. There is a balance to be struck and the amendments strike that balance. It would not be right for people who have purchased sex from someone aged between 16 and 18 to go on to the sex offenders register in all circumstances or for them necessarily to be regarded as a sex offender in all circumstances. Equally, it is clear that there could be circumstances in which that is appropriate. Likewise, someone who is under 18 who commits any of those offences should not necessarily be regarded as a sex offender in all circumstances—therefore, they should not automatically be subject to the notification requirements. However, as I have said, there will be circumstances in which the people whom I have mentioned should go on to the register, which is why the amendments provide for the court to have discretion to refer to the register any offender who has committed any of those offences if it thinks that it is appropriate to do so.

I move amendment 64.

The Convener: Does that mean that, in the case of a 17-year-old who was charged with one of those offences, the court would determine whether they would go before a children's panel?

Hugh Henry: If they were sentenced to 12 months' imprisonment or more, they would automatically go on to the register; in other cases, the court would determine that.

The Convener: So the length of the sentence determines whether they go on the register.

Hugh Henry: Yes.

Stewart Stevenson: Under the existing provisions, can people under the age of 18 be put on the sex offenders register?

Hugh Henry: Yes. If Stewart Stevenson gives me a moment, I will check the position. My officials have confirmed that the Sexual Offences Act 2003 includes provision for offences such as rape.

Stewart Stevenson: Given that age is excluded in other parts of the bill, why does the Executive want to include this provision?

Hugh Henry: We are trying to reflect the committee's concerns on the way in which we deal with young people in particular. We want to ensure that we deal with them appropriately and not automatically. That is the balance that we are attempting to strike.

Stewart Stevenson: To clarify, are you saying that, if someone below the age of 18 has committed an offence under part 1 of the bill, the courts would have the option of putting that person on the sex offenders register.

Hugh Henry: That is correct.

The Convener: Do you want to say anything in winding up?

Hugh Henry: No, thank you.

Amendment 64 agreed to.

After the schedule

Amendment 65 moved—[Hugh Henry]—and agreed to.

Sections 10 and 11 agreed to.

Long title

Amendment 66 moved—[Hugh Henry]—and agreed to.

Long title, as amended, agreed to.

The Convener: Everyone will be pleased to hear that that ends our stage 2 consideration of the bill.

Given the debate that has taken place on amendments for stage 3, it would be helpful if, particularly in the areas on which there is agreement, the committee could see those amendments as soon as possible. We can then decide whether to include any further provisions by way of amendment. I thank the minister and his officials.

Hugh Henry: Thank you, convener.

The Convener: I am pleased to report that we have secured a debate on our report, "Inquiry into the Effectiveness of Rehabilitation in Prisons". The debate will be held on 11 May: we will share a slot with the Procedures Committee in the afternoon and will have an hour and a half. The committee put a lot of work into the inquiry and the report. Some of our recommendations are not only worthy of debate, but address new ground. The Management of Offenders etc (Scotland) Bill covers a lot of the subject matter of the report, but we can use the plenary time that has been allocated to us to put our findings on the record.

Annual Report

11:54

The Convener: Agenda item 3 is consideration of the committee's draft annual report. We are allowed about 750 words for our report, which must be submitted by 11 May—as usual, we have a pressing deadline to meet. I invite members to comment on the draft report. Does any member have a suggestion for an area of work that should be emphasised in the report? For example, we could highlight some of the petitions that we have considered.

No member has a comment to make, so the clerks and I will try to reflect the committee's views in the final draft. Perhaps we will include some of the petitions that we closed last week. Even though we did not conduct full-scale inquiries into the subject of the petitions, quite a bit of consideration was given to them.

11:55

Meeting continued in private until 13:30.

Members who would like a printed copy of the *Official Report* to be forwarded to them should give notice at the Document Supply Centre.

No proofs of the *Official Report* can be supplied. Members who want to suggest corrections for the archive edition should mark them clearly in the daily edition, and send it to the Official Report, Scottish Parliament, Edinburgh EH99 1SP. Suggested corrections in any other form cannot be accepted.

The deadline for corrections to this edition is:

Friday 13 May 2005

PRICES AND SUBSCRIPTION RATES

OFFICIAL REPORT daily editions

Single copies: £5.00
Meetings of the Parliament annual subscriptions: £350.00

The archive edition of the *Official Report* of meetings of the Parliament, written answers and public meetings of committes will be published on CD-ROM.

WRITTEN ANSWERS TO PARLIAMENTARY QUESTIONS weekly compilation

Single copies: £3.75
Annual subscriptions: £150.00

Standing orders will be accepted at the Astron Print Room.

Published in Edinburgh by Astron and available from:

Blackwell's Bookshop
53 South Bridge
Edinburgh EH1 1YS
0131 622 8222

Blackwell's Bookshops:
243-244 High Holborn
London WC1 7DZ
Tel 020 7831 9501

All trade orders for Scottish Parliament documents should be placed through Blackwell's Edinburgh

Blackwell's Scottish Parliament Documentation Helpline may be able to assist with additional information on publications of or about the Scottish Parliament, their availability and cost:

Telephone orders and inquiries
0131 622 8283 or
0131 622 8258

Fax orders
0131 557 8149

E-mail orders
business.edinburgh@blackwell.co.uk

Subscriptions & Standing Orders
business.edinburgh@blackwell.co.uk

RNID Typetalk calls welcome on
18001 0131 348 5412
Textphone 0845 270 0152

sp.info@scottish.parliament.uk

All documents are available on the Scottish Parliament website at:

www.scottish.parliament.uk

Accredited Agents
(see Yellow Pages)

and through good booksellers

Printed in Scotland by Astron