JUSTICE 2 COMMITTEE

Wednesday 19 September 2001
(*Morning*)

Session 1

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JUSTICE 2 COMMITTEE
†23rd Meeting 2001, Session 1

CONVENER

*Pauline McNeill (Glasgow Kelvin) (Lab)

DEPUTY CONVENER

*Bill Aitken (Glasgow) (Con)

COMMITTEE MEMBERS

*Scott Barrie (Dunfermline West) (Lab)
Mrs Margaret Ewing (Moray) (SNP)
*Mrs Mary Mulligan (Linlithgow) (Lab)
Tavish Scott (Shetland) (LD)
*Stewart Stevenson (Banff and Buchan) (SNP)

*attended

THE FOLLOWING ALSO ATTENDED:

Lord James Douglas-Hamilton (Lothians) (Con)
Christine Grahame (South of Scotland) (SNP)
Iain Gray (Deputy Minister for Justice)
Maureen Macmillan (Highlands and Islands) (Lab)

WITNESSES

Dr Michele Burman (University of Glasgow)
Dr Lynn Jamieson (University of Edinburgh)

CLERK TO THE COMMITTEE

Gillian Baxendine

SENIOR ASSISTANT CLERK

Claire Menzies

ASSISTANT CLERK

Fiona Groves

LOCATION

The Chamber

† 22nd Meeting 2000, Session 1—joint meeting with Justice 1 Committee.

Scottish Parliament

Justice 2 Committee

Wednesday 19 September 2001

(*Morning*)

[THE CONVENER *opened the meeting in private at 11:03*]

11:09

Meeting continued in public.

Protection from Abuse (Scotland) Bill: Stage 2

The Convener (Pauline McNeill): While everyone is settling in, let me introduce item 2 of this morning's agenda—the Protection from Abuse (Scotland) Bill. This is the Parliament's first committee bill, so the procedure is slightly different, but I am sure that, having survived so far, we will get to grips with it.

I welcome Christine Grahame and, on behalf of the committee, congratulate her on being chosen as the convener of the Justice 1 Committee. She is having a baptism of fire today. This morning, because the bill has been initiated by the Justice 1 Committee, Christine Grahame will be known as the member in charge.

On previous occasions when we have debated bills at stage 2, a minister has moved Executive amendments. That will not happen this morning, although the Deputy Minister for Justice, Iain Gray, is present and I am sure that he will speak to some of the amendments.

I propose not to go through the brief that explains the procedure for committee bills. The general procedures are known by everyone, so I think that we can get started. I remind those present that only members of the Justice 2 Committee may vote in any division.

Section 1 agreed to.

Section 2—Duration, extension and recall

The Convener: Amendment 11 is grouped with amendments 13, 15 and 16.

Bill Aitken (Glasgow) (Con): It should not particularly concern us that there is a formidable list of amendments on the marshalled list this morning. These amendments seek to clarify what might be an inconsistency and to highlight one or two drafting matters that may cause problems.

Amendment 11 would insert the words

"the order granting the power of arrest"

in subsection (1) instead of the word "it", because "it" is not capable of being defined. The amendment would simply tidy that up. Amendment 13 works on the same principle. Amendment 15 would insert the words "an order granting" into the text to make things clearer. The same words would be inserted by amendment 16.

The amendments would have no import other than to tidy up the bill to make it more grammatically proper. They would remove all doubt about the meaning.

I move amendment 11.

The Convener: If no member wishes to speak to amendment 11 or the other amendments in the grouping, I invite either Christine Grahame or the minister to speak.

11:15

Christine Grahame (South of Scotland) (SNP): This is certainly a departure for me; I could get used to sitting in the minister's chair.

Amendments 11, 13, 15 and 16 are directed at clarifying that the court order granting the power of arrest or extension will be served on the interdicted person. We do not think that the amendments are necessary, as the bill makes it clear that it is the power of arrest or its extension that requires to be served. It is quite clear that that means that a copy of the order made by the court that grants the application must be served. The drafting of the bill is in line with the equivalent provisions in the Matrimonial Homes (Family Protection) (Scotland) Act 1981, which simply refers to service of the interdict and the power of arrest, not to the court order. I invite Mr. Aitken to withdraw the amendments.

The Deputy Minister for Justice (Iain Gray): I support Christine Grahame's point. Although the amendments are well-intentioned, they are not required. The courts already have well-developed procedures for producing authenticated documents to be served on an affected person.

Bill Aitken: The amendments are necessary for reasons of clarity. Although I do not regard this to be a great issue, I feel that I should press amendment 11.

The Convener: The question is, that amendment 11 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Aitken, Bill (Glasgow) (Con)

AGAINST

Barrie, Scott (Dunfermline West) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Stevenson, Stewart (Banff and Buchan) (SNP)

The Convener: The result of the division is: For 1, Against 4, Abstentions 0.

Amendment 11 disagreed to.

The Convener: Amendment 12 is grouped with amendment 14.

Bill Aitken: Amendment 12 seeks to give some clarity to section 2(1) by inserting the phrase "by the courts" at the end of the sentence. I am not being pedantic; I feel that there could be difficulties of interpretation. We are operating on the assumption that section 2(1) provides that the power of arrest becomes effective only in the terms outlined in the subsection. However, we should make it clear that the documents will be prescribed by the courts. The amendment is as simple as that.

I move amendment 12.

Christine Grahame: Amendments 12 and 14 seek to clarify that the court should prescribe the court documents that require to be served along with the court order. However, it is not the intention that the documents should be prescribed by individual courts. The amendments are also unnecessary because section 7 contains a definition of "prescribed" that requires the documents that are to be served to be set out in rules of court. That will ensure a consistent approach throughout Scotland and avoid any need for the court to list documents on each occasion it makes an order. I hope that Mr. Aitken feels able to withdraw amendment 12.

The Convener: Minister, do you wish to speak to amendment 12?

Iain Gray: No. Christine Grahame has once again made the points that we would wish to make. I hope that Mr Aitken withdraws amendment 12.

Bill Aitken: I feel that, in the interests of clarity and given that we are dealing with legislation, we should express the exact intention. As a result, I press amendment 12.

The Convener: The question is, that amendment 12 be agreed to. Are we all agreed?

Members: No.

The Convener: There will be a division.

FOR

Aitken, Bill (Glasgow) (Con)

AGAINST

Barrie, Scott (Dunfermline West) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Stevenson, Stewart (Banff and Buchan) (SNP)

The Convener: The result of the division is: For 1, Against 4, Abstentions 0.

Amendment 12 disagreed to.

The Convener: Amendment 1 is grouped with amendments 2 and 3.

Christine Grahame: The amendments aim to ensure that the person who obtains a power of arrest under the bill is the person who has the right to make any further applications to the court and is given the right to be heard or to be represented at court. That would apply where there is an application for an extension or recall of the power of arrest. As the bill is drafted, the right is given to the person in whose favour the power of arrest has been granted. That might be interpreted as meaning a person other than the original applicant in circumstances where the power of arrest protects a person other than the applicant.

In most cases, the person who applies for the interdict will be doing so on their own behalf. However, in a limited number of circumstances, a person may be entitled to apply to the court for a power of arrest to protect another person from abuse. For example, that could be where an application is made on behalf of children or where the court has appointed somebody to act on behalf of a person who is incapable. It was not our intention that such people would make subsequent applications to the court. The necessary applications and representations at court should be carried out on their behalf by the original applicant. The amendment clarifies the position.

There is, perhaps, a need for a further minor amendment to the provision in relation to a child who reaches the age of 16 or a person who recovers from a mental illness. We are considering whether to introduce such a change at stage 3 and will discuss the position with the Scottish Executive.

I move amendment 1.

Bill Aitken: What Christine Grahame proposes has merit and I will support it.

Iain Gray: We welcome the amendments. We have concerns about children who turn 16 while covered by an interdict. However, as Christine Grahame has undertaken to consider that point further, we will support the amendments.

Christine Grahame: I am grateful to Bill Aitken for his support.

Amendment 1 agreed to.

Amendments 13 and 14 not moved.

Amendments 2 and 3 moved—[Christine Grahame]—and agreed to.

Section 2, as amended, agreed to.

Section 3—Notification to police

Amendments 15 and 16 not moved.

Section 3 agreed to.

Section 4—Powers and duties of police

The Convener: Amendment 17 is in a group on its own.

Bill Aitken: The amendment deals with an issue of principle, not an issue of clarity, and so is a little more serious than my other amendments have been.

We would all agree that depriving anyone of their liberty is extremely serious and that we must be careful when we decide to do so. The bill says that a police officer has the power to arrest someone if he or she

"considers that there would, if that person were not arrested, be a risk of abuse or further abuse by that person in breach of the interdict."

That is not sufficient in terms of law or equity. If an officer is "considers" that something is the case, that is a question of personal judgment. We should sharpen that up. The officer concerned should have "reasonable cause" for suspicion. That imposes on the police an increased duty of care to ensure that their actions are apposite in the circumstances. I feel that the word "considers" does not have the force of "has reasonable cause" in this context. We would not wish to be considered to be acting oppressively. I therefore strongly recommend to the committee that the term "considers" be removed and "has reasonable cause" for suspecting inserted. We should do that in the interests of equity.

I move amendment 17.

Christine Grahame: I will just correct Bill Aitken. He implies that section 4(1) says "should be arrested". The section says "may arrest". There is considerable discretion at the outset. It is important to stress the words "a constable may arrest".

Section 4(1) sets out a two-stage test that must be met. First, the constable requires to have reasonable cause for suspecting that the alleged abuser is in breach of the interdict. That part of the test mirrors the test under section 15(3) of the Matrimonial Homes (Family Protection) (Scotland) Act 1981.

The second test at which amendment 17 is directed is an additional one that requires to be satisfied before arrest can take place. There is no additional test in the 1981 act. To satisfy the second part of the test, the officer must consider that, if the person were not arrested, there would be a risk of abuse or further abuse in breach of interdict. The additional test was inserted to ensure that the constable is required to make a judgment that the alleged abuser will again abuse the victim. The test is intended to ensure that alleged abusers are arrested only if there is considered to be a risk of harm or further harm to the victim.

The amendment would require the constable to look into the future and into the mind of the alleged abuser to find reasonable cause for suspecting that, if the alleged abuser were not arrested, they would commit further abuse. That seems to be an unnecessarily difficult hurdle or higher test. It is asking the police to use an additional safeguard especially as the first part of the test also has to be satisfied and there must be reasonable cause for suspecting a breach of the interdict.

In most situations, it is likely that the interdicted person's behaviour over the period of time from the initial incident or incidents will be sufficient to signify that further abuse would be likely if the person were not arrested. It will be necessary for there to have been an initial incident or incidents that result in the court granting an interdict and then a power of arrest. Another incident would have to follow to allow the first part of the test to be satisfied.

In light of the explanation that the bill enhances the protection of an alleged abuser, I hope that the member will withdraw the amendment.

Iain Gray: It is our view that, as drafted, the bill includes an additional test in comparison with the 1981 act. Therefore, the alleged abuser is already provided with additional protection. To amend the second test as proposed by Mr Aitken would set that second hurdle too high. We agree with Christine Grahame and ask Bill Aitken to withdraw amendment 17.

Bill Aitken: I am not prepared to withdraw amendment 17. The higher test is justified on the ground that the deprivation of any individual's liberty is a serious matter. It demands the higher test in this instance. All sides are attempting to apply reasonable considerations to the serious issues that the bill covers. In some respects, we minimise the effect of the bill if we are seen as unfair and oppressive. I am adhering to my submission and will press amendment 17.

The Convener: The question is, that amendment 17 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Aitken, Bill (Glasgow) (Con)

AGAINST

Barrie, Scott (Dunfermline West) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Stevenson, Stewart (Banff and Buchan) (SNP)

The Convener: The result of the division is: For 1, Against 4, Abstentions 0.

Amendment 17 disagreed to.

11:30

The Convener: Amendment 18 is grouped with amendments 22, 27, 37, 39, 40 and 41.

Bill Aitken: Amendments 22, 27, 37, 39, 40 and 41 are consequential on amendment 18, which deals with a point of principle. It attempts to clarify the status of an arrested person in relation to section 4 of the bill. The Criminal Procedure (Scotland) Act 1995 distinguishes between the rights and status of a person who has been detained under section 14 of that act and a person who has been arrested. For example, a detainee can be detained for a maximum period of six hours, which can be extended on application, but a person who has been arrested can be held in custody to appear before a lawful court on the next lawful day. Therefore, it is important that when a person is being held in custody we should be clear in our minds and in the bill whether that person has been arrested or is being detained.

Section 4 provides that a person may be arrested if they fall within the criteria in section 4(1), but section 4(2) refers to the person being detained. There is a possibility of confusion about the status of such individuals, so it is preferable to replace the word "detained" in section 4(2) with "held in custody there". That would clarify the position and would ensure that the bill acts in the same way as section 15 of the 1995 act.

I move amendment 18.

The Convener: It would be helpful if Christine Grahame could clarify the matter. I am interested in why the bill uses the word "detained". Bill Aitken has raised an important point for the scrutiny of the bill.

Christine Grahame: It might help if I set out briefly how the arrest regime under the bill will work. The police can arrest a person utilising the power of arrest for being in breach of interdict where certain conditions are satisfied. The arrested person is taken immediately to a police station and must thereafter be kept in custody until he is taken to court at the earliest opportunity. Throughout that process, the person's status does not change in the way that it tends to do under criminal procedure. When the arrested person is taken to the police station, the police must keep them in custody until the court appearance. That custody is referred to throughout the bill as detention. It is when the alleged abuser is at the police station that the rights that are available to them apply. It is clear that the term "detained" refers to the interdicted person who has been arrested and held in custody. That person is at no stage detained in the criminal sense of the word.

In the criminal sphere it is important to distinguish between detention and arrest because they carry different rights for the accused and impose different duties on the police. For example, the police may hold a person who has been detained for a maximum of six hours. The position under the bill is different because persons who are in breach of interdict are arrested and cannot hold the status of a detained person, as that term is understood in the criminal sphere.

The provisions of the bill in that respect are consistent with the provisions of the Matrimonial Homes (Family Protection) (Scotland) Act 1981, which refers to a person being detained. Those provisions have not caused confusion in identifying the status of persons during the past 20 years. I hope that that explanation will enable Bill Aitken to withdraw amendment 18.

Iain Gray: Christine Grahame pointed out that the roots of the bill lie in the Matrimonial Homes (Family Protection) (Scotland) Act 1981. The purpose of the bill is to extend the categories of people who can obtain an interdict with an attached power of arrest.

Consistency in language with the 1981 act is required rather than consistency with criminal law. The term "detained" is also used and understood in the same way in the Children (Scotland) Act 1995. As Christine Grahame said, that term has been in use in legislation for 20 years and it has not led to the kind of confusion that Bill Aitken fears. For consistency, the term "detained" is the correct one and therefore the amendments are unnecessary.

Bill Aitken: I am not convinced by the arguments against the amendment. As Christine Grahame and the minister said, the Matrimonial Homes (Family Protection) (Scotland) Act 1981 contains such phraseology, but the bill is likely to be more controversial because its terms are more likely to be challenged. For that reason alone, there is a clear justification for amending the bill to obviate such challenges and not leave ourselves hostages to fortune.

There is no reason why the amendment should not be incorporated in the bill. It is common sense. If we do not amend the bill accordingly, we may

live to regret it when we become open to challenge, which will be almost inevitable. I press the amendment.

The Convener: The question is, that amendment 18 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Aitken, Bill (Glasgow) (Con)

AGAINST

Barrie, Scott (Dunfermline West) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Stevenson, Stewart (Banff and Buchan) (SNP)

The Convener: The result of the division is: For 1, Against 4, Abstentions 0.

Amendment 18 disagreed to.

The Convener: Amendment 19 is in a group on its own.

Bill Aitken: I want to deal with the situation in which a person is held in custody before being brought before a court. We must consider the fact that, as drafted, the bill permits an arrested person to be held in custody until brought before a court under section 5 of the proposed legislation. Section 5 will apply when the procurator fiscal decides that no criminal proceedings are to be taken in respect of the matter that gave rise to that arrest. The bill makes no implied or express provision for the person to be held in custody until the next day when criminal proceedings are brought.

As section 135(3) of the Criminal Procedure (Scotland) Act 1995 deals with such matters, we should insert into the bill a reference to that section. That would remove the anomaly.

I move amendment 19.

Christine Grahame: I am grateful to Bill Aitken and the Law Society of Scotland for raising the matter. On looking at the section, I think that there may be a case for making an amendment to ensure that when criminal charges are brought, instead of the alleged abuser being pursued under the bill, the police have sufficient authority to hold the person in custody.

However, the amendment is defective as it refers only to summary criminal procedure and would not cover the situation if a serious charge under solemn provisions was brought. I will give more detailed consideration to the amendment. The police may already have sufficient powers under the relevant criminal legislation, without there being a need for any express provision in the bill. I ask the member to withdraw it.

I undertake to consider the position, perhaps in discussion with the police and Crown Office interests, to ensure that sufficient power exists. If appropriate, I shall lodge an amendment at stage 3. I am also happy to write to Bill Aitken and keep him advised of developments.

The Convener: Minister, do you wish to speak to the amendment?

Iain Gray: No. We would welcome further consideration by the member in charge.

The Convener: Bill Aitken, do you still wish to press the amendment?

Bill Aitken: The undertakings given by the member in charge have provided me with some reassurance, so I shall not press the amendment.

Amendment 19, by agreement, withdrawn.

The Convener: Amendment 20 is grouped with amendments 21, 23, 24, 25, 26, 28, 30, 33, 34, 35, 36 and 38. I call Bill Aitken to speak to and move amendment 20 and to speak to all the amendments in the group.

Bill Aitken: I shall speak only to amendment 20, as the other amendments are consequential and highly dependent on the result of the committee's deliberations on that amendment. Amendment 20 seeks to clarify the basis on which a person is held in custody under the terms of section 4(2). There is a clear distinction in Scots law, which has been established over many years, between the status of a person who has been detained under section 14 of the Criminal Procedure (Scotland) Act 1995 and earlier legislation, and that of a person who has been arrested. The maximum period of six hours is particularly relevant in this respect. This argument has been canvassed fairly thoroughly under one of the earlier amendments, so I shall simply adhere to the previous argument.

I move amendment 20.

Christine Grahame: The committee shares with Bill Aitken the desire to ensure that an arrested person is provided with appropriate rights and that their status is clear. It was for that reason that the rights of an alleged abuser following arrest were set out in the bill. The provisions of the criminal procedure acts do not apply to a person who has been arrested under the bill. All the rights that are available to the alleged abuser are set out in section 4(3) of the bill.

The purpose of setting out the rights of an arrested person in full was to make the bill clear and to avoid any confusion as to what rights they might be entitled to. I have already explained the difference between the rights of a person under that procedure and under criminal procedure. I therefore do not think that there is any need for the bill to refer to an "arrested" person instead of a

"detained" person, as I have already explained.

In addition, the effect of the amendments in this group would be to confer all the rights available under section 4(3) at the moment when the alleged abuser is arrested, as opposed to when they are taken to the police station. In some cases, that would give them rights that would not apply at a similar time to persons who are arrested under criminal law, and that could cause operational problems for the police. We do not consider that that would be appropriate.

However, although we are clear that there would be problems if the alleged abuser had all the section 4(3) rights at the moment of arrest, we are looking at section 4(3) again to see whether there is a need to ensure that some of those rights—for example, the section 4(3)(a) right to be informed of the reason for the detention—are conferred on the alleged abuser at the moment of arrest. We are giving further consideration to that and may lodge an amendment on that point at stage 3.

I hope that my explanation has been clear, and that members will see that adopting the criminal law terminology in this instance is unnecessary and would affect the rights that the alleged abuser is entitled to.

Iain Gray: The Executive would welcome further consideration of section 4, to examine which rights are available and when. We welcome Christine Grahame's commitment to re-examine that section.

Bill Aitken: Christine Grahame is quite correct to underline the rather strange circumstances in which we are dealing with this proposed legislation. To some extent, the bill is a hybrid of the criminal and the civil law of Scotland, and Christine is correct to underline the principles that apply in that respect.

We are talking about the rights of accused persons. Although we whole-heartedly endorse the principles behind the bill, anything that detracts from the rights of an accused person is something that we have to consider carefully. On that basis, I will press the amendment.

The Convener: The question is, that amendment 20 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Aitken, Bill (Glasgow) (Con)

AGAINST

Barrie, Scott (Dunfermline West) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Stevenson, Stewart (Banff and Buchan) (SNP)

The Convener: The result of the division is: For 1, Against 4, Abstentions 0.

Amendment 20 disagreed to.

11:45

The Convener: Does Bill Aitken wish to move amendment 21, which was debated with amendment 20?

Bill Aitken: On the basis that a principle was established in the vote on amendment 20, I will not move amendment 21.

Amendment 21 not moved.

Amendments 22 to 28 not moved.

The Convener: Amendment 29 is in a group on its own.

Bill Aitken: Amendment 29 deals with the situation when a young person has been detained following an allegation of abuse. The amendment would limit access to the child when there were reasonable grounds to suspect that the parent or guardian was involved in the incidents or alleged breach of interdict, or when the safety of the parent or guardian might be at risk.

The amendment would limit access to the child when that was essential to the further investigation of the offence under scrutiny or to the safety of the parent, guardian or both. Those of us who have had to deal with such matters, such as Scott Barrie, who has experience as a social worker, will be aware of the unfortunate situations that can arise from time to time when that problem manifests itself.

We must strike the balance between the rights of the accused and the bill's basic principles, to which we all adhere. On balance, I am satisfied that the amendment sets out the way in which we should proceed, and I commend it to the committee.

I move amendment 29.

Christine Grahame: In the criminal sphere, it may be necessary to prevent access because the alleged criminal offence may have involved a conspiracy between the child and the parent. In addition, a criminal investigation into the alleged offence will be continuing and there may be good reason to restrict access. However, we think that the position under the bill is rather different.

The interdict is directed at preventing an individual—in this case the child—from abusing the victim. It is therefore difficult to see how the parent could have been involved in the breach of the interdict. In addition, the police are not conducting an investigation into the alleged breach of the interdict. They are simply sending a report to the procurator fiscal on the facts and

circumstances that gave rise to the arrest in breach of interdict and detaining the person until their appearance in court. In those circumstances, even if the parent were involved in the conduct that led up to the breach of the interdict, we would see no reason why the parent should be prevented from having reasonable access to the child.

It is right to enable the parent to have access to the child. In the situation under the bill, we can think of no circumstances in which access to a child should be left to the discretion of the police. I ask the member to withdraw amendment 29.

Iain Gray: The Executive, too, thinks that a significant difference exists between measures that will be taken under the bill and those that are taken in the criminal sphere. To deny access or restrict the parent's access to the child is a serious measure to take and is not required in the circumstances that the bill deals with. Such a measure might be required in criminal investigations. We therefore hope that Bill Aitken will withdraw amendment 29.

Bill Aitken: It is accepted that what I am suggesting is a serious step to take, but I do not accept that the possibilities of such a situation arising are at all far-fetched. The terms of the legislation are deliberately and, quite rightly, set out fairly widely. We have wide parameters for what is meant by abuse and we can all go along with that.

It is not exaggerating the case to suggest that there could be instances where a youngster is involved in abuse and where the parent has been involved in a similar level of abuse against the same victim or complainer. It is unfortunate that the facts of life are such that those situations are not too infrequent.

I accept that what I am suggesting in some respects goes against arguments that I have advanced on other amendments. I am seeking in amendment 29 to restrict a right; I would not do so lightly. In this instance, and based upon experience, I think that amendment 29 is necessary and would strengthen significantly the terms of the proposed bill. I press amendment 29.

The Convener: The question is, that amendment 29 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Aitken, Bill (Glasgow) (Con)

AGAINST

Barrie, Scott (Dunfermline West) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Stevenson, Stewart (Banff and Buchan) (SNP)

The Convener: The result of the division is: For 1, Against 4, Abstentions 0.

Amendment 29 disagreed to.

The Convener: Amendment 4, in the name of Christine Grahame, is grouped with amendments 5, 31 and 6. I point out that if amendment 5 is agreed to, amendment 31 will be pre-empted and cannot therefore be taken.

Christine Grahame: I will speak to amendments 4, 5 and 6. The amendments add an additional minor requirement to police procedures and apply after the police have arrested a person using a power of arrest under the bill.

Under the bill as drafted, the police require to record the time at which certain requests for intimation to a solicitor or other person are made or when action is taken in response to those requests or in relation to a child. The amendments also require the police to record what the request was for and the action that they took either in response to a request or in relation to a child. It could be expected that the police routinely record such details in other areas. The amendments put that good practice on to a statutory footing. That should not be an onerous requirement on the police. The committee is grateful to the Executive for suggesting the amendments, which we are happy to lodge and move today.

I agree that amendment 31 picked up a possible difficulty with the bill because the reference to "or" meant that it was not clear whether the police required to record both the time at which a request was made and the time when action was taken. That point has been picked up in the drafting of amendments 4, 5 and 6. I hope that Bill Aitken will therefore not move amendment 31.

I move amendment 4.

Bill Aitken: Having heard what the member in charge has had to say, I do not think that I need to contribute any more. When the time comes, I will not move amendment 31.

Iain Gray: We support amendments 4, 5 and 6 for the reasons that have already been outlined.

Amendment 4 agreed to.

Amendment 30 not moved.

Amendment 5 moved—[Christine Grahame]—and agreed to.

Amendment 31 not moved.

Amendment 6 moved—[Christine Grahame]—and agreed to.

The Convener: Amendment 32, in the name of Bill Aitken, is in a group of its own.

Bill Aitken: The reasoning behind amendment 32 is that we have to ensure that the bill, like everything else that we do in justice these days, is compliant with the European convention on human rights. I am not satisfied that the bill is following a proper course. Article 5 of the ECHR clearly lays down that a person who has been arrested and deprived of his or her liberty should be able to make a challenge in court at the earliest possible opportunity. The amendment would replace "as soon as practicable" with "immediately".

If we go ahead with the wording as it stands, I am certain that the legislation would be challenged and we could find ourselves in difficulty. It is best practice for an accused person to be brought before a court at the earliest possible opportunity. That principle has been enshrined in Scots law over the centuries and we should not dilute it in any way. I realise that that is not intended to happen, but the wording is loose and needs to be tightened up.

I move amendment 32.

Scott Barrie (Dunfermline West) (Lab): It is for the member in charge to respond, but the phrase "as soon as practicable" occurs all the time in legislation. I am used to seeing it in other pieces of legislation, so I do not see the difficulty with it.

The Convener: It would be useful to clear up why "as soon as practicable" has been chosen rather than "immediately".

Christine Grahame: Amendment 32 would require the police to inform the procurator fiscal immediately following the moment of arrest. That may not be a practical possibility.

In practice, intimation to the procurator fiscal will be made as soon as the procurator fiscal's office is open. There is little point in requiring an immediate intimation when the office is closed. The bill does not deal with a situation in which the procurator fiscal is required to attend the scene of a crime immediately.

To answer Bill Aitken's point, section 5(1) of the bill already requires a person to be brought before the court on the day after the arrest.

The Convener: I want to put on the record that, although I understand why that is the case, it would be useful to clarify whether the words used in this committee would count towards what Parliament is meaning by that phrase. We are in a different situation here than if we were questioning the minister.

Minister, can you help?

Iain Gray: Are you asking whether the words constitute a Pepper v Hart statement?

The Convener: Yes, precisely.

Iain Gray: I do not have the answer to that question. My suspicion is that they would not, but that is simply a guess. Perhaps if the convener would write to me about that, I could get a definitive answer. I fear that I cannot provide an answer today.

The Convener: It needs to be cleared up by somebody. Some allowances will be made, I am sure, because we are dealing with this procedure for the first time. It would be useful if that could be clarified for future reference. I am happy with Christine Grahame's explanation, but I would like to think that that explanation, which has been given to Parliament, could be relied on if there was any question about the bill's meaning.

Iain Gray: If there was to be a problem with the statement of the member in charge carrying that weight, a minister could possibly repeat her assurance at stage 3.

The Convener: That is helpful.

Bill Aitken: After hearing what has been said, I believe that some clarification is necessary. I ask leave to withdraw my amendment, but I reserve the right to reintroduce it at stage 3 if the matter is not resolved satisfactorily in the interim.

Amendment 32, by agreement, withdrawn.

Section 4, as amended, agreed to.

Section 5—Court appearance

Amendments 33 to 41 not moved.

12:00

The Convener: Amendment 42 is in a group on its own.

Bill Aitken: Amendment 42 is perfectly straightforward and highlights a point that was made earlier by the member in charge and by me: namely, that we are dealing here with a matter that must be considered in civil proceedings. The terms of the amendment are fairly self-evident. I do not need to speak about the amendment at length.

I move amendment 42.

Christine Grahame: The reason that the bill refers to the sheriff

"sitting as a court of summary criminal jurisdiction"

is to ensure that the alleged abuser is brought before a sheriff court quickly. The reference in the bill to "rules of court" makes the position quite clear. Rules of court can be made only in relation to civil matters. The practice and procedure of the criminal courts are regulated by act of adjournal. If the bill had intended to make the proceedings criminal, it would have referred to matters being

prescribed by act of adjournal. There is no similar provision in the 1981 act and none has been necessary during the past 20 years. Specific provision for legal aid in relation to the representation of arrested persons is being made and will be dealt with as civil legal aid. No offences are created under the bill and proceedings could only be civil.

I hope that the member will be content with that explanation and will feel able to withdraw the amendment.

Iain Gray: The bill makes it clear that we are dealing with civil law. For that reason, we do not believe that amendment 42 is necessary.

Bill Aitken: The nub of the matter is the definition of the type of proceedings and the type of legal aid that would apply. I am prepared to accept the explanation offered by the member in charge and will not take the matter further.

Amendment 42, by agreement, withdrawn.

Section 5 agreed to.

Section 6—Amendment of the Matrimonial Homes (Family Protection) (Scotland) Act 1981

The Convener: Amendment 7 is in a group on its own.

Christine Grahame: Amendment 7 deals with a minor drafting point. It is designed to make clear the placing of the amendment that the bill makes to the Matrimonial Homes (Family Protection) (Scotland) Act 1981. I have nothing further to say on the matter.

I move amendment 7.

The Convener: You were too quick there. As neither the minister nor members of the committee have indicated that they wish to speak, I ask the member in charge to wind up.

Christine Grahame: I have no comments to make in winding up.

Amendment 7 agreed to.

Section 6, as amended, agreed to.

Section 7—Interpretation

The Convener: Amendment 8 is grouped with amendment 9.

Christine Grahame: Amendments 8 and 9 are designed to clarify for the courts that they are entitled to look at abuse that gives rise to mental injury when they consider what constitutes abuse under the act.

The bill provides for a power of arrest to be attached to an interdict and for a person to be arrested or further detained by the court only when certain conditions are satisfied. In each case, one of those conditions is that the conduct that is covered by the interdict is abusive.

Section 7 provides a definition of abuse and sets out some types of behaviour or conduct that are abusive. The approach taken in defining abuse is specifically to include certain types of behaviour or conduct, but the bill does not set out to provide an exhaustive definition.

After the Justice 1 Committee heard evidence from consultees, it was keen to ensure that the bill included protection from psychological abuse as well as from physical abuse. The bill meets that aim by referring to "mental violence". However, we consider that the word "violence" has physical connotations and is probably not appropriate for behaviour that quietly and insidiously, but non-violently, produces mental injury and amounts to psychological abuse.

We have not been able to identify any usage of the term "mental violence" in other legislation, whereas "mental injury" has been used. In addition the term "mental injury" is used in case law that was considered recently by the courts.

I move amendment 8.

Bill Aitken: Amendment 8 raises an interesting point about the clarity of the definitions in the bill. The clear intention is that the bill's provisions should not relate to physical injury alone, and we have been aware of that from the inception of our consideration of the bill. However, we must be careful about definitions, as, in time, they will be tested. It is reassuring that they will be tested as a result of case law. I am happy to go along with amendment 8.

Christine Grahame: The definition is inclusive, not exclusive. I am happy to provide Bill Aitken with a note of the case law that contains the definition of "mental injury".

Bill Aitken: I would be obliged.

The Convener: You cannot get better than that.

Amendment 8 agreed to.

Amendment 9 moved—[Christine Grahame]—and agreed to.

The Convener: Amendment 10 is in a group on its own.

Christine Grahame: Amendment 10 is a minor amendment and is designed to make clear that the reference to "parental responsibilities and rights" in the bill has the meaning that is given to those terms in the Children (Scotland) Act 1995.

I move amendment 10.

The Convener: Does the minister wish to speak to amendment 10?

Iain Gray: No. We are content with amendment 10.

Christine Grahame: I am pleased to say that I have no comments to make in winding up.

Amendment 10 agreed to.

Section 7, as amended, agreed to.

Section 8 agreed to.

Long title agreed to.

The Convener: Thank you. That concludes stage 2 consideration of the Protection from Abuse (Scotland) Bill. Well done, Christine.

Christine Grahame: I felt as if I were boldly going, in "Star Trek" terms.

Sexual Offences (Procedure and Evidence) (Scotland) Bill: Stage 1

The Convener: The next item of business is stage 1 consideration of the Sexual Offences (Procedure and Evidence) (Scotland) Bill. We will hear evidence from Dr Michele Burman and Dr Lynn Jamieson. I understand that Dr Jamieson may have to leave early to catch a flight. Members will have a copy of the witnesses' submission.

I welcome the witnesses to the Justice 2 Committee. We are sorry to have kept you waiting—we were dealing with stage 2 of a bill, but we managed to fly through that fairly quickly. Thank you for your submission, which is very helpful. Let us move straight to questions.

Mrs Mary Mulligan (Linlithgow) (Lab): The evidence that we have taken shows that although there is some restriction on the use of past history and so on, that has not been sufficient. To what extent will the bill remove that discrepancy and ensure that the spirit of the legislation is carried through? Is there a need for additional training? How can we change attitudes rather than just practices?

Dr Lynn Jamieson (University of Edinburgh): I will start and then let Michele Burman follow up. Two brains are better than one and I do not think that fast on my feet.

The bill will significantly improve the current provisions in several ways. It will encompass bad character in a way that the current provisions do not. At the moment, only evidence relating to sexual history and sexual character—not bad character—is restricted. As I am sure members are aware, information about bad character is often introduced into a trial in a way that suggests that someone is not a credible witness and is likely to consent to sex. That can be quite prejudicial.

The bill will also improve matters by making the principles much clearer and requiring the court to balance the relevance of the evidence against the possible prejudice that it might introduce. Although that principle was clearly present in the intentions of the legislators, it was never absolutely enshrined in the law and it was possible for people to use the wording of the law in ways that did not honour its spirit. The bill spells out the spirit much more explicitly and we think that that will make an important difference.

Training is important. Michele Burman may have comments to make on that.

Dr Michele Burman (University of Glasgow): Training is an important aspect of the legislation. It is a good bill: it is much tighter and offers a fresher approach. One of its strengths is its focus on

weighing up the probative value of evidence in relation to prejudicial effects. However, we must still tackle how the legislation is implemented in the courts.

On the basis of the research that we conducted some time ago and other research that has been undertaken since then, it is apparent that the courts are not always sensitive to all the issues at stake in sexual offence cases. There is a strong case to be made for judicial training and there is an argument to extend such training to the profession as well. As I am sure members are aware, other jurisdictions around the world provide judicial training on dealing with sexual offence cases. It is not a completely new thing.

Mrs Mulligan: From some of the responses that we received, it was evident that practitioners see difficulties rather than benefits with our proposals. How do we overcome practitioners' fears about the changes that they are being asked to make? How do we overcome their initial reaction?

Dr Jamieson: There is no easy answer to that question. Our detailed research on the subject was conducted more than 10 years ago. At that time, we interviewed a range of practitioners, many of whom believed that a change of legislation was not necessary. That said, when particular cases were put to practitioners, they often agreed that sexual history and sexual character evidence should not have been introduced into the trial, because it could have been prejudicial. Defence advocates were often open with us; they admitted that they try deliberately to confuse and divert juries from the facts of a case by suggesting that a woman or a man—it is more often a woman—is of immoral character.

When people are taken through specific instances, they are often persuaded. Our research could be fed into training materials, were those to be developed. People would, however, have to be willing to undergo such training.

12:15

Bill Aitken: To some extent, my question impinges on your last answer, as I wish to pursue the issue of accused persons who conduct their own defence. I do so, well aware of the old adage that any person who defends himself has a fool for a client.

The issue is not much of a problem. At an earlier evidential session, we discovered that an accused person had conducted their defence on only three instances in the past 20 years and that one of those instances was a summary matter. We should also bear it in mind that if we prohibit what—in my view—is a foolish practice, we run the risk of an objection under the European convention on human rights.

Should we not approach the subject differently, by training judges and by encouraging them to come down heavily if a complainer finds herself or himself in a threatening situation in the witness box?

Dr Jamieson: In our submission, we did not cover in any great detail the provision to take away the accused's right to defend themselves. That was not the subject matter of our research, but we are sympathetic to the change for the reason that defenders of the proposal give, which is that the situation is distressing for a complainer. Our experience of attending trials leads us to suggest that judicial and prosecution intervention on behalf of witnesses happens rarely. Sometimes things happen without intervention, including contravention of the legislation that we are discussing. The bill would change that.

Committee members could respond by arguing that training would alter the situation. As far as we have observed, intervention does not always happen when it is expected. The provisions in the bill that concern sexual history and sexual character evidence are likely to have a wider effect. That is because they touch on far more cases. As Bill Aitken said, the situation that he raises is rare. It is the sexual history and sexual character evidence part of the bill that we feel particularly strongly about and think is likely to redress significantly the balance.

Bill Aitken: Other members will pursue that point. Do you feel that the proposed prohibition of conducting a defence personally is using a sledgehammer to crack a nut?

Dr Jamieson: I would rather not make a strong statement one way or the other about that.

The Convener: I want to take Bill Aitken's line of questioning about the prohibition issue a bit further. You have concentrated primarily on sexual history evidence, but I wonder whether you believe that it is only when we consider the bill as a whole—the range of measures together—that that measure is in any way significant. There will be more rules of court in relation to admissibility of evidence, advance notice and special defences if the bill is passed. Do you think that, as a result, an accused person might be inclined to want more guidance, which might err on the side of the ECHR? Incidentally, the Executive has told us that the bill has been ECHR-proofed.

Dr Burman: I am not a lawyer but I understand from my legal colleagues that the bill is compliant with the ECHR. It is the questioning of the complainer by the accused that may cause distress and humiliation and give rise to issues under article 8 of the convention. Is not it the case that the Executive has taken up the issue of

prohibiting the accused person from questioning the complainer as a matter of principle? I agree with Lynn Jamieson that that is a good principle to uphold, whether the situation arises in a lot of cases or not.

The Convener: Bill Aitken made an important point, which is that it has happened in a few high-profile cases. Is it better to have the measure as part of a comprehensive package?

Dr Jamieson: Yes.

Dr Burman: Yes.

Scott Barrie: You have said that you think that the bill is essentially a good one. Does it address all the issues that you identified in your research 10 years ago?

Dr Jamieson: That is unlikely. It addresses most of them.

Dr Burman: In our research, we found three main problems with current legislation. First, the rules were not being followed. Sexual history evidence and sexual character evidence were being introduced in the absence of an application.

Secondly, applications were being made where the evidence that was introduced strayed beyond the bounds of the application or where the evidence that was introduced in relation to, for example, credibility was somehow attached to questions of consent. The rules were being followed, but the aims of the legislation were not being achieved as anticipated.

The third problem, which was raised by the 1979 MacPhail report and the 1983 Scottish Law Commission report—although nothing was done about it in the legislation—was the problem of innuendo. Non-sexual character evidence that was introduced in a trial would have a kind of cumulative effect and would be used to suggest that the alleged victim was the kind of woman who would consent indiscriminately or was immoral or promiscuous.

The innuendo problem is addressed in section 7 of the bill, which will exclude evidence that shows or tends to show that the complainer has at any other time engaged in non-sexual behaviour from which it may be implied that she is likely to have consented or that she is not a credible or a reliable witness. We see that as an attempt to curb the innuendo problem.

As Lynn Jamieson said, a sharpened focus on balancing relevance and prejudice will go some way towards reducing some of the problems that we found in connection with the first and second problems. Elements of the new bill go a considerable way towards dealing with some of the problems that we identified in existing legislation.

Dr Jamieson: The procedures are very important—for example, it is important that the application to introduce sexual history and sexual character evidence, under the allowed exceptions, has to come before the trial. That would be done in conjunction with a provision on lodging notice of a defence of consent. The discussion would be a pre-trial discussion involving written submissions and a written judgment. That would force—or encourage—a much more thorough engagement with what the line of questioning will be and what the intentions behind the questions are. In our research, we found that, under the current procedures, the dialogue can be cursory. It is over quickly and there is little exploration of or challenge to how the line of questioning will be developed. Subsequently, something unexpected may happen that goes much further and is more damaging in terms of generating prejudice and blackening the character of the complainer.

Scott Barrie: Are the three problems that your extensive research identified still as severe as they were, or have things moved on?

Dr Jamieson: It is not possible to give a definitive answer to that, but we do not think that the situation is radically different now. I say that for various reasons, including discussions with members of the legal profession in a number of contexts and a more recent piece of research of ours that did not involve sitting through trials, and so could not give us the same insight, but which involved following the paper trail left as cases moved through the criminal justice system.

Scott Barrie: Are you satisfied that legislation is required to remedy the problem areas, rather than enforcement of rules that may not have been enforced until now?

Dr Burman: Yes.

Dr Jamieson: Yes. The wording of legislation is always important. At the moment, it is possible to stick literally to the wording of the provisions on exceptions and to bypass what I think were the intentions of the legislators. The wording of legislation must not allow that. By speaking about the relevance of evidence and prejudice, and by spelling out what that means—talking about the dignity and right to privacy of the complainer, for example—the wording of the bill is much stronger than the wording of previous legislation. It offers specific guidance on the intentions of the legislation in a way that the existing legislation does not. The existing wording tries to provide general exception clauses, but our research showed that defence advocates were skilled at using that wording to undermine the spirit of the legislation.

Dr Burman: The requirement for evidence to be relevant and related to specific issues in the trial is

a key strength of the bill; it is missing in existing legislation.

Dr Jamieson: The procedures that the bill specifies are important, too. The procedures cannot be cursory.

Scott Barrie: Would better training for those who enforce the current restrictions overcome that? Do you feel that more legislative force is required?

Dr Burman: Yes. We do not want judicial discretion to be compromised. We value judicial discretion. As Lynn Jamieson said, the requirement to focus more on set procedures and to stipulate what evidence might be relevant to what issue—and, following that, to set parameters on questioning—means that some standard procedure for judges to follow is needed. The bill does not compromise judicial discretion, however, which is another strength of the proposals.

12:30

Dr Jamieson: The bill gives much clearer guidance by providing a framework for judicial discretion. In our interviews with judges and prosecutors, we found that sometimes both groups felt that it was the other's job to intervene. Judges felt that their role was sometimes one of umpire and that, if the prosecution did not object, they did not need to intervene. Prosecutors thought that it was sometimes not their job to intervene, but the judge's. In a sense, the present system gives people no reason to come together to confront such issues. Training would help with that, but a legislative framework would develop matters much further and faster.

The Convener: A helpful part of your evidence is your point that judges and prosecutors have felt that it was the role of the other to intervene. That is a partial explanation of the situation. Procedures have been available, as Bill Aitken said, but they have not been enforced. Perhaps we would not need some of the proposed measures if that situation had been worked out. The evidence that you have given us will help us to lay the foundations of our consideration of the need for some of the measures in the bill.

I will flick back to the issue that I raised about a prohibition on accused people representing themselves. You talked helpfully about the nature of sexual offences and the position of women—I appreciate that such cases do not always involve women, although they mainly do. I know that you have not spent much time on prohibition, but I want to press you on it, because we need to get to the bottom of why you would legislate on sexual offences but not on other matters. Given your research on how women feel about how intimate the questions can become, do you feel that a reason exists for removing the right of accused people to represent themselves?

Dr Burman: Sexual offence cases are different from other cases because of the evidence that must be produced in court. Personal information must be presented and going through that procedure can be distressing for women and men. The evidence and how it is elicited can often make sexual offence cases different from other cases.

The Convener: You say that the personal nature of the evidence matters. I am focusing on that because complainers or victims in cases of other crimes feel distressed in the witness box, too. The same logic might be applied to them and their alleged attackers, but your academic research is that the personal nature of the evidence in sexual offence cases is what makes the difference.

Dr Jamieson: I should clarify the matter. The research that we have conducted concerned the use of evidence in court. It involved clerks monitoring all sexual offence cases and us and other researchers attending proceedings in more than 100 cases. However, we did not interview complainers, so we were not taking testimonies of distress. The distress is visible in the court, but our evidence is not about that. The issue that we were examining was whether current legislation was working well. That was our explicit remit and that is what we were studying.

We were concerned about the high acquittal rate in cases of rape and serious sexual offences. Although it is not possible to quantify exactly what contribution sexual history and sexual character evidence makes to that acquittal rate, we know that in serious sexual offence cases, even under the current provisions, it is introduced in about half of cases. In about 35 per cent of cases it is introduced using the rules and in another 15 per cent of cases it is smuggled in despite the rules. We believe that it must be affecting the acquittal rate.

The defence of consent and suggesting that someone is an immoral character have no parallel in other kinds of cases and could not affect their outcome. Questions about sexual history and sexual character evidence are unique to sexual offence cases. It would sit uneasily to try to protect a complainer from irrelevant questioning of that sort but still to allow her to be cross-examined. I do not see how that situation could easily be squared.

The Convener: Given what you have said, do you think that the measures will have any practical effect either on the number of women coming forward or on acquittal rates?

Dr Burman: It is difficult to say. One would hope that it would encourage more women to report

offences and to be prepared to give evidence.

Dr Jamieson: It is common knowledge that giving evidence as a complainer in a sexual offence trial might result in one's sexual history and character being dredged up in court. I hope that it might become common knowledge that that will not happen. That is surely within the bounds of possibility. If it were common knowledge that only relevant evidence will be introduced, and if the legal professions in general were committed to that and accepted it as important, things could change radically.

Bill Aitken: Surely everything comes back to the fact that, if people were doing their jobs properly, we would not face this difficulty. If, in a case of rape or sexual assault, evidence was introduced that the complainer and the accused had had a liaison in 1993, I would regard that as totally irrelevant. However, if it could be demonstrated that they had consensual sex three nights in a row prior to the alleged incident and had sex again two days later, that might well be relevant. If judges were much tougher about the kind of evidence being introduced, we would not have that problem, would we?

Dr Jamieson: We saw a case in which a liaison had taken place even longer ago than the time gap in your example.

Dr Burman: It was seven years.

Dr Jamieson: Yes. The judge permitted that evidence within the current legal framework and I am sure that the judge would say that he was doing his job.

Bill Aitken: Did the prosecutor object?

Dr Jamieson: No. The prosecutor suggested that the questioning should be limited to that one alleged previous incident. It was not clear from the dialogue that it had taken place as long ago as seven years and no one properly asked that question.

Dr Burman: One of our findings is that there is little consensus on what counts as relevant information in sexual offence trials. Varying combinations of judges, defenders and prosecutors may make different decisions on the same evidence. What evidence may or may not be relevant varies widely.

Dr Jamieson: Doing one's job properly means different things to different people. For many defence advocates, it means having every possible hare running and, if possible, a smokescreen of immorality around the complainer. Some prosecutors see it as their job to counteract red herrings more rigorously than other prosecutors do, while some see their job as being more straightforward and lay out all the relevant evidence.

Bill Aitken: If such evidence is to be introduced, is there merit in a system in which there is provision for a trial within a trial to establish whether the evidence is pertinent?

Dr Jamieson: Such a suggestion appeared in the pre-legislative discussion documents. I presume that it is not part of the bill because it did not receive widespread support.

Written submission goes some way towards scrutiny and has a less elaborate procedure than a trial within a trial. There are advantages in such action being taken before the start of the proceedings, so that there is no interruption, although I am not unsympathetic to the idea of calling witnesses and taking evidence, as would happen in a trial within a trial.

The Convener: I have two final questions. Does Dr Jamieson know of other countries that have dealt with similar matters in relation to the proper administration of justice?

Dr Jamieson: The pre-legislation discussion document refers to Canadian legislation. I have not kept sufficiently abreast of developments in other countries to give the committee a well-developed answer. Dr Burman may have something to say about the matter.

Dr Burman: Sexual offence courts have been introduced in South Africa. Those who appear in the courts undergo training in awareness raising. The procedures have been changed slightly so that the defence is made more explicit at an earlier stage and it is known whether it will be a defence of consent. That is the extent of my knowledge. I am sorry.

The Convener: Your paper refers to issues that the bill does not tackle but that might be a future matter for Parliament depending on the result of the Lord Advocate's reference. Is it your view that we must tackle the clarity of the definition of rape before we can make any real progress? How important is that in relation to a sexual offences bill?

Dr Jamieson: We mentioned some anomalies such as clandestine injury and the fact that it is not possible under the present definition of rape to recognise an assault as rape if the woman is unconscious at the time. There is also a mistaken belief in consent defence that someone can argue that he mistakenly believed—even if that belief is unreasonable—that the woman consented, so that the act is defined as not one of rape. That kind of judgment brings the law into disrepute. In the 1990s, it was upheld at appeal in the case of Jamieson—who was no relative of mine, I hasten to add. The judgment does not undermine the bill, but it leaves unfinished business. The definition of rape or of a number of sexual offences should be examined.

The Convener: Do you have a view about what the law should be on that question? Should we look at positive consent or should we look at the English version?

Dr Jamieson: I do not have a clearly formulated view. I hesitate to give a strong view on that.

Dr Burman: We would welcome the early intimation of a defence of consent in a trial. Another strength would be for everyone to know what to expect at as early stage as it was possible for that to be intimated.

Dr Jamieson: I want a version of intention where it is not possible to privilege force, as currently happens. Lord Abernethy's judgment reflected the privileging of force whereby, if someone does not resist until the last, the action is not rape. That is not what Lord Abernethy said, but women continue to get the impression that, if they are so terrified that they do not do something, such as poke the person in the eye, they will somehow not be treated with dignity as a victim. We have to avoid a definition of rape that privileges force.

The Convener: As there are no further questions, I thank the witnesses for giving evidence to the Justice 2 Committee.

That concludes our main business today. The next Justice 2 Committee meeting is to be held on 26 September, when we will hear evidence from a number of organisations as part of the stage 1 scrutiny of the Sexual Offences (Procedures and Evidence) (Scotland) Bill. Are we agreed to meet in private at 9.45 am to consider lines of questioning and to focus our attention on the issues that the bill has not resolved?

Members *indicated agreement*.

Meeting closed at 12:47.

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