JUSTICE 2 COMMITTEE

Wednesday 3 October 2001
(*Morning*)

Session 1

£5.00

Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by The Stationery Office Ltd.

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JUSTICE 2 COMMITTEE
† 26th 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)
George Lyon (Argyll and Bute) (LD)
*Mrs Mary Mulligan (Linlithgow) (Lab)
*Stewart Stevenson (Banff and Buchan) (SNP)

*attended

WITNESSES

Graham Bell (Faculty of Advocates)
Tim Hopkins (Equality Network)
Rosemarie McIlwhan (Scottish Human Rights Centre)
Assistant Chief Constable Graeme Pearson (Association of Chief Police Officers in Scotland)
Detective Superintendent Norrie Robertson (Association of Chief Police Officers in Scotland)
John Scott (Scottish Human Rights Centre)

CLERK TO THE COMMITTEE

Gillian Baxendine

SENIOR ASSISTANT CLERK

Claire Menzies

ASSISTANT CLERK

Fiona Groves

LOCATION

Committee Room 3

† 25th Meeting 2001, Session 1—joint meeting with Justice 1 Committee.

Scottish Parliament

Justice 2 Committee

Wednesday 3 October 2001

(*Morning*)

[THE CONVENER *opened the meeting in private at 09:51*]

10:16

Meeting continued in public.

The Convener (Pauline McNeill): Good morning everyone. I apologise for starting the public meeting a wee bit late, but the committee had a few things to sort out in private. I welcome you all to the 26th meeting this year of the Justice 2 Committee. I have received an apology from George Lyon, who cannot be with us this week.

Item in Private

The Convener: Do members agree that we should meet in private to discuss the stage 1 report on the Sexual Offences (Procedure and Evidence) (Scotland) Bill when we meet on 24 October?

Members *indicated agreement.*

Convener's Report

The Convener: The committee has received three documents from the European Committee for our interest. Members will remember our briefing session on the importance of Europe. We have decided that we would like to get more involved with these matters. However, at this stage, given our work load, I recommend that we simply note the documents that we have received.

The documents are listed in members' papers, but I should say for the benefit of the *Official Report* that they are: paper SP 2209, which includes proposals for a Council framework decision on combating the sexual exploitation of children and child pornography; paper SP 2210, which is a proposal for a Council framework decision to combat trafficking in human beings; and paper SP 2367, which is a communication from the Commission to the Council and the European Parliament on the implementation of the European Union action plan on drugs 2000-04. The papers are available from the clerks.

We agreed that at some stage we would indicate to the European Committee and the Minister for Education, Europe and External Affairs that we wanted to be notified of and examine any European legislation that they felt significantly or otherwise changed the basis of Scots law.

Scott Barrie (Dunfermline West) (Lab): Did not we agree, albeit in the private briefing, that towards the end of this year or the beginning of next year, when the European Union and the Council of Ministers were doing their stuff we would decide on one subject and see it all the way through? That would be the more appropriate time to decide what we are going to do.

The Convener: Yes.

Scott Barrie: That is what we agreed to do and we should do it at the appropriate time.

The Convener: If there are no other comments, that is agreed.

We are involved with one document at the moment. If there is anything to report to members, we will do so at the appropriate time.

Subordinate Legislation

Firemen's Pension Scheme (Pension Sharing on Divorce) (Scotland) Order 2001 (SSI 2001/310)

The Convener: The next item is subordinate legislation. I refer the committee to paper J2/01/26/4, which sets out the background to the order. Does the committee wish to note the order?

Members *indicated agreement.*

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

The Convener: The next item on the agenda is the Sexual Offences (Procedure and Evidence) (Scotland) Bill, on which this is our third evidence-taking session. Members have papers from the witnesses from whom we will hear this morning. We have allocated approximately 30 to 35 minutes for each group of witnesses. I am conscious that some have to get away at particular times. We have also received a late paper from the Faculty of Advocates, which has been distributed to the committee.

Our first witness is Tim Hopkins from the Equality Network. Tim, your paper has been useful, as it focuses not only on the problem but on what you think the solution might be.

Tim Hopkins (Equality Network): The paper focuses on one issue. The remit of the Equality Network is to examine legislation and policy for equality on the ground of sexual orientation. We do not want to comment on the general provisions of the bill other than to say that we welcome the move by the Scottish Executive to find the right balance.

The legislation on sexual activity between men is bundled together into subsection 13(5)—not even a whole section—of the Criminal Law (Consolidation) (Scotland) Act 1995. Under the subsection, sexual relations between men that are offences are put into three categories. Section 13(5)(b) covers acts for which no consent was given, which are serious offences of sexual assault or male rape. Section 13(5)(c) covers the sexual abuse of children—in other words, boys under 16.

Section 13(5)(a) covers sexual relations between men that are offences only because the sexual activity did not take place in private. Those are fairly minor offences, the penalty for which is usually a small fine. There are a significant number of prosecutions for such offences each year. The most recent information on the incidence of such prosecutions comes from a letter that was sent by the Scottish Executive justice department to the Justice 1 Committee when it was taking evidence on the Convention Rights (Compliance) (Scotland) Bill earlier this year. It tells us that, in 1998, there were 28 prosecutions under section 13(5)(a). Four of them were for something that, thanks to the Convention Rights (Compliance) (Scotland) Bill, is no longer illegal: sexual activity between men when there are more than two men present. In 1999, there were 11 prosecutions under section 13(5)(a), all for activities that would still constitute an offence.

We are talking about a significant number of prosecutions each year.

A man and a woman who, for example, were discovered engaged in sexual activity in a park would be charged with a breach of the peace. Whether such a case involves a man and a man or a man and a woman, there is no complainer. The reason why the activities constitute an offence is that they took place in a public place.

The new section 288C, which is proposed in section 1 of the bill, prohibits personal conduct of defence in cases of certain sexual offences, which are the same offences to which the new section 274 would apply. Proposed section 288C includes section 13(5) of the Criminal Law (Consolidation) (Scotland) Act 1995, which means that it includes all three of the categories of sexual relations between men that I mentioned. That is the problem. As we said in our submission, and as the Public Defence Solicitor's Office has said, the fully consenting offences that fall under section 13(5)(a), for which there is no complainer, should not be included, as there is no reason to prevent the accused from defending himself in those cases.

The existing section 274 of the Criminal Procedure (Scotland) Act 1995 includes exactly the same list of offences as section 13(5) of the Criminal Law (Consolidation) (Scotland) Act 1995, but that has not been a problem because the existing section 274 kicks in only when there is a complainer—it is designed to protect the complainer from inappropriate questioning. In the cases to which I have referred, where there is no complainer, it has had no effect. The new bill, however, will have an effect in those cases because of the restriction on a person defending themselves in court. Not only is there a practical reason for getting the list of offences right and for not including the victimless offences, but there is a principled reason: if less serious offences are included, that takes away from the seriousness of the offences that are included.

Our submission did not mention the fact that we fully support subsection (4) of the new section 288C, which allows a court to impose the same rules on any other offence in which there is a significant sexual element. The procedure could kick in in a breach of the peace case—for example, stalking of a sexual nature. Even if offences under section 13(5)(a) of the Criminal Law (Consolidation) (Scotland) Act 1995 were removed from the list of offences, in a case in which there was a complainer and a sexual element, subsection (4) of the new section could be used.

That is all that I want to say in introduction.

The Convener: That was concisely put.

You are saying that there is no equality in the law about consenting sex that happens in public. For a heterosexual couple, the offence would be a breach of the peace, whereas the offence would be different if the act took place between two men.

Tim Hopkins: The inequality is not in what is and is not illegal. For a man and a woman to engage in sexual activity in public could constitute a breach in the peace; however, there is no statutory offence in that. A statutory offence is committed when sexual activity between two men takes place in public, which is a paragraph (a) offence.

Once upon a time, all sexual activity between men was illegal and was viewed as equally bad whether it was consenting or non-consenting—it was considered bad because it was sexual activity between two men. People no longer think that. Following changes to the law over the past couple of years, what is and is not illegal in sexual activity between two men is much the same as what is and is not illegal in sexual activity between a man and a woman. For example, the age of consent is the same—16. The discriminatory rule on group sex was repealed earlier this year, under the Convention Rights (Compliance) (Scotland) Act 2001. However, the structure of the law regarding the two types of activity is very different.

In heterosexual cases, the structure is in some ways quite sensible, although there are obvious concerns over the way in which the law deals with crimes such as rape. Sections 5 and 6 of the Criminal Law (Consolidation) (Scotland) Act 1995 deal with offences against girls. Rape and indecent assaults constitute separate offences and a charge of breach of the peace could be used in cases of heterosexual sexual activities in public. However, in the case of sex between two men, all those offences have been bundled together in section 13(5) of the Criminal Law (Consolidation) (Scotland) Act 1995, causing a number of problems.

This is not the first time that the issue has arisen. When the Sex Offenders Act 1997 was introduced, the list of offences that mandates registration on the sex offenders register caused the same problem in Scotland. As the bill was originally drafted, two men who had been fined £50 because they were caught in sexual activity in a car that was parked in a lovers lane would have been put on the same register as someone who had abused a child or raped someone. The Equality Network undertook a lot of work with the Scottish Office to get the bill changed, and it was changed before it was passed.

The fundamental problem in the structure of the offences for sexual activity between men, which causes this problem to arise time and again, is the fact that all the offences are bundled together. If

we can correct that situation in this bill, there will perhaps be less chance of the problem arising again. We would like the underlying structure of the offences to be put right. We do not want fundamental changes in what is and is not illegal; we would like a separation of the serious offences of sexual assault and the abuse of children from the minor offence of consensual sexual activity between two men in public. Bundling those offences together implies that the serious offences are not being taken seriously enough and that the minor offence is taken too seriously and treated more harshly than if a similar act took place between a heterosexual couple.

There is much anecdotal evidence that male rape is more commonly charged under the common-law offence of sodomy than under section 13(5)(b) of the 1995 act. That offence carries a maximum penalty of two years in prison, so the maximum penalty for male rape is being set at two years in prison, which is wrong. If the rape of a woman was charged under a statutory offence with a maximum penalty of two years, there would rightly be an outcry. The bundling together of offences involving sexual activity between males means that the serious offences are sometimes not treated seriously enough.

10:30

Mrs Margaret Ewing (Moray) (SNP): I am conscious of the fact that you are an expert in this sphere, Tim—you have been talking very much in paragraphs. Your paper points out your worry about the bundling together of offences and makes two simple recommendations. Do you think that those would be sufficient to resolve the problem? Do you think that subsequential amendments will have to be made to other legislation?

Tim Hopkins: The recommendations would completely resolve the problem in the Sexual Offences (Procedure and Evidence) (Scotland) Bill. As I have just explained, it is important that the underlying structure of the offences is considered. There are issues to do with the offence of rape, which in England includes male rape, but in Scotland does not—that is a problem. There are underlying issues to do with the structure of sexual offences law. However, the changes that we have suggested would remove the discrimination that we believe is in the bill.

Bill Aitken (Glasgow) (Con): You said, perfectly correctly, that a heterosexual couple having sex in a park would be charged with a breach of the peace. There is of course a sexual element to that offence. Is not it the case that, as a result of that, the couple could find themselves on the sex offenders register?

Tim Hopkins: I do not think so. I would have to check that, but I believe that breach of the peace is not included in the list of offences that mandate registration on the sex offenders register. However, there is a proposal to change the Sex Offenders Act 1997 to give courts discretion to include on the register people who have committed offences that are not included in the list in schedule 1 to the act. At the moment, however, I believe that the schedule does not list breach of the peace.

Bill Aitken: We can check that. Thank you for the answer.

Tim Hopkins: I will check that and get back to you about it.

The Convener: You pointed out the difference between the way in which a man and a woman are treated and the way in which two men are treated on being convicted of either a statutory or a common-law offence. Given what you said about separating out the serious offences for the purpose of the bill, do you think that, if we were to tackle the inequalities, we should consider breach of the peace? Should that be left to particular circumstances?

Tim Hopkins: I do not think that breach of the peace should be included in the list of offences under proposed section 288C of the Criminal Procedure (Scotland) Act 1995. Breach of the peace can include a range of activities, many of which would not be appropriate for the bill to cover. As other people have said in their evidence, it is important that proposed section 288C(4) allows a court the discretion to apply the bill's provisions to breach of the peace where that is appropriate. It is right that breach of the peace is not included in the list, however.

The one common-law offence that our submission mentions is sodomy. In the context of the bill, the same problem with sodomy arises as with section 13(5) of the Criminal Law (Consolidation) (Scotland) Act 1995. Originally sodomy meant any sexual activity—anal intercourse—between men in any circumstances; it was illegal in all circumstances. It is now illegal only in the three circumstances that are set out in section 13(5) of the Criminal Law (Consolidation) (Scotland) Act 1995. Again, where sodomy constitutes male rape, it should quite clearly be included in the list of offences. Where it constitutes abuse of a person under 16—a boy under 16—it should be included. Where it constitutes consensual activity in a parked car, for example, it should not be included. We are not suggesting that sodomy be removed from the list; it should be included.

The Convener: You say in your submission that if we add the words

"without consent or with a person under the age of sixteen years"

to proposed section 288C(2)(b), that would resolve the issue. That is quite clear.

Tim Hopkins: I make one other point that I did not have the opportunity to mention in the briefing. An issue could arise with the European convention on human rights. It seems clear from what people are saying that overall the bill does not breach article 6.3(c) of the ECHR, which gives an accused person the right to be defended or to defend themselves. The bill does not directly breach article 6.

Article 14 guarantees people equal access to the rights under the convention without discrimination, but it does not mention sexual orientation because it was written 50 years ago. However, the European Court of Human Rights has ruled clearly that the article covers sexual orientation. There is therefore the possibility that, because the bill provides discriminatory access to self-representation in the cases that I have mentioned, it could breach article 6 taken together with article 14.

The Convener: Are you saying that the provisions could be challenged on the ground of sexual orientation?

Tim Hopkins: In the situation that I have described, where a man is prosecuted under section 13(5)(a) of the Criminal Law (Consolidation) (Scotland) Act 1995 for consensual activity in a parked car, he could claim that his rights under article 6 taken together with article 14 had been abrogated, because a heterosexual man in the same position would not have been prevented from representing himself.

The right to represent oneself is not an absolute right, so the bill as a whole is not in breach of the ECHR. Nevertheless, article 14 says that, to the extent that rights are given, they should be given to everyone without discrimination, which includes discrimination on the ground of sexual orientation. There is a danger that, without the amendments that we have suggested, the bill could be in breach of the ECHR.

The Convener: So if we were to amend the bill, we would not have that worry about the combination of articles 6 and 14.

Tim Hopkins: Exactly. If the amendments that we have suggested were made, I do not think that there would be an article 14 issue. Many have suggested that the bill as a whole does not breach article 6 because article 6 does not grant an absolute right.

The Convener: That adds weight to what you have already said. We need to look at that issue to see whether it contravenes article 14.

Tim Hopkins: Without the changes that we have suggested, there is a danger that the bill would not be ECHR-compliant.

The Convener: Thank you.

Our next witnesses are from the Association of Chief Police Officers in Scotland. I welcome Assistant Chief Constable Graeme Pearson, who is secretary of the Strathclyde police crime standing committee, and Detective Superintendent Norrie Robertson, who is from Tayside police. I know that you are a wee bit short of time, so we will get down to business. I thank you for your submission, which focuses on the main issues that are of concern to your organisation.

Mrs Mary Mulligan (Linlithgow) (Lab): Good morning. Your submission gave a positive response to the bill, which I welcome. The one area of difficulty that stood out is whether an accused person should be informed at the time of arrest about their rights to representation. Will you expand on that? Can you suggest at what stage the accused should be given that information and by whom it should be given?

Assistant Chief Constable Graeme Pearson (Association of Chief Police Officers in Scotland): On behalf of ACPOS, I welcome an approach that offers support and assistance to witnesses who are involved in the criminal justice system. We believe that a great deal of work needs to be done to support witnesses who give evidence in court, particularly in the circumstances that the bill deals with.

Our concerns about the notification process to the accused lie largely with the extent to which there is the ability to audit that such a process has occurred and that the notification has been clearly understood by the person. Rather than rely on a verbal expression in what might be distraught circumstances—the accused might be under some pressure—a better option might be for a written confirmation of the process to be handed to the person along with the copy complaint or indictment before he or she is due to appear at court. Such a written confirmation could make clear the exact position in respect of the person's representation at the future court hearing.

Mrs Mulligan: Would the police still be responsible for giving the accused that information, even if it was in writing?

Assistant Chief Constable Pearson: It would be the responsibility of the procurator fiscal to ensure it that was delivered. If it is decided that that should be the means of delivering the information, the benefit is that we would have confirmation in writing and that we would know on what date that confirmation was delivered to the accused and that it had officially been received by the accused.

Bill Aitken: What you are being asked to do is not particularly onerous, is it? You are required to administer a common-law caution and the information could be given at the end of that.

Assistant Chief Constable Pearson: The problem is not whether the requirement is onerous. As usual, the human condition is complex and one can imagine a set of circumstances in which, for instance, someone is being dealt with initially in relation to a vandalism incident. The process would be undertaken in respect of that vandalism, but a whole range of information could subsequently become available that would bring us within the ambit of the bill that we are analysing today. If the original arrest had been conducted in respect of the vandalism, no intimation would be made at the common-law caution stage. However, hours or days later, as additional information came in, we would have to be confident that there was a realisation of the need to intimate to an individual at some subsequent stage that it was likely that he would be unable to defend himself or cross-examine a witness.

Bill Aitken: At that stage, you would have to charge him with a further offence of a sexual nature and you would then have to administer another common-law caution, would you not?

Assistant Chief Constable Pearson: There are times when police officers do not inform an accused person of additional charges face to face. An accused may have been taken away from police interview and custody and additional information may subsequently be supplied to the procurator fiscal. The intimation of those charges is then relayed to the accused through paperwork. In those circumstances, where intimation has been overlooked or is omitted by some other means, we may drop the ball. A more regular method of delivering the information to the accused would be with a copy complaint or indictment. One could be confident that, in those circumstances, the process had been followed through. If police have to make that intimation in all circumstances, as the bill demands, that is not onerous, but we would always want to be confident that the process had been followed through.

Bill Aitken: I do not see how it could be dealt with otherwise because, in most cases, the first court appearance would be from custody or in response to a petition. At that stage, the accused would have to be represented at a judicial examination or petition hearing, so he would have to know long before he hits the cells at the local sheriff court that he cannot conduct his own defence. Surely he would have to be told that at the time of charge.

Assistant Chief Constable Pearson: As I said, there are circumstances in which the police might not be in full possession of the facts at the time of the initial charge. In circumstances in which we charge in relation to initial information and subsequently obtain other information, if the accused receives a copy complaint that contains a written intimation of that restriction—even in the cells at the court—there can be no doubt about whether that intimation had been delivered on the accused.

Bill Aitken: Thank you.

Mrs Ewing: Whenever we introduce new legislation, there always seem to be implications for our police forces. What are the training implications of the bill, to ensure that your personnel are aware of all the details of the legislation? Are there budgetary implications for the police service?

Assistant Chief Constable Pearson: There are additional training implications. We have a common-law caution and we would need to assure ourselves that all our police officers realised that, in the circumstances outlined in the bill, they would also need to take on board the fact that a restriction may apply to the accused. Our officers would need to be trained to be aware of those circumstances so that they could deliver a form of words that leaves the accused in no doubt about his status. There are implications, but they are not enormous.

10:45

Mrs Ewing: Would that training be done by your superintendents or chief officers in local communities, or would it have to be done at the Scottish Police College at Tulliallan?

Assistant Chief Constable Pearson: Some back record training would be needed initially, because the current crop of police officers—who are already out there—would need to be trained by their forces. There would be the usual distillation of memoranda and local training exercises. However, in the medium and longer term, that would become part of the training process for probationary constables. It would be part of their learning environment and they would accept it as normal.

Scott Barrie: The paper that has been submitted by Sir Roy Cameron on behalf of ACPOS states that

"current practice … is undoubtedly in need of amendment."

As an organisation that deals directly with both the complainer and the accused, the police are in a unique position. It has been suggested that an amendment to the bill should require better training for judges, prosecutors and defence agents. Do you agree or do you feel that the bill as it stands is the way forward?

Assistant Chief Constable Pearson: The bill is needed. A declaration of some form of protection is important for witnesses and victims, so that they realise that they have some form of support when they go to court. I know of no witness who has found court to be other than a daunting experience; many have found it to be a punishing experience and have felt re-victimised by the process. My experience and knowledge therefore tells me that a bill is required.

Training and education for prosecutors in courts is always useful. We all in the criminal justice system need to realise how members of the public experience the system.

Scott Barrie: From your experience and knowledge, do you feel that further training and better application of the existing procedures might be insufficient? Does training need to go further?

Detective Superintendent Norrie Robertson (Association of Chief Police Officers in Scotland): I do not think that further training would provide the answer that we require. Rigid legislation is the only way to protect witnesses.

The Convener: Your view is that, when a person is cautioned, a form of words should be used so that the person knows that they cannot conduct their own defence. Would that be a useful point at which to establish when a solicitor needs to be appointed? We have heard evidence from the Law Society of Scotland, which is concerned about the point at which a solicitor is appointed for various trial diets. Should there be provision in the bill giving the form of words that must be used so that the accused person knows that he or she cannot conduct his or her own defence and must appoint a solicitor? Could the point at which they are cautioned be the trigger for that appointment?

Assistant Chief Constable Pearson: When it is clear at the time of arrest and caution that the accused is unlikely to be able to represent himself or herself, there could be a form of words to clarify that. Normally, the duty officer would offer the services of the duty legal aid solicitor at that stage. In all circumstances when accused persons are brought to the charge bar, they are offered access to legal support—whether from their own nominated solicitor or from the rota of legal aid solicitors. That offer is made every time somebody is brought to a police station under arrest. We could find a form of words to indicate to accused persons their particular circumstances and the importance of accessing legal support.

The Convener: Would that form of words say that the court would appoint a solicitor on the accused's behalf?

Assistant Chief Constable Pearson: Yes.

The Convener: Would you go further than that?

Detective Superintendent Robertson: Some forms that specify the accused's rights might need to be amended. If required, the form could highlight the fact that a sexual offence was involved so that the accused person could sign it to show that that had been made known to them. A change might be needed in procedures and in forms that are used by police forces throughout Scotland to include that in the notification to accused persons in the few cases that involve sexual offences.

Assistant Chief Constable Pearson: We would do that, or we would record the fact in a police officer's notebook. As we said, amending the forms and the processes and software that support administration of those forms would have significant resource implications.

The Convener: Would a police constable's failure to advise an accused person or to have him sign a form make possible a challenge?

Assistant Chief Constable Pearson: That is what I am concerned about. I presume that we would be dealing with a serious offence in such circumstances. I would be deeply worried if the omission of such a stage were to be fatal to the later process. Hence, if a piece of paper could be delivered on an accused before they appeared in court, we could be confident that that stage had been completed and we could confirm that, on a certain date, a hand-written note had been delivered on an accused before their appearance in court.

Mrs Ewing: Would you want a time limit to be placed on that?

Assistant Chief Constable Pearson: Yes.

Mrs Ewing: That is a difficulty.

Assistant Chief Constable Pearson: That is right.

Mrs Ewing: There is a big difference for those who are charged on a Saturday night and whose court cases are delayed by several months.

Stewart Stevenson (Banff and Buchan) (SNP): It is clear that the information can be presented to the accused in two ways. One way might be to say that the accused cannot represent himself in court and the other might be to say that the accused is required to have a legal representative acting on his behalf. Do you agree that the latter is less likely to cause difficulties for the accused, because it is less confrontational?

Assistant Chief Constable Pearson: Yes.

The Convener: You submit that any addition to procedures, including words added to the caution procedure, would not undermine the arrest. You suggest simply that the police constable must be protected while the accused is given the maximum

amount of information.

Assistant Chief Constable Pearson: The form of words in itself is not significant. It is not so important to us to protect the police officer as it is to ensure the integrity of the prosecution. It would be lamentable if a police officer failed to deliver the information, but I am concerned less about protecting that officer than I am about ensuring that when a member of the public reports a crime, the authorities can process that information and allow justice to take its course.

The Convener: Will you expand on the concern that you mention in your submission that

"some offences that contain a sexual element, and may be charged as a Breach of the Peace, are excluded from the list"?

Assistant Chief Constable Pearson: The previous witness talked about the use of breach of the peace. One can outline several scenarios in which a person would be charged with breach of the peace. That is not on the list of offences to which the bill refers, but witnesses who would have to give evidence in such circumstances would be subject to the same pressures as witnesses who complained of rape or some of the other crimes that are listed in the bill. The bill might need to offer similar protection and support to witnesses who complain of scenarios that amount to breaches of the peace.

The Convener: The Equality Network's view is that it is important to separate out what we regard as serious sexual offences in order to feel the full impact of the provisions of the bill. Do you agree that some issues in relation to that might arise if we were to include breach of the peace as a general—

Assistant Chief Constable Pearson: No, I think that the earlier submission about the objective view of the tariff that applies to the acts that are complained of is important. Not all breaches of the peace have the same weight of import.

I have been involved in a case of breach of the peace in which the accused was convicted and sentenced to five years' imprisonment, such was the seriousness of that breach of the peace. I have also been involved in breach of the peace cases in which the accused was admonished at the conclusion of the process. As usual, the issue is complex. However, ignoring people who are witnesses in a breach of the peace case and not taking due cognisance of some of their needs in those circumstances would be wrong. As a result, we made specific mention of the fact that there are offences that are prosecuted in courts for which a similar level of protection would be appropriate.

The Convener: I cannot think of such a circumstance in which there would not also be a charge of a sexual crime in addition to breach of the peace.

Detective Superintendent Robertson: There could be a number of such circumstances. However, I think that there is sufficient flexibility under section 1(4) of the bill to allow the court to implement the powers of the legislation, should the sexual activity be an important part of the breach of the peace. That is encapsulated within the bill.

The Convener: We have a provision in the bill to deal with that. You want to draw out your specific concern. You want to make sure that—

Assistant Chief Constable Pearson: We want to make sure that the link is made—that there is awareness of the sexual component within a charge of breach of the peace.

The Convener: Are there any final questions?

Thank you for coming—your evidence has been helpful.

Assistant Chief Constable Pearson: Thank you for your kindness.

The Convener: Believe it or not, we are quite on time this morning.

I welcome our next witnesses, who are from the Scottish Human Rights Centre. Rosemarie McIlwhan is the director and John Scott is the chair. Members have a submission from the Scottish Human Rights Centre, which is helpful.

I know that you have appeared before the committee a few times. Thanks for your time—we appreciate the time that you spend giving evidence to the committee. Your paper has been most helpful in focusing the issues that are of concern to you. We will go straight to questions—I know that you are short of time.

Scott Barrie: I notice from your paper that you broadly support the bill. Do you believe that the option that the Executive has chosen to legislate on is the best of the four options that was contained in the Executive paper?

Rosemarie McIlwhan (Scottish Human Rights Centre): You will see from our paper that we chose a different option. Although the Executive option is compatible with the European convention on human rights, we believe that it is not the most proportionate option. As you know, proportionality is the key to the ECHR. We believe that enforcing representation only for the cross-examination would be more proportionate.

Scott Barrie: Will you give us your reasoning behind that?

Rosemarie McIlwhan: The reasoning behind that is that the accused has a right to choose his defence or to defend himself. Obviously, that must

be balanced that against the complainer's right not to be subjected to degrading treatment or to have her privacy breached. There is a fundamental flaw with the law as it stands in that it allows the complainer to be faced with the person she thinks committed the crime against her. I apologise for using "him" and "her" in this instance—I realise that it can be otherwise. That is the fundamental flaw that must be addressed. It does not matter whether the questioning steps over the line or not.

In our view, the best way of addressing that fundamental flaw is to limit the rights of the accused, but only in so far as that is necessary. We argue that it is not necessary to have enforced representation for the entire trial in order to ensure that the victim's rights are safeguarded and that they are protected from degrading treatment.

11:00

John Scott (Scottish Human Rights Centre): In a rape trial, the only civilian witness might be the complainer herself. The rest of the witnesses might be police officers or forensic scientists. If the accused wanted to cross-examine them, I do not see a problem with that. Professional witnesses would not be distressed at being cross-examined by the accused, because that might have happened to them before. The evil that we want to attack is the situation in which the accused confronts the complainer directly.

Stewart Stevenson: Do you believe that it would be proper for the accused to question the 16-year-old daughter of the complainer, for example?

John Scott: That would need to be considered separately. The 16-year-old daughter of the complainer might be a vulnerable witness, but I do not think that there should be a strict rule one way or the other. There should be sufficient flexibility to allow the situation of such a witness to be considered. Rather than allowing the accused to cross-examine the daughter of the complainer, we should probably enforce representation for that stage of the trial as well.

Stewart Stevenson: If the accused is allowed to interrogate the professional witnesses, is there likely to be a danger that the jury will view those witnesses as having special credibility, because they can be interrogated directly by the accused when people who are not professional witnesses cannot?

John Scott: In that situation, the sheriff or the judge would give direction to the jury, which would be expected to abide by that. It can be explained to the jury why there is representation for one stage of a trial and not for another. If legislation of the sort that we suggest were introduced, the situation could be monitored—as others who have given evidence to the committee have proposed—to see whether further changes were required, which might well be the case. We are suggesting the smallest intrusion on the rights of accused persons that is compatible with the proper and long-overdue recognition of the rights of complainers or vulnerable witnesses in cases of this sort.

The Convener: I would like to put some questions to you that have been raised in evidence from other individuals and organisations.

First, why should the procedure that we are discussing apply only to sexual offence cases? The Faculty of Advocates has suggested that a similar argument could be made for changing the way in which victims are treated in cases of serious assault. The Scottish Rape Crisis Network and other women's organisations have given as a reason for distinguishing between sexual offences and cases of serious assault the intimate nature of rape cases. Do you have a view on that?

Rosemarie McIlwhan: It comes down to the nature of the offence. The issues that are discussed in rape cases are of a very intimate nature, so there is a need for better protection of complainers in such cases than there is of complainers in other criminal cases.

John Scott: Giving evidence is potentially awkward and embarrassing. I have had to give evidence only once and despite the fact that I appear in court regularly, I found it difficult. There will always be some difficulty associated with giving evidence. However, the situation of a complainer in a sexual offence case is different from that of somebody whose house or car has been broken into and who might never have had any contact with the accused.

Rosemarie McIlwhan: There is scope for the witness service to play a greater role in supporting the complainer, both in sexual offence cases and more generally. The service could ensure that complainers are better prepared for what they will have to go through.

The Convener: The Law Society of Scotland made the point that often the victim is not represented in court and that there is confusion about the role of the prosecution. We have taken that point on board.

Secondly, I wonder whether you can help the committee with the particular issue of restrictions and prohibitions on evidence. I know that John Scott is a practitioner. As members are not practitioners, it would be useful to hear your views on the procedural elements that are associated with the restriction of sexual history evidence and bad character evidence.

The committee has heard concerns that the

procedure of having to notify in advance that sexual history or bad character evidence is relevant and is therefore admissible will result in trials within trials, and that the victim will have to hear such evidence twice. Furthermore, it is an onerous procedure, even in the view of those who believe that such evidence is entirely relevant and admissible. The Law Society of Scotland even suggested that one way of protecting a vulnerable witness from evidence that should not be heard in court would be to appoint a person who would step in and protect the witness from particular questions. However, the problem is that the evidence already exists and no one can prevent a jury from hearing it.

I know that my question seems to be a bit long-winded, but I just want to give you a snapshot of a particular issue on which the committee would like to focus. Because we do not understand trial procedures, we sometimes find it very difficult to imagine what happens during a trial. Is it unusual to have trials within trials? Furthermore, would the vulnerable victim be present? We imagined that the court would be cleared and then the case would be argued in front of the judge, who would decide on the admissibility of evidence. It would be very helpful if you could help us with some of those questions.

John Scott: I understand that some difficulty was caused by the amount of Latin—such as the phrase "amicus curiae"—that was flying around when the Law Society gave evidence. I will try to restrict my use of Latin today.

I have not heard of any trials—relating to the evidence of the complainer—within trials in rape cases. Such trials are most common in relation to police interviews where there might be a suggestion of unfairness on the part of the police, or that there was bullying or interrogation instead of a proper and fair interview. The evidence that would be heard in the trial within a trial without the jury's presence would be given by police officers.

There might be a place for a trial within a trial to decide on the admissibility of evidence relating to the character of the complainer. If the complainer is to be protected from any evidence of bad character being led when the case is being heard by the jury, perhaps the trial within a trial would be a solution; however, it will not mean that the complainer will necessarily avoid having to give evidence twice on the same point. That would depend on the judge's decision.

I will use as an example a trial within a trial to decide whether bad character evidence should be admitted. The complainer might well be required to give evidence during that trial; they would be examined and cross-examined and the judge would then decide whether the evidence was relevant to the accused's right to a fair trial and whether the jury should be allowed to hear it. If that were found to be the case, the whole lot would be reheard in front of the jury.

The trial within a trial is a very cumbersome procedure and involves much duplication, even without the difficulties that are associated with the crimes that we are discussing.

The Convener: We were not sure whether the complainer would always be involved in the trial within a trial. Would they always be asked to give such evidence? Is there any situation in which only the prosecution and defence would discuss with the judge the admissibility of such evidence?

John Scott: In a trial within a trial, evidence has either to be led or to be agreed between defence and prosecution. However, as it is still part of court procedure, very little is done by way of agreement. It tends to come down to witnesses giving evidence. However, as I said, I have not experienced a situation in which a complainer has had to give evidence in relation to a decision on the admissibility of bad character evidence. That has not happened up to now; however, I think that was the suggestion.

The Convener: That is right. It is in the new bill.

Bill Aitken: Do the witnesses agree that it would be possible to amend the bill to allow for the procedures of a trial within a trial to take place without the direct involvement of the complainer? The defence would state to the judge, "We intend to lead evidence along the following lines." The Crown could either say, "Fine, we agree to that" and the judge would say, "That is in order" or the Crown could object and the judge would make a determination.

John Scott: If it is possible to do that, it should be done. There might be aspects of the evidence that the defence seeks to lead that would not require the complainer to attend to give evidence. There would be potential difficulties, however, if there was a dispute about the evidence. If the defence said, "This is the evidence that we want to lead; this is the aspect of her character that we wish to attack" and that was not accepted by the Crown, the Crown could refer to the complainer who might say that the claim was not true. The truth of the matter would have to be determined before its admissibility could be decided. That would have to be done by the judge without the jury being present, but would require the complainer to give evidence.

Bill Aitken: We all know that what comes out in court is sometimes contrary to statements that have been made earlier. The system could be tightened up—although I accept that it would not be fail-safe—so that it would be a simple matter to decide on the basis of statements whether certain evidence should be admitted.

John Scott: It is suggested in the bill that the intention to lead evidence about character should be intimated in writing in advance. That could result in a hearing at which the complainer does not require to give evidence. The matter could be thrashed out properly without any need for a jury or witnesses to be present. That is what should be done. The appeal court has suggested that as much as possible should be done in advance of the trial because if we wait until the trial to decide on such matters, the witnesses, jurors and other members of the public would be inconvenienced and further affected by what has happened.

Rosemarie McIlwhan: I return to the point about someone giving evidence on behalf of the complainer. We do not see that that would be particularly beneficial. In current law, there is provision for the judge and the prosecution to intervene to stop a line of questioning and one must now make a written application to lead certain lines of questioning. That provides sufficient protection. It would be helpful to have more training or clear guidance on whether the judge or the prosecution should intervene.

Stewart Stevenson: Excuse the naivety of this question, but you suggested that in the context of a trial within a trial, there would be a determination of whether certain facts were true. Is that relevant? Is that not for the jury to determine in the full trial? Whether the evidence that the defence wants to lead is true is irrelevant if it relates to material that should not be put to the complainant. The fact that the material is true or untrue is not the issue; it is the fact that it is put to the complainant that ought to determine whether it is included.

11:15

John Scott: At the moment, the judge is required to make a determination of the facts in a trial within a trial to allow him or her to decide whether the evidence is admissible.

In trials within trials, the jury is excluded. The judge will hear evidence from police witnesses about how the interview with the accused was conducted. The judge will then hear the accused, who is allowed to give evidence about the interview but cannot be asked about their guilt or innocence. At the end of that, the judge will have to decide who is believed and who is not believed and then, on the balance of probabilities, decide whether the evidence should be allowed. Judges are required to do all that at the moment anyway.

To an extent, that procedure usurps the position of the jury. However, previously, the jury was shown evidence and told to decide what it believed or did not believe. The jury also had to decide whether the evidence was obtained fairly and whether it should have been admitted. The jury was therefore being asked to perform part of the judge's role. It is more appropriate that judges should be asked to take on some of the jury's role, especially if that allows matters to be determined in advance of a trial. In effect, we are talking about a trial before a trial rather than a trial within a trial, but it is the same type of procedure.

Stewart Stevenson: I am still left slightly in the dark and I can see by the looks on my colleagues' faces that I am not the only one.

Is not the point whether the defence's evidence is relevant to the charge that has been laid and whether it has proximity to the offence—for example, sexual behaviour?

John Scott: That is one of two issues. If the evidence is not relevant, it should not be admitted, whether or not it is true. However, if the matter is relevant but the truth of it is disputed, a forum is still required for the defence to have the matter determined.

Mrs Mulligan: I will let Stewart Stevenson ponder that answer. We are all still a little confused but I am sure it will come right.

The submission refers to the possibility of establishing a statutory code of practice. Will you expand on that a little because I am not sure that I understand the need for such a code?

Rosemarie McIlwhan: The reasoning behind a statutory code of practice is twofold. It would give better protection to the accused, as it would set down a procedure to be followed in all cases. The accused would then be able to say that their solicitor fulfilled all the requirements and that they were defended correctly. A code would also give protection to the lawyer involved. If the accused said that the lawyer did not do what they were supposed to do and appealed on that basis, the judge would be able to consider the matter and use the code to decide whether the lawyer had done everything they were supposed to do. The code would also cover things that a lawyer would not have to do.

We think the code of practice should be statutory because the Scottish Human Rights Centre receives a lot of complaints about solicitors. Often, those complaints have been through the Law Society's self-regulation process and the complainants are still not happy. If there was a statutory code of practice, more complaints might be dealt with satisfactorily. I am aware that there is already a code of conduct but, from the complaints that we receive, it seems that it does not work as well as it might.

John Scott: That is one of the most difficult situations that arise in the criminal justice system. When an accused refuses to appoint a solicitor, it is only fair that everyone involved—including the

solicitor, advocate or solicitor-advocate—knows where they stand. Inevitably, when the legislation goes through, someone will appeal and say that they did not get a fair trial. Alternatively, a complainer might go to court and say that despite the change in the law, they were still treated in a way that they found inhuman and degrading. The case might end up in the Court of Session rather than the High Court. Therefore, it would be easier if the appeal court or the Court of Session had a code against which the legal representatives could be measured, as opposed to trying to use the existing code of conduct, which was not designed to deal with such a difficult situation.

Mrs Mulligan: We have already heard evidence that suggests that the appointment of a solicitor might make appeals more likely. That is not in anyone's interest, particularly the interest of the victim. The Law Society complained that solicitors would feel vulnerable. Do you think that a code of practice would remove such difficulties?

John Scott: It would help. It is inevitable that there will be appeals whatever happens and however good the legislation is by the time of enactment. Our meeting today will be taken into account, but it will be for the appeal court to say what it thinks about the right to a fair trial and about victims' rights, which have not been considered, in particular by courts in Scotland, because they have not been recognised before now. At some point, there will be a proper examination of that by the courts. They will be able to say how the system operates in practice.

Scott Barrie: Do you believe that the bill's proposals on the prohibition of the precognition of the complainer by the accused person and the restrictions on evidence are robust and can withstand challenge under the European convention on human rights?

Rosemarie McIlwhan: I will deal with the complainer. One point that has not been noted in previous evidence is that the focus is on the right to privacy. We have more fundamental concerns about the right of the complainer not to be subjected to degrading treatment. There is a fundamental problem, because just putting the complainer in front of the accused is degrading treatment. The bill goes quite far—it does a lot to protect the complainer in such situations—and I believe that it is ECHR-compliant, but there should probably be further mention of degrading treatment instead of a focus on privacy.

John Scott: There are two important aspects. The privacy aspect relates to the past life of the complainer and to sexual or other behaviour. The consideration of inhuman and degrading treatment—the article 3 consideration—comes into play when the complainer is put in front of the accused, who is in the dock, and is then cross-examined. Even though the bill does not include our suggestion about representation only for the cross-examination stage, it probably is ECHR-compliant.

The right to defend oneself is not an absolute right. The European Commission stated in one case that

"the special features of criminal proceedings concerning rape and other sexual offences"

must be regarded. It went on:

"Such proceedings are often conceived of as an ordeal by the victim, in particular when the latter is unwillingly confronted with the defendant. In the assessment of the question whether or not in such proceedings an accused received a fair trial, account must be taken of the right to respect for the victim's private life. Therefore, the Commission accepts that in criminal proceedings concerning sexual abuse certain measures may be taken for the purpose of protecting the victim, provided that such measures can be reconciled with an adequate and effective exercise of the rights of the defence."

The issue has been examined in Europe and intrusion into what would be recognised in Scotland as the accused's time immemorial rights will not be a problem.

Rosemarie McIlwhan: It is important that precognition is not done by the accused. That can be balanced with the ECHR because, as we said, the accused does not have an absolute right to examine witnesses; it can be done on their behalf. That would allow for a solicitor to do the precognition, which would ensure that the complainer is not subjected to degrading treatment.

Scott Barrie: In essence, you think that the bill—albeit it does not contain your proposal—protects the rights of the complainer and the accused and strikes a fair balance between the two.

Rosemarie McIlwhan: It strikes a reasonable balance, but it probably could have been better.

The Convener: I want to address the prior notification of a defence of consent, about which the Law Society of Scotland has expressed quite a few concerns. You may not have had the opportunity to read the evidence, so I will draw a few points to your attention and it would be useful to receive your comments.

A witness from the Law Society of Scotland stated:

"The Crown always has to establish lack of consent. It will have to whether the accused lodges a notice or not and whether he gives evidence or not."

He went on to list a few more concerns and noted the fact that prior notification of a defence of consent would not be of much assistance. He finished by saying:

"I would not like it to be thought that, by intimating a defence of consent, the accused is being disentitled to rely on deficiencies in the Crown case. I assume that that is not the intention."—[*Official Report*, *Justice 2 Committee*, 26 September 2001; c 441-42.]

No one else has raised the point, so the issues have to be examined. Do you have any comments?

John Scott: Alistair Duff pointed out that an accused person's entitlement to rely on deficiencies in the Crown case is an aspect of the right to a fair trial that should be kept. Even if someone accused of rape accepts that he had sexual intercourse with someone and says that it was consensual, but the woman says it was not, the accused is not required to assist the prosecution in obtaining a conviction. The accused is not required to give evidence at all. At the end of the prosecution case, the accused can stay in the dock if he wants to, but he does not have to go into the witness box.

Anything that the accused said to his legal representatives that resulted in a notice of consent being lodged would not be evidence. The notice is not evidence, just as a special defence of alibi or incrimination is not evidence. In fact, during a trial, such a defence may be departed from, and the judge would simply tell the jury, "You heard that there was a special defence of alibi. No evidence has been led. Just forget about it." It is always for the Crown to prove the case. The Crown would have to prove, on the basis of corroborated evidence, that the crime happened and that it was the accused who did it.

Identification is not usually a problem in such cases, often because of forensic evidence or because of eye-witness evidence that puts the accused and the complainer in company together shortly before the incident happened. In the vast majority of cases, consent will be the only issue that is argued. The accused would not be able to say, "Well, you haven't corroborated that it was me who was involved in this." The possibility that the Crown is unable to satisfy the required standard of proof must always remain. The accused can then make a submission of no case to answer, even though it is accepted that what happened involved the accused. It would not be possible to remove that possibility.

Having to lodge a notice saying that the defence is one of consent does not really add anything. It was interesting that Sandy Brindley said that she did not feel that it would add anything to the position of the complainer either. In the vast majority of cases, the complainer will be told early on—if she does not already realise it—that consent will be the issue.

The Convener: Do you feel that, even if there is concern that prior notice could affect the right of the accused person to a fair trial, it would not make a real difference in any case?

John Scott: That is correct.

The Convener: However, as things stand, you have no objection to it being there.

John Scott: The main problem is tackled by the fact there has to be advance notice of the possible attack on character—either general character or sexual character. I can see how the question of consent might be of concern, but I do not think that it is a real problem.

Bill Aitken: I want to examine that point a little further. In their evidence last week, the representatives of the Law Society of Scotland did not fully satisfy me on the point about the two defences being mutually exclusive. They seemed to say that if a special defence of consent had to be lodged, it would result in the accused being unable to state that it was not he who committed the offence. Did you read that?

John Scott: I did.

Bill Aitken: Have you any comment to make on that, because it seemed rather convoluted thinking?

John Scott: It was a trip into the area where criminal lawyers spend a lot of their time and where the question that is asked most often is how you can defend someone you know to be guilty.

If the person has had to lodge a notice saying that the complainer consented, that is not evidence. Regardless of that being the person's position, even from the outset, it does not assist the prosecution in convicting the accused. The prosecution would be required to find evidence that was independent of that notice to be able to take the case to the jury at all. Despite the fact that the accused accepts that he was the person involved, if, for whatever reason, the forensic evidence does not stand up or if eye-witnesses who were supposed to back up the complainer and say that the two were seen together beforehand or shortly afterwards cannot identify the accused and the case therefore relies on the evidence of only one witness, the case will automatically fail, because the corroboration of identification has not been established. The Crown could not then say that a special defence of consent had been lodged. That would come into play only if the Crown had sufficient evidence against the accused in the first place, at which point the accused must go into the witness box and say that the act was consensual.

11:30

Bill Aitken: That would be my understanding of the situation and would mean that the requirement

to lodge a notice of consent would not inhibit a proper defence.

John Scott: It would not inhibit it, but I do not see the need for the notice and I do not think that it assists the complainer particularly. The only possible danger might arise from something that the accused said. If an accused, for whatever reason, lodged a notice late and the judge felt that he had not shown sufficient cause for the late lodging of the notice and that the lawyers should have taken care of it earlier, the matter would inevitably end up in the appeal court, which would add to the problems.

Stewart Stevenson: Would the jury be aware that a defence of consent had been lodged?

John Scott: Any special defence is read to the jury at the beginning of the trial, just after the indictment is read to them.

Stewart Stevenson: Would that influence the jury, regardless of what they might subsequently be told about admissibility?

John Scott: It might. Unfortunately, we are unable to do any research into juries in this country, so it is impossible to say. According to the appeal court in Scotland, however, juries do everything that the judge tells them to do, which means that if they are told to ignore something, they ignore it.

The Convener: We need to examine further the question of the jury being the master of fact and the judge being the master of law. You said earlier that the jury is often asked to decide issues that the judge should have decided.

John Scott: That used to be the case. Trials within trials have been resuscitated only in the past couple of years. Before they were resuscitated, juries were told to decide on the truth of what had happened and also to decide whether an interview with the police had been conducted fairly and, therefore, whether it was admissible. That means, in effect, that they were being asked to decide a legal question. The problem has now been rectified and the judge would make that decision.

The Convener: We have not examined the right to dismiss the court-appointed solicitor. That has been raised many times as something that would give an element of choice to the accused or would deal with genuine dissatisfaction. Have you given any thought to the number of times that the accused could appoint another solicitor? Where would we draw the line?

Rosemarie McIlwhan: We have not given particular thought to the issue. When the accused is notified by the police that they must appoint a solicitor, they should be told that if they choose to dismiss that solicitor, a court-appointed solicitor will be given to them. That will give them as much warning as possible.

John Scott: It would be dangerous to set a number of times that a solicitor can be appointed. There will always be circumstances in which the wish to change the legal representative is justified. However, we are talking about an unusual situation and there might be a suggestion that the accused was chancing his arm in some respect or had some other problem that resulted in the situation arising. It would not be incompatible with the ECHR to say that the accused does not have unlimited opportunities to appoint other solicitors. The point at which it should become difficult for the accused to change lawyers is when the trial starts. However, if a good reason was given, the matter could be considered. We should bear in mind the fact that we are talking about someone who has refused to have legal representation in the first place.

It would be unwise to set a number of times that the accused could dismiss a lawyer as that would give the accused the chance to appeal the decision. A pinch of salt must be taken when an accused wants to change their lawyer, although I accept that there may be good reason for someone not wanting to have a lawyer.

Rosemarie McIlwhan: The court has discretion in the matter, which I think is reasonable.

The Convener: Thanks for your useful submission.

11:35

Meeting adjourned.

11:45

On resuming—

The Convener: I reconvene this meeting of the Justice 2 Committee and welcome Graham Bell and David Young, from the Faculty of Advocates. Thank you for coming along to give evidence this morning. Your submission is thorough and helpful. If you do not mind, we will begin our questions and pick up some of the issues that are contained in your paper.

Mrs Ewing: Like Pauline McNeill, I welcome your submission. When I read your paper, it seemed to me that you were talking about categorising rape, as if there were differences and one rape could be defined as being more serious than another. Would you like to elaborate on that?

Graham Bell (Faculty of Advocates): This is a difficult issue. The faculty shares the concern expressed by many people about the number of cases that proceed before the courts in which a conviction is not secured. I have experience of

such cases both as an advocate depute and by appearing for the defence, and I am aware that the conviction rate is much lower in rape cases than in other cases. One must ask why that should be. There is no doubt whatever that the public generally looks on rape as a serious matter that normally involves a man and a woman who are in no way connected, in which the man—who has had no previous dealings with the woman—has attacked her viciously. That is what the ordinary man in the street thinks of as rape.

We have become all too familiar, however, with the fact that most rape cases arise out of a situation in which the man and the woman are known to each other. The offence is often referred to as date rape. As I am sure that you are aware, in many cases a man and a woman will meet in a pub, spend a considerable period drinking late in the evening and into the early hours of the morning. They will then return to the woman's flat, where the man expects that something sexual is going to happen, but the woman—who is absolutely entitled to—says no. The problem for juries is that they find such situations difficult to categorise as rape. There are different degrees in all such cases, which is what causes the difficulty.

It has been suggested—I do not know whether to the committee, but publicly by some police officers—that the matter requires consideration. In death cases, the jury has a choice of verdict between murder and culpable homicide. It is time that consideration was given to whether an alternative word to "rape" could be used. Rape has very serious connotations to the man in the street and juries generally find it difficult to apply the word in certain circumstances. In those circumstances, a woman has said no—as she is entitled to—and a crime has been committed, yet juries are not prepared to convict. That has nothing to do with the issues that have been raised about cross-examination and the introduction of questions of character, and so on; it is just that juries generally find it difficult to categorise that situation as being rape.

Mrs Ewing: You have given a clear personal view—although it may be the view of the Faculty of Advocates as a whole—of the issue. However, it sounded as if you would not want cases to proceed unless they could secure convictions. Only over the past decade or so have women been prepared to come forward with charges of rape and of domestic violence, which can include marital rape. If we proceeded in the way you describe, would that not prevent people from reporting instances of rape or domestic violence?

Graham Bell: With respect, you may have misunderstood what I was saying. I am concerned that we are not securing convictions in cases where convictions should be secured. We must ask ourselves why that is happening. It is very wrong that when a women has reported an offence and given evidence about it in court, she should find that the jury is not prepared to convict the accused.

My gut feeling in these matters—and I have 20 years' experience in the criminal courts, on both sides of the bar—is that juries find it difficult to categorise certain incidents as rape. My colleagues share that feeling. I do not think that juries have any difficulty convicting men of rape within marriage, which usually involves violence. The problem comes when the accused and the complainer have met in a public house, when there has been drinking—often a lot of drinking—when other substances have been taken, and when the couple has gone to the girl's house late at night in circumstances in which it might be expected that sexual intercourse would take place.

Mrs Ewing mentioned the past 10 years. Society has changed a great deal over that period. The law of rape was formulated in the 18th and 19th centuries. We are now living in a very different moral age, in which it is not unusual for a man and a woman to have consensual sexual intercourse after having spent an evening together in a pub. That is now a fact of life.

Mrs Ewing: Where should the guidance for juries that are dealing with the different categories of rape that you describe come from?

Graham Bell: At the moment there is only one option open to juries. If a man has sexual intercourse with a woman against her will, that is rape. The jury is not given the choice of bringing in an alternative verdict. It has to accept that the offence was rape.

Mrs Ewing: Do you think that there is a legal framework for doing what you propose?

Graham Bell: There could be such a framework, but it is not in the bill. I do not blame the committee for that. The faculty would like some consideration to be given to how rape is defined and whether a jury should be able to bring in an alternative verdict. What I am talking about would still be a serious offence. Members should not get me wrong: I consider it a serious offence for a man to pay no attention to a woman who says no, regardless of the circumstances. Without question, that is an unpleasant matter for the complainer. Time and again, however, when 15 men and women drawn from the street hear evidence in date-rape cases, which are the cases that tend to go to trial, they have difficulty convicting—not necessarily because there is not enough evidence.

The Convener: You make some very interesting points. As you say, at the moment we are dealing with the provisions of the Sexual Offences

(Procedures and Evidence) (Scotland) Bill. However, like us you will be aware that there is also debate about clarifying the law on rape and so on.

One of the most controversial aspects of defences to the crime of rape is the standard of the defence. If the belief that consent was given is held honestly, not matter how unreasonably, by the accused, the jury should not convict. Could that test be retained if juries also had the choice of convicting the accused on a lesser crime, albeit still a serious one?

Graham Bell: It would still be a serious crime, but juries may well be prepared to consider some lesser charge than rape. A man and woman may go to a flat at 2 o'clock in the morning and the man, not unreasonably, may think that sex is going to take place. The woman may also think that sex is going to take place, but may then change her mind for perfectly proper reasons, as she is perfectly entitled to do. The area of reasonable belief then becomes very difficult for juries. They have to decide between the account of the woman and the account of the man, because they were the only two people there. Credibility is of great importance in that sort of trial.

The Convener: Are you saying that, even if an honest belief that there was consensual sex was held unreasonably—

Graham Bell: If the defence is, "I honestly believed that she was consenting," the jury must consider all the circumstances and decide whether to accept that the man could honestly have believed that the woman was consenting. The question of the reasonableness of that belief is properly a question for the jury. The jury must ask whether it is really possible, in the circumstances, that the man believed that the woman was consenting.

I can illustrate the point by describing a case that I was involved in not very long ago. An upstairs neighbour gave evidence about hearing a woman screaming for about an hour and a half until it got to the point where he was about to phone the police. The man's defence was that he honestly believed that the woman was consenting. The jury had little difficulty in dismissing that because they had the advantage of the evidence of the upstairs neighbour who had heard the screaming and knew that no one could possibly believe that she was consenting. When it becomes difficult is when there is only the man and the woman and no independent evidence from another source.

The Convener: In the case that you describe, would you have to attack the honesty of the belief, and ask the jury if it was prepared to accept that there was an honest belief, or would you attack by saying that, although the man had an honest belief, it was unreasonably held?

Graham Bell: I do not think that those are separate issues. In the case that I described, the accused went into the witness box and gave evidence that he believed that the woman was consenting. There was no difficulty in addressing the jury and saying, "If you believe the man upstairs, there can be no question of the woman having consented." That case was relatively easy. It would have been difficult if, in exactly the same case, there had been no independent witness and the woman had said that she had been resisting and screaming for help for an hour and a half, but the man had said that she had consented. The jury would then have had to deal with a straightforward issue of credibility.

The Convener: Thank you for that evidence; we may have a chance to return to this interesting subject in future. I would like to move on to discuss some of the other issues raised in your paper. In paragraph 2.1, under the heading

"Prohibition of personal conduct of defence by alleged sex offender",

you suggest that it could be argued that a restriction on cross-examination could be applied to all offences of assault.

I do not know if you have had the chance to read previous evidence, but the Scottish Rape Crisis Network said that the intimate nature of the offence draws the distinction. This morning, the Scottish Human Rights Centre gave evidence. It has a similar view. A distinction could be drawn between sexual offences and other offences because giving evidence on the former is embarrassing and intimate, although the committee accepts that the victim of a serious assault could be just as distressed as the victim of a sexual offence.

12:00

Graham Bell: There is particular concern about complainers in sexual offences. I do not dispute that such complainers must give, and be cross-examined on, the most unpleasant evidence. However, there are other circumstances in which victims of crime find it very distressing to face the perpetrators. In particular, I am thinking about elderly people who have been subjected to assault and robbery in their own homes. It can be very distressing for such people to be cross-examined by those responsible—they must relive horrendous situations.

The question is, where do we start to draw the line? Complainers in many cases find it very distressing to give evidence.

Mrs Mulligan: I would like to move on to another issue. In your submission, you refer to the difficulties that you foresee in appointing a solicitor for the accused—I think that you refer to the possibility of miscarriages of justice. This morning, a suggestion was made that one way of dealing with such difficulties might be a code of practice so that the accused and the solicitor are aware of their responsibilities and obligations. Could difficulties be overcome in that way or would there still be problems?

Graham Bell: I listened to some of the evidence, but, with the greatest respect, I do not think that a code of practice would help at all.

The problem for either a solicitor or counsel instructed to represent an accused who refuses to give instructions relates to a proper basis on which to conduct the defence. Obvious problems could arise in rape cases. The defence in a rape case might be that the woman consented, the accused was not there or that someone else committed the crime. Unless the defence is known, questions cannot properly be put to the complainer. It is never part of counsel's job to make up the defence or to speculate on what the defence might be, in spite of what the press may sometimes think. It is entirely improper for counsel to do that—solicitors are subject to the same rules.

The Faculty of Advocate's concern is that a problem could arise when an accused person wants to defend himself and is not prepared to instruct a solicitor or counsel to represent him. The court could say that the person cannot do so and that it will appoint a solicitor or counsel to represent the person. If the accused then refused to say what his defence was, it would be impossible for any meaningful defence to be represented by a solicitor or counsel.

In our original response, we referred to the European Court of Justice's decisions—I am aware of those. We must consider article 6 of the ECHR. It is clear that there are circumstances in which an accused abuses his right to a fair trial. The courts must protect the complainer and other witnesses and prevent abuse.

There may be circumstances in which the accused is not prepared to instruct anyone. The accused will be told that he has had his opportunity and that counsel will be instructed to represent him as best they can. However, the difficulty remains that if the absolute rule is made as the bill would make it, no accused person will ever be allowed to represent himself in a sexual offence case.

I have been at the bar for 20 years. I know of no accused who has represented himself in a serious sexual offence case. I am aware of one recent case that attracted much press attention, but we respectfully submit that the situation is so rare that to make absolute rules that will affect every accused is unnecessary and may cause more problems than it will solve. That is our concern.

Mrs Mulligan: You say that such a situation occurs rarely. When it does, it causes the individuals involved much grief, so is it not right that the bill should make allowance for every eventuality? Is that not what legislation should do?

Graham Bell: Under the Criminal Procedure (Scotland) Act 1995, the court has power to conduct a trial in the absence of the accused if the accused is abusing his rights. There is no doubt that the judge has a right and, in my opinion, a duty to ensure that the accused does not abuse the privilege of cross-examination. The case that attracted much attention involved, regrettably, an accused who was unquestionably allowed to abuse his position. I respectfully criticise the judge involved for allowing that to happen. However, one exceptional case does not make good law. Although that case was distressing and the situation should not have happened, I respectfully suggest that the criticism falls on the judge for not stopping the situation long before he did.

Mrs Mulligan: You say that the right exists to continue a case while the accused is not present. I can see that happening when the accused has legal representation, but how would that work if the accused was defending himself?

Graham Bell: The situation creates dreadful problems, but it can happen. Recently, I was involved in an appeal on a sheriff court case in which the accused had started with representation and decided to sack the solicitor during the trial. The sheriff rightly allowed an adjournment to enable the accused to instruct another solicitor. The accused declined to do so, so the judge asked the Edinburgh bar to make a solicitor available, which it did. That solicitor met the accused, who initially agreed to the solicitor's taking over, but after about 10 minutes, the accused sacked that solicitor.

The sheriff then decided that the accused would represent himself. The accused abused his position by abusing everyone—not only the witnesses, but the sheriff—so he was sent downstairs and the trial proceeded in his absence. We then had the farcical situation in which the sheriff had to invite a solicitor who had heard none of the evidence and had not taken part in obtaining any of it to address the jury on behalf of the accused. Members will appreciate that that situation raised difficult issues about whether a fair trial had taken place. Catapulting in legal representation raises terrible problems.

The bill deals with people who say from the beginning that they will not instruct a solicitor, but

in practice it is more common for people to sack their solicitor when the evidence is not coming out in the way that they think it should. They think that sacking their solicitor might help, but usually it does not.

Bill Aitken: You are correct that instances of the accused conducting their own defence are limited. The case that you referred to was an English case—there have been only three such cases in Scotland in the past 10 years and one of them was a summary matter.

With your experience as an advocate depute and a defence counsel, do you feel that the possibility of a complainer being confronted in direct cross-examination by the person who has allegedly raped her might have an inhibiting effect on women reporting crimes of that type?

Graham Bell: No, because cross-examination by the accused is such a rare occurrence. One must accept that it is not a pleasant experience for the complainer to be cross-examined by counsel. Complainers in sexual cases have the unpleasant task of giving evidence about the matter in court, in particular when they are cross-examined. I suspect that cross-examination by counsel is a more searching cross-examination than the accused would embark upon. I do not think that the possibility of being cross-examined by the accused inhibits complainers from coming forward.

The Convener: We cannot dismiss the fact that vulnerable witnesses have a hard time from the counsel for the defence—that is part of the trial—but when a woman is faced with the person who may have violently raped her, it is hard to see how that would not affect her evidence. She would not only be distressed by the trial, but she would be faced with the person who put her in a state of fear and alarm.

Graham Bell: I return to the fact that the bill will legislate for a rarity—such cases seldom happen—and that will create needless difficulties. Members must bear in mind that in trials in which a complainer is giving evidence about rape, she has the misfortune of the accused sitting there. Even if the complainer answers questions from a counsel or solicitor-advocate, she does so in the presence of a man who, she claims, has perpetrated the offence. Inevitably, she is face to face with the perpetrator.

The Convener: If the accused is conducting his own defence, how close to the witness box is he allowed?

Graham Bell: That depends on the layout of the court, but I think that he is not allowed to be much closer than the distance between the convener and me and we are at opposite ends of the table. The accused is not allowed to get close to the complainer—the cross-examination is normally across the courtroom. The jury is on one side of the courtroom and the witness box is on the other side. In the majority of courts, that distance is not less than the distance between the convener and me.

The Convener: It is easier to make eye contact at that distance than it is if the accused sits quietly beside the solicitor.

Graham Bell: That varies from case to case. One is often aware that accused persons look aggressively at the witness when she is giving evidence, but the judge and jury notice that, so it does not do any good. Do not misunderstand me: it would be a worse experience to have to answer questions from the alleged perpetrator of the rape, but the bill will introduce an unnecessary framework because such cases are rare.

Stewart Stevenson: The Faculty of Advocates also made the point in its written evidence that there are already circumstances—including "accused is insane"—under which a court might have to appoint a solicitor to act for the accused. Is there any evidence that that arrangement operates unfairly in respect of the accused, or that it is unsatisfactory?

12:15

Graham Bell: No. We made the point in our submission that such a situation will not end with a conviction because the accused is insane and is unable to give instructions. The Criminal Procedure (Scotland) Act 1995 now allows a proof of the facts. The solicitor or counsel who is sitting in and representing an insane victim is not provided with any defence and is there simply to ensure that the Crown does not lead any evidence that goes outwith the terms of the original libel. That is the restricted purpose; there is no question of addressing the jury and saying, "This man's not guilty," for example.

Stewart Stevenson: Can I clarify that we are discussing circumstances in which the accused is insane in relation to the accusation? The insanity may have arisen after the event.

Graham Bell: We are dealing with insanity at the time of the trial and circumstances in which the accused is unable to give instruction for his defence.

Stewart Stevenson: I can imagine a range of reasons for which the accused might not be able to give instructions, including becoming insane subsequent to the event. Is there a process by which the interests of the accused can be protected?

Graham Bell: The accused is protected to the extent that that situation does not result in a conviction. Under the circumstances that we are

discussing, a hospital order will be made. The judge will not make a hospital order unless he is satisfied that an incident has occurred.

Stewart Stevenson: Therefore, the appointment of someone to act in defence of the accused against the instructions of the accused is entirely new.

Graham Bell: Yes.

Stewart Stevenson: There is no precedent in the existing operation of the law.

Graham Bell: That is correct.

The Convener: I wish to move on to deal with paragraph 3.2 of your written submission, on section 7 of the bill, which would introduce a new section 274 to the Criminal Procedure (Scotland) Act 1995. The proposed replacement section would deal with evidence attacking character and credibility or reliability.

Bill Aitken: That is clearly likely to be one of the more controversial sections of the bill. Basically, if everybody were doing their job, we would not be having this discussion, would we? If the judge were to rule out fishing expeditions from questioning, and if the prosecutor were sufficiently robust in protecting his witness, we would not be experiencing the difficulties that occur from time to time.

Graham Bell: I have some difficulty in answering that question—it reminds me of the "Have you stopped beating your wife?" question. Our discussion indeed proceeds on the basis that judges are not doing their job properly. I have 20 years' experience. My colleague Mr Young, who is sitting next to me, has four years' experience. We are both conscious of the fact that judges respect the rules very much. One is concerned to know on what basis it is being suggested that they do not respect the rules. I was somewhat alarmed to hear the Law Society representatives agreeing to the proposed new section. I would not agree to it.

I remind members that judges are getting younger all the time—most are younger than I am. They are very much aware of the importance of not allowing questioning regarding character or sexual misconduct, unless it can be shown to be relevant to the issues of the trial. Counsel who try going on a fishing expedition will find themselves in serious trouble if they have not sought the consent of the court before asking their questions.

In my opinion, the current rules work. The difficulty is that many of the complaints that members hear come from complainers who went to court and found themselves being asked a series of questions without knowing why they were being asked them.

It often happens that the complainer might say in the course of her evidence that she has never had sexual intercourse before, although the defence counsel has been told by his client that the accused and the complainer had sex last year. The defence counsel would then make a motion to the judge under the relevant section, the jury and the witness would be removed and the counsel would explain that he has information that is contrary to what the lady has just said in the witness box.

The fact that they had sexual intercourse last year bears not on the merits of the case but on her credibility; it is her credibility that is at issue. Counsel will therefore ask the court's authority to cross-examine the complainer on whether it is the case that, although she said that she had never had sexual intercourse, she had intercourse with the defence's client last year. The judge would have to decide whether what the witness had said so far would justify breaching the rule. In such a situation, the judge would be hesitant to grant permission. However, that is how the situation would arise in practice.

The concern of the Faculty of Advocates is that the bill would require notice in writing to be given so that the issue could be determined before the trial began and before the jury was empanelled. An attack on the complainer's character happens much more regularly because the woman says something that can be shown to be untrue.

Bill Aitken: Let us explore that a little further. Although the bill provides the facility for a trial within a trial, would there be any value in having a procedure—which I know is not in the bill—whereby the defence could intimate in the absence of the jury and the complainer the line of questioning that it intended to follow, the admissibility of which the Crown could accept or reject, but whose admissibility the judge would then have to determine? The advantage of that would be that the complainer would be removed from the potentially distressing situation of having to give evidence twice on highly evocative matters.

Graham Bell: That is what happens in practice. In the sort of situation that I described, the judge would be invited to allow the cross-examination and the Crown would be called upon to reply. The Crown might say that it is aware that the incident happened the previous year and that it does not oppose the line of questioning. There is no question of having to have a trial within a trial. The judge can make the determination on the facts that are agreed between the parties, which happens quite frequently. Whether the woman's character should be an issue is always a matter for the judge; the defence and the Crown cannot agree that between them.

Bill Aitken: I fully accept that that is the general practice. For the sake of public acceptability—if for

nothing else—would there be some value in making a statutory provision for that to take place?

Graham Bell: I have difficulty with the idea of adding to the rules and regulations that govern trials, unless it is absolutely necessary. This is a justice committee and justice is the issue that concerns us. Such provisions would need to assist the administration of justice and would have to result in justice being done. It is difficult to do such things by written applications in advance, because one does not know what sort of evidence will be given. I am aware of situations in which a woman has not denied that she had sexual intercourse with the man the previous year and because she is not lying about it, the matter is not raised in evidence and there is no need to start attacking her credibility.

One wants to restrict such applications to when they are necessary. My fear is that if we make a provision such as that which is proposed in the bill, every defence counsel will frame an application—dotting the i's and crossing the t's—just in case the situation arises. That might result in a woman—before the real trial starts—being put unnecessarily through a trial to determine issues that might never need to be determined.

The Convener: We are committed to examining such issues and to getting the balance right. We hear what you are saying. We do not want to make the procedure so cumbersome that it creates an unhelpful delay for the victim. There is a lack of academic evidence, which makes it a struggle for us to determine the facts. That is why we took evidence from Dr Burman and Dr Jamieson, who are the only people of whom we are aware who have undertaken research on rape victims. One of the comments that they made in evidence to the committee was not on the difficulty of the "Have you stopped beating your wife?" question that you alluded to earlier, but on the fact that the judge and the prosecutors were not at all clear whose job it was to step in. In the absence of anybody stepping in to protect the victim, the evidence tended to stray into areas that it should never touch. Even if such evidence was not relevant, it would have been admitted already; the jury would have heard it and made a decision based on what it had heard.

There is a perception—perhaps you could comment on its veracity—that often defence counsels try to undermine a woman's credibility by making her out to be of low moral character. That—to try and stop the defence attacking credibility in such a way—is at the heart of the restriction on evidence. As a committee, we accept that it is part of fair trial procedure to question the credibility of any witness, but not, as happens in many cases, when the evidence on a woman's sexual history or character bears no relation to proving the claim. The perception is that that has happened to many women and it is one of the reasons why women do not come forward.

Graham Bell: I agree that that is the perception, but it is wrong. Under the current law, before any counsel asks a question of that nature, it is imperative that they obtain the authority of the judge to do so. No judge would sit and allow counsel to ask such questions without counsel first having obtained consent.

The difficulty is that much of the evidence that Dr Burman and Dr Jamieson are considering is simply what the complainers say happened—they do not know the justification for people being asked the questions. It would be useful to carry out research on that. Our initial response said that the Scottish Law Commission should be asked to advise on the matter. The SLC has the opportunity to carry out a proper survey on how such things work in practice. At the moment, all we have are the accounts of complainers and those of lawyers justifying their procedures.

One of the difficulties with rape cases is that no members of the public are present at trials, because the public is excluded. In other areas of the law the public have the opportunity to observe what happens in practice. The perception depends on people saying what happened to them. Some people are more reliable than others in that respect. I suggest respectfully that much research is required to determine whether changes are justified.

12:30

The Convener: I note that point. Your submission mentions the stereotypes that juries have in mind when they see an alleged rapist and the fact that they do not think that the accused looks like what they imagine a rapist to look like. Is it also possible that the jury could stereotype the victim? If subtle character attacks are allowed—they happen—that adds to the difficulty.

Graham Bell: That goes back to what I said at the outset. Most of the cases that we are talking about relate to date rapes. Juries find it hard to understand a case that involves a man and a woman who meet for the first time, spend the night carousing and then go back to a flat. When my generation was young, that would have been extraordinary, but it is not extraordinary today. One might even say that it is commonplace. Juries are amazed when they hear that everybody was drinking and everybody was great pals and that the people concerned were kissing in the pub before they went back to her flat. The jury wonders why they went back to her flat. The answer is that they wanted to continue what was happening in the pub, but the jury finds it difficult to accept that

she would then say no. Why would she take the boy back to her flat in the first place? It all comes back to the issue of credibility.

The answer to the question—which I think I have avoided so far—is that the court should not, without laying a proper foundation for such questioning, allow questions that are designed to attack a woman's character. However, jurors are suspicious of the situation. My experience—I suspect that it is the experience of most of my colleagues—is that the more women there are on a jury, the more suspicious the jury is and the less likely the Crown is to get a conviction.

Bill Aitken: I want to explore that a little further. As you are aware, the maximum sentence for rape is life imprisonment. If you are suggesting that there should be another offence to cater for date rape, are you also suggesting that there should be a lesser disposal?

Graham Bell: Yes. Juries are often reluctant to convict because they are aware of the fact that, if somebody is convicted of a charge of rape, they will receive a substantial sentence that is usually seven years or more. Similarly, juries are reluctant to convict somebody of murder because they know that it carries a life sentence. That is why, when they think that there might be an argument that the crime was something less than murder, juries will plump for culpable homicide, which gives the judge a range of options. It would help if there were a similar charge that juries could use in cases in which they are not prepared to accept that the crime deserved to be called rape.

Bill Aitken: Your case is arguable, but leaves us with the situation where, after carousing and drinking in the pub, the pair return to the flat, drink more alcohol and take dubious substances before something happens. The jury would still have a problem with that, would it not?

Graham Bell: Yes, but juries would be inclined to accept that an offence had taken place. Many years ago, a judge who talked about contributory negligence on the part of a woman was subject to tremendous criticism. Although, no doubt, most of us in this room would also criticise him, there is an element of truth in his view. Juries' decisions are affected considerably by the fact that the woman has, somehow or other, placed herself in a position in which there was a reasonable expectation that sexual intercourse was going to take place and has then said no. She is absolutely entitled to say no, but what is distressing about many of those cases is that juries return verdicts of not guilty or not proven.

The Convener: For the sake of completeness, I will cover all the points that you put to us in your submission. Given your 20 years of experience in the criminal courts, can you tell us whether, if a woman's sexual history is raised in court without notice, the accused's previous convictions can come into play? Can you explain that process?

Graham Bell: The rule is that an accused's previous convictions cannot be referred to unless he sets up his own good character or he attacks the character of the complainer. If either line is followed, the prosecutor, in turn, must seek the court's authority to lead evidence as to the accused's bad character and his convictions. If an accused person has convictions that he does not want to disclose, he, and the counsel who appears for him, must proceed with caution.

The Convener: I raised that question because evidence, albeit anecdotal, has been put to me that suggests that that process is not often, and certainly not always, followed. It is not automatic; it is only an opportunity: if a woman's sexual character is attacked, it is open to the prosecution to mention the accused's previous convictions.

Graham Bell: That is not what would happen. If the woman's character is attacked with justification—I am sure that you accept that it is sometimes done with justification—that would not result, under the present rules, in the disclosure to the jury of the accused's conviction.

In a rape case, we are concerned with the credibility and reliability of both the accused and the complainer, and the jury must make a determination about their credibility and reliability. If the jury convicts, it is the accused who will go to prison. For example, a woman may come into court and try to maintain that she is an honest person, although clear evidence exists that she has a previous conviction for perjury. It would be perfectly proper for the defence counsel to seek leave to put to her that what she says about being an honest person is not correct, because she has a conviction for perjury. In those circumstances, the judge would almost invariably allow that question. That would not result in the disclosure of the accused's convictions, because it would be part of the process of testing the Crown's evidence and whether the Crown can prove the case beyond reasonable doubt by credible and reliable witness evidence.

The Convener: Are you saying that in cases in which the rule would kick into play and in which it would be competent for the prosecution to raise the previous convictions of the accused, that always happens or are you saying that sometimes it does not happen?

Graham Bell: It does not always happen. The judge must make a determination and the defence ought to be careful, as there may be occasions when the defence counsel asks a witnesses about their previous record with the result that the accused's record is disclosed. However, it is a

matter for the court to decide whether introducing that evidence is in the interests of justice.

The Convener: You do not mention prior notification of the defence of consent in your submission. Do you have any views on those provisions that you would like to share with us?

Graham Bell: I read the Law Society's comments on those provisions, which I think are absolutely unnecessary. If the accused tenders a plea of not guilty, that is that. The Crown is then put to the test of proving the case. I cannot see what such notification would add. The Crown has to prove that there was no consent before it can secure a conviction.

The Convener: On proposed new section 275 of the 1995 Act, which concerns exceptions to restrictions, your submission states that

"the probative value of evidence yet to be led or elicited is or is not 'significant'."

It goes on to say that such questions should be a matter for the jury, not the judge. We understand why you would say that. The jury could, however, make the wrong decision about the relevance of that evidence. It would then be too late for the complainer to benefit. If the judge—who already decides questions of relevance and admissibility—were to decide whether that evidence should be allowed, that is still an independent person making the decision. There is also still protection for the complainer, which would not exist if the jury were making that decision.

Graham Bell: The difficulty with that is that if the evidence is relevant, why should the jury not have it before them? The jury is the fact finder in any trial; the judge is not. Everyone who practises in the courts will tell you that, time and time again, a piece of evidence that was not thought to be significant at the time suddenly becomes important after all the evidence has been heard. There is a grave danger that if a judge is faced with an objection to a piece of evidence that he thinks is relevant, but he cannot see how it will affect the jury's decision, he might be inclined to exclude it. However, later on in the day, he might realise that if the jury had known about that evidence, it might have affected the credibility and reliability of other witnesses. It is often a little lie.

The Convener: If someone did not apply to have evidence heard in advance, does the bill provide for them to apply to have it admitted later, as long as they can justify why they did not apply to have it heard earlier? If there is no such provision, could the bill be adjusted to take that scenario into account?

Graham Bell: It is difficult to anticipate what evidence will be. Everyone who practises in court will tell you that, time and again, when a witness goes into the witness box they will say something different from their precognition. One cannot rely on evidence in court being the same as it is on paper. That is why we have trials. With the greatest respect, if the evidence is relevant, the fact finder must decide how to use it. I do not understand the fear that a piece of evidence that might be relevant should be excluded from the jury because it might affect the jury wrongly. That seems to be the thinking behind the proposal.

The Convener: Are you saying that the jury should decide whether evidence is relevant?

Graham Bell: No. The judge must decide that.

The Convener: When does the judge decide that? Does he decide during the trial?

Graham Bell: For example, counsel might ask a question such as, "What was the complainer wearing?" There is a reference in the Law Society's submission about buying underwear from a certain firm that I have never heard of.

The Convener: We will not advertise it again.

Graham Bell: The defence might think that that information has been put in as a piece of prejudice. The defence might then object to the question about the underwear that the lady was wearing. The witness and the jury would then go out of court and the judge will then hear argument as to why that evidence should not be allowed. If it is brought up so that someone can say that because the lady was wearing underwear from that firm she is more likely to engage in sexual intercourse, that would be wrong. However, if the woman maintains that she was wearing underwear from Marks and Spencer and that never in her life—

The Convener: Let us not get into that.

Graham Bell: She might be the only person who still gets underwear from Marks and Spencer.

The Convener: Let us not get into that, either.

Graham Bell: That evidence could seriously affect the jury's decision about her credibility. The judge is faced with a difficult line: the lady has said that she was not wearing anything unusual or exotic on the night in question when the rape is alleged to have occurred. The accused's position is that the woman was wearing exotic underwear and there might be independent evidence that she was.

12:45

The Convener: If that is argued in court, albeit that there is no answer until the judge decides whether it is relevant, do you not think that the jury might draw an inference from such evidence? If counsel is required to ask in advance to raise such

points, the decision is taken away from the jury.

Graham Bell: It is the duty of counsel in framing a question in an area like that—when the evidence that is raised is something in the way of an attack on the sexual character of the complainer—to do it in a way that does not tell the jury what he wants to ask. One would normally say that there was a matter that one wanted to raise before proceeding further with the examination of the witness. One would not ask, "Were you wearing underwear from a particular firm?" because that would give the game away. One would say to the judge, "I want to raise an issue and I wish to obtain authority from the court before doing so."

The Convener: What you say sounds perfectly reasonable. I do not think that the vast majority of people would accept that everyone in that process has adhered to their duties, whether they be prosecutors, judges or counsel. The point has been put to us many times that the law as it stands could be adequate, but there is a general view that it has failed many victims. We are here to examine whether we can change that. It is difficult for us to accept that if everyone did their duty there would be no problem. It is certainly the case that people are going beyond what they should be doing.

Graham Bell: The same thing will happen when the new rules are in place. The rules must be followed. If counsel, solicitors or judges do not follow them, a different result will not be achieved.

My submission is that if the existing rules were followed properly, there would be no need to change them. They are perfectly adequate and they strike the right balance between the interests of the accused and those of the complainer. I urge you to consider carefully before you start restricting rights any further because it is important that the trial process stands up to the European convention's requirements for a fair trial. The more obstacles you put in the way of the jury determining the issue and all the facts that are relevant, the less satisfactory the process of achieving a fair trial becomes—that is the danger.

I have considerable experience in the courts and I think that judges are alive to the problem and anxious to ensure that counsel do not overstep the mark. As I said, judges are getting younger all the time and they are alive to the issue. The problem of which we speak might have happened in the past, but it does not happen now.

Stewart Stevenson: Do you accept that even if what is proposed in the bill has no effect in the courts, it would have value in changing potential complainers' perception of how they will be treated by the courts? Would it reduce the number of potential complainers who are deterred from laying a complaint because of a belief in the community at large that they will not be dealt with fairly?

Graham Bell: Frankly I do not think so, but it is for you, rather than me as a lawyer, to determine the public perception. Complainers in rape cases in particular tend to complain when they are in a state of distress—which, almost inevitably, is necessary to prove the lack of consent. Complainers will tell the first person they meet, "I have just been raped." They do not stop and think about it. They certainly do not stop and think, "What will happen when I go to court?" That is not the real world. In the real world they shout, "I have just been raped. I have been raped." They want help and they want the man concerned to be sorted out. They do not stop to think, "How will I deal with cross-examination in court?"

Stewart Stevenson: Are you aware of any objective research or information on the number of complainers who do not persist with their complaint because they fear that they will not be treated fairly?

Graham Bell: No. What I can say is that once the complainer has made the report to the police, it is then a matter for the police to report to the Crown, and it is for the Crown to decide whether prosecution should take place. Having been a depute, I am aware of more than one occasion when the complainer did not want to proceed but the Crown proceeded because it considered it its public duty to do so, because there had been a complaint of rape and there was evidence of rape. I do not think that complainers sit at home thinking, "Should I report this, because if I do I will be cross-examined in court?" In the real world, that does not happen.

The Convener: We will close the discussion there. I thank Graham Bell and David Young for their excellent evidence.

Graham Bell: Thank you. On behalf of the Faculty of Advocates, we greatly welcome this opportunity to give evidence. In spite of the fact that our paper may seem rather negative, we are more than delighted that you are examining these matters and bringing the law up to date.

The Convener: I assure you that we are very grateful for all the points that you have made, even if we do not agree with them all.

Item in Private

The Convener: Members have already agreed to meet in private at our next meeting to discuss lines of questioning. In addition, do members agree to meet in private to discuss the stage 1 draft report?

Members *indicated agreement.*

The Convener: I have one item before we close, which is that I am going to mention something after we close the meeting.

Mrs Mulligan: On that point, we are going to meet in private to consider the stage 1 draft report, but we still have evidence to hear. Is that correct?

The Convener: Yes. This is an extra session that we have fitted in, because we felt that we had to get a fuller picture. It now butts up against the time when we will consider the draft report. I emphasise that it will simply be a draft report. Obviously, we will have to include the evidence that we hear. The point of the discussion is to begin to formulate the areas that we want to focus on. Some of them are pretty clear already, in that they are issues that we want to examine and issues of difficulty or agreement, but next time we meet we should be able to do something formally.

Meeting closed at 12:54.

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Printed in Scotland by The Stationery Office Limited

ISBN 0 338 000003 ISSN 1467-0178