JUSTICE 2 COMMITTEE

Wednesday 12 December 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
35th 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)
*Alasdair Morrison (Western Isles) (Lab)
*Stewart Stevenson (Banff and Buchan) (SNP)

*attended

THE FOLLOWING ALSO ATTENDED:

Dr Richard Simpson (Deputy Minister for Justice)

CLERK TO THE COMMITTEE

Gillian Baxendine

SENIOR ASSISTANT CLERK

Claire Menzies

ASSISTANT CLERK

Fiona Groves

LOCATION

Committee Room 2

Scottish Parliament

Justice 2 Committee

Wednesday 12 December 2001

(*Morning*)

[THE CONVENER *opened the meeting at 10:02*]

The Convener (Pauline McNeill): Good morning everyone, and welcome to the 35th meeting in 2001 of the Justice 2 Committee. Some of us have been at all 35 meetings. I am sure that the rest of you will catch up in due course. I have received no apologies. We have a full turnout, which is good news.

Interests

The Convener: I have nothing to report under convener's report, so we will move to item 1, which is a declaration of interests. I welcome Alasdair Morrison to the committee. I am afraid that there is a lot of heavy work in this committee, Alasdair, but I am sure that you will enjoy it. I invite you to declare any relevant interests to the committee.

Mr Alasdair Morrison (Western Isles) (Lab): I have no relevant interests, convener.

Item in Private

The Convener: Under item 2, I invite the committee to agree to take item 6 in private. Is that agreed?

Members *indicated agreement.*

Sexual Offences (Procedure and Evidence) (Scotland) Bill: Stage 2

The Convener: Item 3 is stage 2 of the Sexual Offences (Procedure and Evidence) (Scotland) Bill. I welcome Richard Simpson, the new Deputy Minister for Justice, to the committee. Congratulations on your appointment, minister. I welcome also your team.

Members should have a copy of the bill, the marshalled list and the groupings. I remind members that, as usual, we will follow the order of amendments in the marshalled list, and we will have only one debate on each group of amendments.

I do not propose to take today the group of amendments on the disclosure of previous convictions. I hope that members have had the chance to read the letter from the Deputy Minister for Justice that explains the reason for those amendments and to read the Executive note on all its amendments. The clerks have taken the opportunity to write to those who gave oral evidence at stage 1 to explain the basis of the new amendments, because it is only fair that they be invited to comment. We will not be dealing with that group of amendments today, so members will have a chance to examine them in more detail.

Section 1—Prohibition of personal conduct of defence in cases of certain sexual offences

The Convener: I call amendment 1, which is grouped with amendments 18, 19, 2, 30 and 15.

The Deputy Minister for Justice (Dr Richard Simpson): Before I talk to the amendments, I thank you for your forbearance, convener, with regard to the letter that we wrote to you about holding back the amendments on the disclosure of previous convictions until next week. That will give people time to consider them.

Amendment 1 is designed to plug a small gap that has been noticed in the list of offences that are covered by the bill. While assault with intent to rape is included in the list, abduction with intent to rape is not. That is anomalous. Both offences should attract the protection of the bill.

Amendment 2 removes from the list of offences that are covered by the bill offences under section 13(5)(a) of the Criminal Law (Consolidation) (Scotland) Act 1995. Section 13(5) of that act deals with homosexual offences. Sections 13(5)(b) and 13(5)(c) cover sexual assaults and sexual activity with underage boys, but section 13(5)(a) is concerned with consensual homosexual activity between adults that does not take place in private. In such public decency cases, there will be no

complainer to protect, so it is not necessary to include the offence in section 13(5)(a) on the list of offences that are covered by the Sexual Offences (Procedure and Evidence) (Scotland) Bill.

Amendment 15 is a consequential amendment. Section 10 of the International Criminal Court (Scotland) Act 2001 amended section 274 of the Criminal Procedure (Scotland) Act 1995, which lists the offences to which the current restrictions on the use of sexual history evidence apply, by adding genocide, war crimes and crimes against humanity to the list in cases in which those crimes have a sexual content, such as mass rape. Because the bill replaces the present section 274 of the Criminal Procedure (Scotland) Act 1995 with a new version, section 10 of the International Criminal Court (Scotland) Act 2001 will automatically cease to have effect. Amendment 15 makes that plain by repealing section 10 of the International Criminal Court (Scotland) Act 2001.

We could have carried over genocide, war crimes and crimes against humanity into the list of offences in the bill, but we have decided not to do so. The list contained in the bill is not a list of only the most serious offences; it includes a wide range of sexual offences, although all are likely to involve a distressing experience for the complainer. The listed offences have in common the fact that they are exclusively sexual offences; they cannot be anything else. That is important, because the police, courts and prosecution will all need to know from the outset whether the provisions of the bill apply. They will need to be able to get on with giving to the accused the notices and warnings that are specified in the schedule. If the list included a particular offence, but only when that offence had a substantial sexual element, too much uncertainty would be introduced into the process.

When the offence is not on the list, but the case has a substantial sexual element, the bill provides a solution. The court will have the power to extend the bill's provisions to such a case at any stage of proceedings under the proposed section 288C(4). The bill's provisions will apply from that point on. The court will not have to wait for a prosecution application; it will be able to exercise its power of its own motion if it sees the need.

Genocide, war crimes and crimes against humanity are truly appalling crimes. However, they would not always be sexual crimes, so they should not be included in a bill that deals only with sexual offences and not with wider vulnerable witness issues. Occasionally, those crimes may have a sexual content. If that were to be the situation in a case being tried here, the court's power to extend the bill's provisions would be there to protect any complainer.

I move amendment 1.

Bill Aitken (Glasgow) (Con): The issues here are fairly straightforward. Having been convinced of the efficacy of section 1 of the proposed legislation, I am seeking to make it more effective.

Amendment 18 relates to whether the crime of shameless indecency should be included in the definitions. That type of offence almost invariably has a sexual connotation—the minister may wish to come back on this. Although in many cases those who are guilty of this offence are sad rather than bad, a woman having to give evidence in court on that type of behaviour might feel a degree of inhibition if she were to think that the person who had exposed himself to her would be carrying out the cross-examination. It might be useful to add that definition to section 1.

A similar argument applies in amendment 19, in which I seek to add at the end of line 7 on page 2:

"(seduction, prostitution, etc. of girl under 16)".

The argument is slightly different from that which I made for amendment 18. The sexual connotation would almost invariably be there in the offence of shameless indecency, but I accept that on some occasions it might not. Under amendment 19, I suggest in the strongest possible terms that invariably there would be a sexual connotation to that type of offence. A conviction for such an offence now would almost invariably result in the offender being put on the sex offenders register. That suggests that there is a recognition that the sexual element in this offence would merit its inclusion in the bill.

I take no issue with the Executive's amendments. They have merit and I will support them.

Mrs Margaret Ewing (Moray) (SNP): Amendment 30 has two parts. The first part is to stop the provisions that prevent the accused from representing himself from applying to summary cases. It seems to me, and to others, that the right to represent oneself in court should be removed only when the Crown believes that the offence is sufficiently serious to merit being tried on indictment.

Lewd behaviour covers a wide range of offences. Some could be serious and others could be fairly mundane. Of the offences listed as lewd behaviour in Gordon's "Criminal Law of Scotland", the statutory offences to which the bill applies are specified in paragraphs (g) and (h) of proposed section 288C(1) that the bill adds to the Criminal Procedure (Scotland) Act 1995. That leaves indecent exposure and shameless indecency. The recent cases on indecent exposure indicate that it has to be intentional, although possibly subjectively reckless with

"awareness of the risk of exposure",

as was found in the McDonald v Cardle case of 1985, reference Scottish Criminal Case Reports 195. Only 39 per cent of those with a charge proved of indecent behaviour receive a custodial sentence. That statistic comes from table 8(c) of "Criminal Proceedings in Scottish Courts, 2000".

The second part of the amendment would prevent the same provisions from applying to crimes such as shameless indecency when there has been no direct victim or when the victim consented. Although it is apparently rarely charged, shameless indecency could be almost anything. Many of us might have difficulty in defining it, although there was a case, McLaughlin v Boyd 1934, reference Justiciary Cases 19. Theoretically, as I understand it, shameless indecency that could include a display in a nightclub, intercourse with consent, intercourse in a car or a deserted street, and intercourse with an animal. There is no reason to include that kind of behaviour, when there is no complainer, in the bill.

Scott Barrie (Dunfermline West) (Lab): I would like the minister to clarify amendment 2, as I am not very au fait with the Criminal Law (Consolidation) (Scotland) Act 1995. Was the change to the definition of homosexual offences made to take into account the evidence that we took from Tim Hopkins from the Equality Network?

Dr Simpson: Yes.

Scott Barrie: That is all that I needed to know.

10:15

The Convener: The committee may want to be assured that amendment 2 deals with the points that were made to us by the Equality Network, which claims that the bill as it stands discriminates against gay men. Scott Barrie has already made that point.

I hear what you say, minister, about the repeal of section 10 of the International Criminal Court (Scotland) Act 2001. However, I still believe that mass rape has enough of a sexual element to be named specifically in the bill. Have you given any thought to that issue, which would be relevant in the event of war? It is unlikely that we will need such a provision, but how could we amend the list of offences to include mass rape? Perhaps we should do that now.

The committee received a considerable amount of evidence suggesting that we should list only those offences that were sufficiently serious to merit being dealt with in court under the provisions of the bill. For that reason, I support the sentiments that Margaret Ewing has expressed this morning and have a difficulty with the amendment that Bill Aitken has lodged.

Could you address some of those points in your closing remarks?

Dr Simpson: I would be happy to.

Amendment 18, in the name of Bill Aitken, seeks to add shameless indecency to the list of offences that are covered by the bill, so that an accused charged with such an offence would not be able to conduct his defence personally. The list in section 1 of the bill is intended to cover all sexual offences. It already covers indecent behaviour, which is stated to include

"any lewd, indecent or libidinous practice or behaviour".

In the categorisation of crimes in the leading text book of Scottish criminal law, shameless indecency is treated as a subcategory of crimes involving indecent behaviour. I understand that in practice the charge is little used, but if it is, it would be caught by the provision in the bill that covers indecent behaviour. For that reason, we see it as unnecessary to add it to the list separately. I ask Bill Aitken not to move amendment 18.

We have considered amendment 19 very carefully. Section 10 of the Criminal Law (Consolidation) (Scotland) Act 1995 covers offences that could involve the questioning in court of a girl who was the victim of a sexual assault or had been seduced or prostituted at the instigation of a parent or someone who had parental responsibility for her. The parent would be the accused. We agree that in those circumstances the girl should have the protections offered by the bill and that the offences covered by the relevant section should be added to the list. For that reason, we accept the amendment.

The first part of amendment 30, in the name of Margaret Ewing, would restrict the benefit of the protections of the bill that are afforded to complainers to what might be described as more serious cases—that is to say, cases tried by a jury. We do not think that that is justifiable in principle. An offence may be relatively minor from the point of view of the accused, who may face only a fine or a short period of imprisonment, but the impact of the offence on the victim can be very severe.

We considered carefully the scope of the bill as it was being drafted and came to the conclusion that summary cases should also be covered. A complainer in a summary case could potentially be questioned about intimate sexual matters and find the experience distressing. We think that all complainers in sexual offences cases should have the benefit of the protections that are offered by the bill. Members will no doubt recall that one of the cases that the press reported, which started the call for changes in the law, was a summary case.

We were rather unclear about the second paragraph of amendment 30. The amendment is unnecessary and unhelpful. Few cases will have no complainer. There may be a difference of opinion in some cases about whether a complainer exists, but the vast majority of instances of the offences that are listed in proposed section 288C of the Criminal Procedure (Scotland) Act 1995 will clearly involve someone against whom the offence was committed. It is not sensible to modify the bill fundamentally to take account of the few cases in which it is arguable whether a complainer exists.

Amendment 30 would just add another test that the police and the courts would apply to determine whether the alleged offence is covered by the bill. That complicates matters unnecessarily. As early as possible, it must be as clear as possible whether the provision covers a case. The best way of ensuring that is to refer to the offence charged. That is simple and clear and does not involve anyone deciding whether a sexual offence is victimless.

Adding a further test would just create more room for differences of opinion and argument as to whether a complainer exists, and therefore more opportunity for uncertainty. That is unhelpful to the accused and the complainer. I therefore ask Mrs Ewing not to move amendment 30.

Scott Barrie raised points, which the convener repeated, about the equality issue, which we believe has been fully addressed. The international criminal court issue is covered adequately by proposed section 288C(4). That allows the matter to be brought back, if the court decides that the offence has a substantial sexual element. The problem is that if we put such offences back in the 1995 act, the police will have to warn people at the early stages and make a decision. For clarity, we feel that that matter is best dealt with separately under proposed section 288C(4), rather than in the list of offences at the beginning of that section.

Amendment 1 agreed to.

The Convener: Amendment 18 was debated with amendment 1. Does Bill Aitken wish to move the amendment?

Bill Aitken: Having heard the minister, I will not move amendment 18, but I reserve my position for stage 3 until I have checked the matter.

Amendment 18 not moved.

Amendment 19 moved—[Bill Aitken]—and agreed to.

Amendment 2 moved—[Dr Richard Simpson]—and agreed to.

The Convener: Amendment 3 is grouped with amendments 20, 4, 26 and 27. If amendment 20 is agreed to, amendment 4 will be pre-empted.

Dr Simpson: Amendments 3 and 4 are tidying amendments. Proposed section 288C(2) of the Criminal Procedure (Scotland) Act 1995, which section 1 of the bill will insert, contains the list of offences that will be automatically covered. Proposed section 288C(2) talks about sexual offences, not alleged sexual offences. It is taken as read that when the provisions are applied, a trial will not have begun or will be in progress, and so it will not have been proved that the accused committed the offence.

Subsections (3) and (4) of proposed section 288C allow the court to extend the provisions to an offence that is not on the list, when a substantial sexual element is involved in the case. Those subsections refer, respectively, to

"alleged commission of the offence"

and "alleged offence". They spell out the fact that the case against the accused has not yet been proved, but that is unnecessary, because it states the obvious. It could also give the false impression that the word "offences" in subsection (2) is intended to have a different meaning from the words

"alleged commission of the offence"

or "alleged offences" in subsections (3) and (4) respectively. Amendments 3 and 4 would delete the surplus wording in those subsections.

Amendment 20, in the name of Bill Aitken, is misconceived and unnecessary. Proposed section 288C(4) is perfectly adequate to cover the process by which a court can decide whether to treat an offence as a sexual offence and so prevent the accused from questioning the complainer personally.

The intention of the bill is that an accused who is charged with any sexual offence will be prohibited from conducting his defence in person. The prohibition does not depend on whether there is a relationship between the accused and the complainer, or whether the quality of the complainer's evidence would be affected by the fact that the accused was conducting the questioning. The Executive believes that, as a matter of principle, complainers in all sexual offences should not have to contemplate the possibility of being questioned personally by the accused.

Complainers in all such offences should also have the benefit of the restrictions on the use of evidence about their sexual history or character. The only question to be determined by the court in deciding whether to treat the offence as sexual is whether it is, to all intents and purposes, a sexual offence—whether it has a substantial sexual element.

Amendment 20 would bring into the process criteria that are irrelevant to the question whether the offence is sexual. Those criteria are not relevant to the question whether the provisions of the bill will apply to the sexual offences on the main list in proposed section 288C(2). They should not, therefore, be applied to any other offence that is basically a sexual offence.

Amendment 20 would also greatly complicate what should be a relatively simple process. The prosecution will be aware of the circumstances of the alleged offence and will draw to the court's attention those factors that show that the offence has a sexual element. It is then up to the court to decide whether that element is substantial enough for the offence to be treated as a sexual offence. There is no need for a complicated set of criteria to be set out in statute, and I ask Bill Aitken not to move amendment 20.

The Executive is content to accept amendment 26. We take the point that, at the time of arrest, it will be possible to advise the accused that the offence is one to which proposed section 288C applies only if the offence is listed in proposed section 288C(2). It will not, at that time, be possible to say whether the court would consider whether any other offence is one to which proposed section 288C should apply by virtue of proposed section 288C(4).

We do not, however, think that amendment 27 is necessary and it might have an unintended effect that would not be beneficial to the accused. Amendment 27 seems to assume that a hearing under proposed section 288C(4) to decide whether the offence had a substantial sexual element could not take place at the same time as the judicial examination of the accused. We see no reason why those two processes should not happen at the same time, given that the prosecution should have sufficient information at that point to be able to explain to the court the sexual nature of the charge. The earlier that a decision is made on whether the alleged offence is to be treated as a sexual offence, the better. The accused would then be clear, as soon as possible, whether he is required to have a lawyer.

Amendment 27 would not stop the decision being made at the judicial examination, but it would mean that an oral warning about obtaining legal representation need not be given following that decision. That would not be beneficial to the accused. I request that Mr Aitken not move amendment 27.

I move amendment 3.

Bill Aitken: I disagree with the minister. Amendment 20 is well conceived and would provide a necessary part of the bill. To some extent, it seeks clarification of the term "substantial sexual element". That is an important aspect.

Under proposed section 288C(4), the court is required to make an order applying the procedure under proposed section 288C to the offences that are not listed in proposed section 288C(2). I cannot see anywhere criteria for the definition of the term "substantial sexual element". I bear in mind the fact that we are talking in a vacuum and that few cases of that type are likely to require determination, but difficulties could still arise and there is still, to my mind, an imperative that that term be defined. If it is not defined, appeals will be inevitable from time to time.

The minister will have to consider the compliance of the bill as it stands with the European convention on human rights. A contribution from the minister on that aspect would be welcome.

Amendment 26 is being accepted, so I need not detain the committee on that point. Having heard the minister's assurances, I will not move amendment 27. However, I commend amendment 20 to the committee.

10:30

Stewart Stevenson (Banff and Buchan) (SNP): In commenting on amendment 20, in the name of Bill Aitken, I shall focus particularly on proposed subsection (4A), paragraph (c), to which the minister referred. It says that the conditions are:

> "that there are reasonable grounds to believe that the quality of evidence … is likely to be diminished if the cross-examination is conducted by the accused in person and likely to be improved if an order is made".

That cuts right across the grain of the intention of the bill, and gives paramouncy to the quality of evidence over the protection of a vulnerable witness. On those grounds alone, I do not believe that we can agree to amendment 20.

Scott Barrie: I concur with what Stewart Stevenson said. Amendment 20 strikes against what the bill intends to do. We should be wary of that. Anything that promotes the quality of evidence over and above the protection of witnesses is the absolute opposite of what we are trying to achieve with the bill.

The Convener: I want to make a few comments in opposition to amendment 20.

The committee thought long and hard about the way in which complainers should be protected. We spent a bit of time with people who gave evidence, questioning them on whether the bill was in breach of the European convention on human rights. Witnesses from the Scottish Human Rights Centre, whose evidence should be given due weight, said that, although it was not how they

would choose to do it, they preferred that a solicitor should be appointed only for the purposes of cross-examination. Although that was their position, they felt that the Executive's position was not in breach of the ECHR. Other witnesses, including Professor Gane, said the same.

The principle that Bill Aitken is dealing with in amendment 20 is one that the committee, quite rightly, examined, so it is fair to debate it today. However, we came to the conclusion that, although the Executive was in a minority in wanting to pursue that route, the bill is ECHR proofed and is the right way to proceed. However, it might be helpful to put on the record this morning the fact that it is still the Executive's position that there are no breaches of the ECHR.

Dr Simpson: In our view, the bill should cover all sexual offences. The only relevant question, therefore, is whether the offence is a sexual one. Amendment 20 would mean that the court had more factors to consider and would make the process unnecessarily complicated and time-consuming. It is up to the court to determine whether there is sufficient sexual element to proceed with the application of the bill.

We have examined the bill closely and believe that it is fully ECHR compliant.

Amendment 3 agreed to.

Amendment 20 moved—[Bill Aitken].

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

Members: No.

The Convener: There will be a division.

FOR

Aitken, Bill (Glasgow) (Con)

AGAINST

Barrie, Scott (Dunfermline West) (Lab)
Ewing, Mrs Margaret (Moray) (SNP)
Lyon, George (Argyll and Bute) (LD)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Morrison, Mr Alasdair (Western Isles) (Lab)
Stevenson, Stewart (Banff and Buchan) (SNP)

The Convener: The result of the division is: For 1, Against 6, Abstentions 0.

Amendment 20 disagreed to.

Amendment 4 moved—[Dr Richard Simpson]—and agreed to.

Section 1, as amended, agreed to.

Section 2—Appointment of solicitor by court in such cases and availability of legal aid

The Convener: Amendment 30, in the name of Margaret Ewing, has been debated with amendment 1. Does Margaret Ewing wish to move amendment 30?

Mrs Ewing: In the light of the comments made by the Deputy Minister for Justice, I will not move amendment 30.

Amendment 30 not moved.

The Convener: Amendment 5, in the name of Mr Jim Wallace, is grouped with amendment 7.

Dr Simpson: Amendment 5 would cure a defect in the bill that several witnesses noticed at stage 1. The bill provides for the court to appoint a solicitor to the accused only if the court establishes at a pre-trial hearing that the accused is not represented. Pre-trial hearings are intended to be the appropriate mechanism for sorting out legal representation. However, there might be other situations when the accused does not have representation and the court needs to appoint a solicitor. For example, the accused might dismiss his solicitor after the trial has started, in which case the court would not have established at a pre-trial hearing that he was without a lawyer, so the power to appoint would not be triggered. Amendment 5 would allow the court to appoint a solicitor at any stage of the proceedings.

Section 31 of the Legal Aid (Scotland) Act 1986 gives a legally aided accused the right to choose his solicitor. That would be a problem for a court that was appointing a solicitor to an unrepresented accused in a sexual offence case under the Sexual Offences (Procedure and Evidence) (Scotland) Bill. The accused would already have had ample opportunity to choose a solicitor. A right of veto over the court-appointed solicitor would not be justified; it could easily be used as a tactic to delay the trial.

Section 31 of the 1986 act contains an exception to the right of choice where the Scottish Legal Aid Board has established a duty solicitor scheme. However, we hope to avoid the bureaucracy of creating a formal duty scheme for what we expect to be a small number of cases. The Law Society of Scotland has suggested, helpfully, that it will set up a database of suitable and willing solicitors. The database suggestion makes it even more likely that a duty solicitor scheme will not be needed—the court would simply find a solicitor from such a database.

Amendment 7 would amend section 31 of the Legal Aid (Scotland) Act 1986 to make it clear that the accused will have no right of choice when the court appoints a solicitor under the provisions of the bill, whether a duty scheme is used or not.

I move amendment 5.

Mrs Ewing: I am interested in the idea of one organisation being allowed to draw up a list of duty solicitors. I mean no disrespect to the Law Society of Scotland, but I wonder how that process would be scrutinised to ensure that the public could have

total confidence in duty solicitors.

Dr Simpson: The Law Society of Scotland volunteered that suggestion, but the court would not be obliged to take a duty solicitor from the society's database. However, it would be easier for the court to do so and the Law Society of Scotland is a respected body. One hopes that the database will be inclusive.

Mrs Ewing: So there will still be a choice if people do not want to use the Law Society of Scotland's roster.

Dr Simpson: The bill does not compel the court to choose from that database. We have said only that it is helpful of the Law Society of Scotland to offer to assist us in that way, as that would mean that we would not have to set up a duty scheme.

The Convener: There is an issue about the accused having no choice of which solicitor is appointed. The Law Society of Scotland is particularly concerned about the appointing of solicitors, so I am pleased that the Executive has lodged amendments to deal with that issue.

The committee appreciates that there are dangers in allowing the accused the flexibility of choice of solicitor, because one would not want the accused to use that as a tactic to delay the trial. However, I am concerned about the accused having no choice. Why is that not in breach of the convention?

Dr Simpson: Because the accused will have been made very aware of the fact that the court will appoint a solicitor, from whatever source, if the accused does not exercise their right to appoint their own solicitor. That is part of ensuring clarity in the charging and pre-trial process. The accused will have put himself in a situation in which the court is required to make an appointment.

The next group of amendments for debate deals with the question of conflict between the solicitor and the accused. Although initially there is no choice, if—later in the trial—the appointed solicitor is not functioning adequately, the court will have an opportunity to change them. The court will do that rather than the accused. However, we are straying on to later amendments.

The Convener: Would it be fair to say that it ought to be emphasised to the accused that, if they want to have a choice, they should appoint their own solicitor and that that choice will be removed if they fail to do so?

Dr Simpson: Absolutely. Many of the Executive's amendments seek to clarify the process, so that the accused will be aware as early as possible that the provisions in the bill will apply in his case, that he will not be entitled to conduct his own defence and that he should appoint a solicitor. It is important that that point be made as early as possible.

I take Margaret Ewing's point, which was well made, and emphasise that the database of suitable solicitors will be voluntary. Other than that, I have nothing to add to my opening statement.

Amendment 5 agreed to.

The Convener: Amendment 21, in the name of Bill Aitken, is grouped with amendments 33 and 6.

Bill Aitken: Amendments 21 and 33 recognise the points that the minister has already made. The events to which they relate will occur so infrequently that we could be accused of taking a sledgehammer to crack a nut, but we should ensure that legislation covers the sometimes bizarre events that can arise in court proceedings.

We are not dealing with rational, normal people. Anyone who thinks that he can conduct his own defence in cases as serious as those to which the bill relates is clearly a fool. However, such people make life extremely difficult for all those who have to deal with them. With amendments 21 and 33, I seek to offer some protection to solicitors who find themselves acting for people whose instructions can verge on the bizarre.

Amendment 21 would enable a solicitor who has been appointed under the system that was outlined by Dr Simpson to withdraw from a case. I am sure that any legal practitioner would withdraw from a case only in the most extreme circumstances, but unfortunately from time to time such circumstances occur. It is therefore only proper that a solicitor who is confronted by such a situation should be allowed by the court to withdraw from a case.

Amendment 33 seeks to regulate the relationship that such a solicitor would have with their client. It is important to stress that this would not be a normal client-solicitor relationship, as the solicitor would have been appointed. The solicitor might have no raging desire to act on behalf of the accused, but might have agreed to do so as a matter of duty. Amendment 33 seeks to regulate the way in which the relationship would be conducted. As I said, this would be a matter for legal practitioners, many of whom might feel that they do not require such protection. However, there must be fairness for all concerned, and I suggest that amendment 33 would provide that.

I do not take issue with amendment 6.

I move amendment 21.

10:45

Dr Simpson: We believe that amendment 21 is unnecessary, because amendment 6 would make provision for a solicitor who had been appointed

by the court to withdraw from a case. A court-appointed solicitor should not be able to withdraw from the case without seeking leave of the court as a matter of courtesy, if nothing else. As such a withdrawal in the middle of a case would seriously disrupt the trial, the court should have an opportunity to satisfy itself that the solicitor has made every effort to act on the instructions or in the best interests of the accused and that it is impossible for him to continue. Amendment 6 would provide such an opportunity, whereas amendment 21 would not. As a result, I ask Mr Aitken to withdraw amendment 21.

Amendment 33 attempts to define further the relationship between an accused and his court-appointed solicitor. Section 288D of the Criminal Procedures (Scotland) Act 1995, which is inserted by section 2 of the bill, imposes a duty on the solicitor to ascertain and act on the accused's instructions. Where a solicitor receives no instructions, or receives inadequate or perverse instructions, his duty is to act in the best interests of the accused; otherwise a court-appointed solicitor has the same obligations and authority as a solicitor who is chosen by the accused. The first, second and fifth paragraphs of amendment 33 do not add to what is already in the bill. The term "inadequate or perverse instructions", which is used in the bill, sufficiently covers instructions that could not be carried out by a solicitor who was following normal rules of professional ethics, which, clearly, will continue to apply.

The third paragraph of amendment 33 would allow a court-appointed solicitor to withdraw unilaterally from acting. If solicitors kept taking that action, the accused's trial could be prevented from taking place. Furthermore, that would be a serious discourtesy to the court whose appointment the solicitor had accepted. If the court has appointed a solicitor, only the court can end that appointment. Amendment 6 would allow the court to discharge a court-appointed solicitor and to select a replacement where the judge was satisfied that there were genuine reasons for doing so.

The third and fourth paragraphs of amendment 33 would allow a solicitor who could not obtain appropriate instructions to act according to his own professional judgment with no responsibility towards the accused. We believe that court-appointed solicitors should continue to owe the accused a duty to act with ordinary professional care and skill. Clearly, what that means in the circumstances might be limited if the accused has refused to co-operate fully. However, it would be unfair to the accused to allow the solicitor to escape all responsibility to him if he had in fact been negligent.

The final paragraph of amendment 33 refers to a code of practice that would be drawn up by the Law Society of Scotland. As the society already has the power to produce codes that its members are expected to follow, it is unnecessary to give it the same power in this bill. I ask Mr Aitken not to move amendment 33.

Amendment 6 provides that, where the court has appointed a solicitor to act for an accused in a sexual offence case, it may revoke that appointment if the judge is satisfied that the solicitor can no longer act either on the instructions or in the best interests of the accused. A new solicitor may then be appointed.

I understand the committee's concerns, which were expressed at stage 1, about the consequences of a clash of personalities between the accused and the court-appointed solicitor. However, we do not think that it is practicable to allow the court's appointment to be terminated whenever the accused wishes or whenever the relationship between the accused and the solicitor is difficult. An accused who, in the first place, has declined to choose a lawyer for himself, despite warnings of the need to do so, might well have problems with any solicitor, and a right to dismiss the lawyer who had been selected for him could simply be used as a delaying tactic. Where there is a genuine reason for a particular court appointee not being able to continue, amendment 6 should ensure that that reason could be acted upon.

Stewart Stevenson: I have a point of clarification on amendment 6. I assume that the wording would permit the solicitor to seek and gain the court's approval to withdraw for a range of causes that might have nothing to do with the trial—for example, the cause might be his or her personal circumstances—and that it is no more restrictive than current practice in that regard.

Dr Simpson: That is absolutely correct.

The Convener: Does amendment 6, which talks about a solicitor who is

"no longer able to act upon the instructions, or in the best interests, of the accused"

also cover a situation in which no instructions or perverse instructions had been received?

Dr Simpson: Yes. The solicitor, as part of his professional duty, will have to act in the best interests of the accused even if he receives no instructions from the accused.

Bill Aitken: There is not much that I need add. The issue is one of degree and extent; we are all attempting to achieve the same aim. On that basis, I have some sympathy with what the minister said. However, that sympathy is outweighed by the difficulties that I envisage confronting a legal practitioner who, through no fault of his own, needs to withdraw from a case. I

am not totally satisfied that, apart from the normal courtesies, it is appropriate for the court to be involved in that withdrawal. Accordingly, I will adhere to my view and press my amendment.

A similar situation arises with amendment 33. The minister's words provide some reassurance, but I still feel that my wording is fairer.

The Convener: The question is, that amendment 21 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Aitken, Bill (Glasgow) (Con)

AGAINST

Barrie, Scott (Dunfermline West) (Lab)
Ewing, Mrs Margaret (Moray) (SNP)
Lyon, George (Argyll and Bute) (LD)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Morrison, Mr Alasdair (Western Isles) (Lab)
Stevenson, Stewart (Banff and Buchan) (SNP)

The Convener: The result of the division is: For 1, Against 6, Abstentions 0.

Amendment 21 disagreed to.

Amendment 33 moved—[Bill Aitken].

The Convener: The question is, that amendment 33 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Aitken, Bill (Glasgow) (Con)

AGAINST

Barrie, Scott (Dunfermline West) (Lab)
Ewing, Mrs Margaret (Moray) (SNP)
Lyon, George (Argyll and Bute) (LD)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Morrison, Mr Alasdair (Western Isles) (Lab)
Stevenson, Stewart (Banff and Buchan) (SNP)

The Convener: The result of the division is: For 1, Against 6, Abstentions 0.

Amendment 33 disagreed to.

Amendments 6 and 7 moved—[Dr Richard Simpson]—and agreed to.

Section 2, as amended, agreed to.

Section 3 agreed to.

Schedule

NOTICE TO ACCUSED ABOUT EFFECT OF SECTIONS 288C AND 288D OF 1995 ACT AND SPECIAL PRE-TRIAL PROCEDURES: AMENDMENT OF 1995 ACT

Amendment 26 moved—[Bill Aitken]—and agreed to.

Amendment 27 not moved.

The Convener: I call amendment 28, in the name of Bill Aitken, which is grouped with amendments 8, 9 and 10.

Bill Aitken: Amendment 28 might be inspired by my being my usual pedantic self, but we need to tidy up some wording slightly.

To whose absence does the word "his" in proposed new section 71(5A) of the Criminal Procedure (Scotland) Act 1995 refer? My wording would make it absolutely clear that we are talking about the accused.

I will reserve my position on the more substantive amendments that are being sought by the minister until I hear what he has to say. In particular, amendment 9 might be portentous.

I move amendment 28.

Dr Simpson: I will begin with amendment 28. I would never call Mr Aitken pedantic, but we believe—the draftsmen have examined the wording—that the existing wording of the bill is unambiguous. It is clear that the word "his" in paragraph 5, line 31 of the schedule refers to the accused. The words "he" and "his" are used in lines 29 and 30 to refer to the accused and line 31 continues that grammatical sense. When one considers the context of the provision, it is clear that it refers to the absence of the accused.

Section 71(5) of the Criminal Procedure (Scotland) Act 1995, which immediately precedes the proposed new subsection (5A), expressly allows a first diet to proceed in the absence of the accused. The clear purpose of the provision is to disapply that rule in sexual offence cases and ensure that the accused attends a first diet so that the court can discover his intentions on the appointment of a solicitor, if he has not done so. I ask Mr Aitken to withdraw amendment 28.

Amendments 8 and 9 cure a defect in paragraph 5 of the schedule to the bill, which deals with the prosecutions on indictment in the sheriff court. Paragraph 5 applies a 48-hour time limit to the court's power to adjourn to obtain the attendance of an accused who has failed to appear at the pre-trial hearing, which is known as a first diet. It was not intended that there would be a time limit on that sort of adjournment as it might not be possible to trace the accused straight away. Amendment 8 will remove the 48-hour time limit on the power of adjournment.

At present, paragraph 5 of the schedule does not apply a time restriction to the court's power to adjourn a pre-trial hearing to allow the accused a final chance to appoint a solicitor. By contrast, paragraphs 7 and 11 of the schedule apply a 48-hour time limit to such an adjournment when the prosecution is on indictment in the High Court and

when it is under summary procedure in the sheriff court.

The intention was always that the 48-hour restriction should apply across the board. By the time the pre-trial hearing takes place, the accused will have had plenty of time to find a solicitor and will have received notices and warnings of the need to do so. The trial will be fast approaching and there will be a need to sort out legal representation quickly. Amendment 9 will bring sheriff court proceedings on indictment into line with other prosecutions by imposing the 48-hour time limit. In short, paragraph 5 of the schedule has the 48-hour time limit in the wrong place. Amendments 8 and 9 will correct that.

Amendment 10 is purely a drafting amendment. Paragraph 6 of the schedule to the bill will insert a new section—section 71A—into the Criminal Procedure (Scotland) Act 1995. The new section deals with the situation in which, in a sheriff court case prosecuted on indictment, the accused sacks the solicitor or the solicitor withdraws after the pre-trial hearing, which is known as the first diet. A duty is imposed on the solicitor to tell the court what has happened. The court will then fix a fresh pre-trial hearing to sort out the accused's legal representation.

Nothing in the text of the new section 71A expressly says that it applies only to those accused who are charged with sexual offences. That is what the bill is about, but it is not all that the 1995 act is about. When the bill inserts new sections into the 1995 act, it must make it clear that they do not apply to other crimes. The substitute wording in amendment 10 does that. Otherwise, the effect is the same as before.

Bill Aitken: I am prepared to accept what the minister said about amendment 28 in his eloquent address on the wording of the proposed new section 71(5A) of the Criminal Procedure (Scotland) Act 1995. I listened with interest to what he had to say about amendments 8 and 9. In conclusion, I have formed a view that there is merit in those amendments and will accept them.

Amendment 28, by agreement, withdrawn.

Amendments 8, 9 and 10 moved—[Dr Richard Simpson]—and agreed to.

The Convener: Amendment 29 is grouped with amendment 31.

Bill Aitken: Again, the issues are perfectly straightforward. Amendment 29 seeks to clarify that the preliminary diets referred to by new section 72A(5) of the Criminal Procedure (Scotland) Act 1995 are governed by section 72 of that act. Similarly, amendment 31 seeks to clarify that the intermediate diets referred to by new section 148A(4) of the Criminal Procedure (Scotland) Act 1995 are those governed by section 148 of the same act. Amendments 29 and 31 are merely an attempt to tidy up the bill.

I move amendment 29.

11:00

Dr Simpson: Amendments 29 and 31 are purely drafting amendments. The draftsman has looked at them and considers them to be unnecessary. As regards amendment 29, the term "preliminary diet" is defined for the whole of the 1995 act in section 72 of the act as a diet ordered under section 72(1). As a matter of statutory interpretation, the words "preliminary diet"—which appear in the new section 72A—in effect mean a diet that is ordered under section 72. Therefore, the words added by amendment 29 are tautologous.

The same applies to amendment 31. An intermediate diet is defined for the purposes of the 1995 act in section 148 of that act, so there is no need to refer to an intermediate diet

"under section 148 of this Act".

The words "an intermediate diet" will suffice to convey the meaning. I ask Mr Aitken to withdraw amendments 29 and 31.

Bill Aitken: As I said, there is no great issue here. However, amendments 29 and 31 have been useful for investigating the science of tautology. On the basis of what the minister has said, I will not pursue the matter further.

Amendment 29, by agreement, withdrawn.

Amendment 31 not moved.

Schedule, as amended, agreed to.

Sections 4 and 5 agreed to.

Section 6—Accused to give notice of defence of consent

The Convener: Amendment 22 is grouped with amendments 23 and 11.

Bill Aitken: Amendments 22, 23 and 11 deal with the issues surrounding the defence of consent. We are aware that consent is the most common defence against charges of the kind that we are dealing with. Therefore, it is important that the issue is totally clarified in the bill.

We must apply our minds to situations that could arise and ensure that we tie up the wording to those cases in which consent is the relevant defence. That is all that I seek to do in amendments 22 and 23. I have no issues to raise on amendment 11.

I move amendment 22.

Dr Simpson: Amendments 22 and 23 are unnecessary. In some sexual offences, such as incest or statutory offences such as sexual intercourse with or indecent behaviour towards a girl who is under 16, the question whether consent was given is irrelevant. The bill makes no change to the definitions of any sexual offences. When consent is not a defence to a charge of a sexual offence, that will remain the position. When consent is not a defence, there would be no point in the accused arguing that consent was given and therefore no question would arise of his lodging a notice in advance. The amendments would add unnecessary and ineffectual words to the bill, so I ask for amendment 22 to be withdrawn and for amendment 23 not to be moved.

As for amendment 11, the bill requires a defence of consent in a summary case to be notified only before the first witness is sworn. For more serious cases, which are prosecuted on indictment, notice must be given 10 clear days before the trial. The time limits are the same as those that apply to other defences that must be notified in advance.

We accept the criticism that has been made of the time limit for notifying a consent defence in summary proceedings. One reason for the requirement to notify defences of consent is to give complainers fair warning to prepare themselves psychologically. That aim will not always be achieved if the notice has to be lodged only before the first witness is sworn, especially as the complainer is often the first witness. Amendment 11 will bring the time limit for notifying consent defences in summary proceedings in line with that for proceedings on indictment by making it 10 clear days.

Stewart Stevenson: When the court rules under proposed section 288C(4) that an offence that is not listed in proposed section 288C(2) has a sexual content, how can 10 clear days' notice be given of any defence of consent, given that the offence was not determined until the court sat?

Dr Simpson: Since proposed section 288C(4) deals with the court's decision about whether an offence has adequate sexual content to fall within the scope of proposed section 288C(4), and that decision is made later, the words in amendment 11 would apply only then. Notice of a consent defence could be lodged later, because only then would the court have said that the offence fell within the scope of proposed section 288C. At that point, the defence would be entitled to say that it wished consent to be taken into account.

Stewart Stevenson: I understood that such a process would have to be followed. I merely ask whether amendment 11 sufficiently addresses that.

Dr Simpson: It does, because it applies only when the decision has been made that the offence falls within the scope of proposed section 288C. It cannot apply before then.

Stewart Stevenson: Amendment 11 refers to a time "before the trial diet". Would the trial diet be deemed not to start until after the court had ruled that an offence was a sexual offence under proposed section 288C(4)? Is that the implication?

Dr Simpson: For the first time, I will need to consult my advisers.

I am sorry, but I will probably repeat my argument—I hope that I can satisfy Stewart Stevenson. Until the court decides that the offence falls within the bill, the question of consent as a defence will not arise. The words that amendment 11 will insert would not need to be applied earlier, because they would not apply to the situation. They will apply only to earlier provisions in the bill. Once the court has decided that a case falls under the provisions of proposed section 288C(4) and the offence has been declared a sexual one to which the bill applies, the question of consent will have to be considered by the defence and a process of lodgment will have to take place. I am advised that at that point there would need to be an adjournment to consider the matter.

Stewart Stevenson: An adjournment of 10 days?

Dr Simpson: Not necessarily. We will take the issue away and consider it before stage 3.

Stewart Stevenson: I think that you should. However, I am supportive of what you are trying to achieve.

Dr Simpson: I understand the point that the member is trying to make. We will take the matter away for consideration.

The Convener: That would be helpful.

Dr Simpson: The issue does not affect amendment 11 as it stands.

The Convener: The committee considered the defence of consent. Although we are happy for the provision concerned to remain in the bill, none of those from whom we took evidence felt that it added anything in particular to the bill. However, given that the provision exists, the procedure relating to it should be clarified. It also seems fair that a defence of consent should be lodged in all courts within a specified period, rather than a minute before the complainer takes the stand. It would be useful if you could clarify those points.

Bill Aitken: I have listened with interest to what the minister has had to say. However, the nub of the matter is that I am still not convinced that the provisions of section 6, as it stands, will apply only where consent is relevant to proof of the charge. We must ensure that there is no ambiguity in this

important section of the bill. I therefore intend to press the two amendments that I have lodged.

The Convener: The question is, that amendment 22 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Aitken, Bill (Glasgow) (Con)

AGAINST

Barrie, Scott (Dunfermline West) (Lab)
Ewing, Mrs Margaret (Moray) (SNP)
Lyon, George (Argyll and Bute) (LD)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Morrison, Mr Alasdair (Western Isles) (Lab)
Stevenson, Stewart (Banff and Buchan) (SNP)

The Convener: The result of the division is: For 1, Against 6, Abstentions 0.

Amendment 22 disagreed to.

Stewart Stevenson: This would be a bad hair day for Bill Aitken, if that were possible.

Bill Aitken: Some men know how to hurt.

Amendment 23 moved—[Bill Aitken].

The Convener: The question is, that amendment 23 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Aitken, Bill (Glasgow) (Con)

AGAINST

Barrie, Scott (Dunfermline West) (Lab)
Ewing, Mrs Margaret (Moray) (SNP)
Lyon, George (Argyll and Bute) (LD)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Morrison, Mr Alasdair (Western Isles) (Lab)
Stevenson, Stewart (Banff and Buchan) (SNP)

The Convener: The result of the division is: For 1, Against 6, Abstentions 0.

Amendment 23 disagreed to.

Amendment 11 moved—[Dr Richard Simpson]—and agreed to.

Section 6, as amended, agreed to.

Section 7—Restrictions on evidence relating to sexual offences

The Convener: The next amendment for debate is amendment 24, in the name of Bill Aitken, which is in a group on its own. I call Bill Aitken to move and speak to the amendment.

Bill Aitken: Amendment 24 is an important amendment, because I am seeking to find out from the minister the circumstances in which evidence about sexual behaviour that took place at or around the time that the acts that form the basis of the charge took place can be led without restriction. That is an important aspect of the bill, because if we are to be fair in the conduct of trials, we must establish the basis on which evidence of the type to which I refer can be introduced.

As I see it, proposed new section 274(1)(c) that would be introduced under section 7 of the bill as it is drafted would allow evidence of non-sexual behaviour that took place

"shortly before, at the same time as or shortly after the acts which form"

the basis of the complaint to be led without application under new section 275.

In other trials, such evidence would—in accordance with the rules for evidence—normally be admissible if it could be shown that such behaviour was closely related in terms of time, place and circumstance to the alleged offence. However, proposed new section 274(1)(b)—which would prohibit evidence about

"sexual behaviour not forming part of the subject matter of the charge"—

does not make provision for the leading of evidence of a sexual nature and so appears to override the normal rules of evidence. I will listen to the minister with interest, but I seek clarification of that. We need to establish what the relationship is between paragraphs (b) and (c) of proposed new section 274(1).

11:15

It is obvious that the bill involves a question of balance. We seek to protect the interests of the victims of such crimes while ensuring that, in the interests of the accused and of wider society, a fair trial takes place. Accordingly, I would be very reluctant to acquiesce in any measure that would dilute the well-established rules of evidence, which have been the cornerstone of Scots law for hundreds of years.

I move amendment 24.

Stewart Stevenson: Amendment 24 would appear to have a highly undesirable effect. For example, if a normal married couple had indulged in sexual relations two minutes before their house was broken into and the wife was raped, that fact could be introduced as evidence because such sexual relations would have occurred shortly before, at the same time as, or shortly after the acts which form part of the subject matter of the charge. I cannot see how such a blanket amendment would be helpful to the complainer or to the ends of justice.

The Convener: If no other committee member wishes to speak, I call the minister.

Dr Simpson: Amendment 24 would allow admission of evidence about a complainer's sexual behaviour shortly before or after the alleged offence without an application under proposed new section 275.

I realise that it might seem to be odd that evidence of non-sexual behaviour by the complainer shortly before or after the alleged offence can be admitted without an application—although evidence of sexual behaviour needs an application—unless the behaviour forms part of the subject matter of the charge. However, there is a good reason for that. The bill gives some additional leeway in the case of non-sexual behaviour to allow for the possibility that the complainer might verbally have indicated her agreement to what happened. That agreement might have been given before the alleged offence.

For example, the accused might want to say in evidence that the complainer had told him just before the alleged offence that she consented by explicitly inviting him back to her flat to have sex. We do not want to force the accused to make an application under proposed new section 275 just to allow him to offer the basic defence of consent to the effect that the complainer said that she agreed to sexual activity on the occasion in question.

Sexual behaviour is different. Consent must be given on each occasion that sexual activity takes place. It cannot be assumed that consent on a previous occasion means consent on another occasion, nor can it be assumed that consent to one level of sexual activity—such as kissing—means that consent to another level can be taken as read. I am sure that members will agree that a woman—or a man, for that matter—has the right to say no, at any point and to any person. An accused person might want to claim that he had consensual intercourse with the complainer shortly before he is alleged to have raped her. Even if that were true, it would not demonstrate that the complainer consented at the relevant time.

Also, "sexual behaviour" could be interpreted to include behaviour that falls well short of intercourse. For example, amendment 24 might allow the defence to introduce evidence about the accused and complainer kissing shortly before an alleged rape without their having to make an application that showed why that was relevant. There is no reason why the accused should not have to make an application under proposed new section 275, so that the court could consider the matter in context before deciding whether to allow the evidence. Agreement to amendment 24 would create a large loophole in the bill and it would undermine one of the bill's basic purposes. I ask Mr Aitken to withdraw amendment 24.

The Convener: Do any members wish to speak? Section 7 is one of the strongest sections in the bill and is, I argue, stronger than the prohibition on alleged sex offenders conducting their own defence, in that it attempts to achieve a fairer balance in court for complainers. We have heard some evidence, albeit restricted, about juries' perceptions of complainers and accused persons. The issue is fundamental.

Later, committee members will take the opportunity to put to the minister our worries about how the bill will operate; members are at one on that. However, I appreciate the fact that the bill's attempt to use procedures to take out some evidence, and its aim of allowing the judge, rather than the jury, to decide on admission will help us to achieve a fairer balance of evidence in court. I oppose Bill Aitken's amendment 24. If no other member wishes to comment on amendment 24, I invite Bill Aitken to wind up.

Bill Aitken: As has been stated, the rules on evidence are a fundamental part of the bill. Those fundamental rules go beyond the terms of the proposed legislation, because the rules of evidence have been established—as I said—over many years. Those rules are an important aspect of Scots law and I am extremely reluctant to see them being interfered with.

We are attempting to ensure fairness and I think that members are at one on that issue. An accused person has rights however, including the right to a fair trial and the right to introduce the most widely based evidence possible, in order to protect his position in respect of accusations that have been made against him.

We are also to some extent diluting the principle—well established in Scots law—that questions of fact are a matter for the interpretation of the jury, rather than the judge. I have much faith in the common sense of the average man and woman in the street. There is no evidence to suggest that juries do not take their task seriously and in a manner that reflects the thinking of Scottish society as a whole. It would be quite understandable if juries, having heard evidence of the type that we are discussing, concluded that such evidence was utterly irrelevant to the accused's defence and discarded it. Jury members recognise when people are attempting to drag red herrings into their path. On that basis, I am prepared to back the common sense of the average jury. I must press amendment 24.

The Convener: In that case, the question is, that amendment 24 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Aitken, Bill (Glasgow) (Con)

AGAINST

Barrie, Scott (Dunfermline West) (Lab)
Ewing, Mrs Margaret (Moray) (SNP)
Lyon, George (Argyll and Bute) (LD)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Morrison, Mr Alasdair (Western Isles) (Lab)
Stevenson, Stewart (Banff and Buchan) (SNP)

The Convener: The result of the division is: For 1, Against 6, Abstentions 0.

Amendment 24 disagreed to.

Section 7 agreed to.

Section 8—Exception to restrictions under section 274 of 1995 Act

The Convener: Amendment 12 is in a group on its own.

Dr Simpson: Amendment 12 was lodged following concerns that were expressed to the committee at stage 1 about the wording of proposed new section 275(1)(b), which will be inserted in the Criminal Procedure (Scotland) Act 1995 by section 8(1) of the bill. At the moment, proposed new section 275(1)(b) states that evidence about the character or past behaviour of the complainer cannot be admitted if it is not relevant to an issue

"falling to be proved by the prosecutor or the accused in the trial".

A number of witnesses pointed out at stage 1 that the accused does not generally have to prove anything in a criminal trial. Professor Chris Gane suggested that the provisions requiring prior notification of a defence of consent, when coupled with section 275(1)(b) of the Criminal Procedure (Scotland) Act 1995, might give the impression that in future an accused will be required to prove consent.

As my predecessor Iain Gray said in evidence to the committee at stage 1, there has never been any intention to change the existing law about burdens of proof. We have taken on board the comments that have been made about proposed new section 275(1)(b). Amendment 12 would replace the test of relevance to issues

"falling to be proved by the prosecutor or the accused"

with a test of relevance to establish whether the accused committed the offence with which he is charged. The suggested wording would achieve the effect that is intended without referring to proof by the accused.

I move amendment 12.

The Convener: No member wants to comment—I think that the committee welcomes amendment 12. The Law Society of Scotland made strong representations. We understand that the law of Scotland is quite clear, but amendment 12 tidies up a problem.

Amendment 12 agreed to.

The Convener: Amendment 25, in the name of Bill Aitken, is in a group on its own.

Bill Aitken: Amendment 25 is a probing amendment. It deals with the definition of the term

"the proper administration of justice".

The wording that is proposed in amendment 25 would extend the current wording to include a reference to

"the right of the accused to make a full answer and defence to the charge".

It is interesting that part of the wording is modelled on the Canadian system. The Canadian criminal code deals with determination of admissibility of evidence. That code specifies that a trial judge must take into account the interests of justice, including the right of the accused to make a full answer and defence. The bill as it is drafted makes no reference to that right. I suggest that we should balance matters by including a definition of

"the proper administration of justice"

for the purposes of the bill.

I will listen with interest to what the minister has to say. I am seeking to be helpful rather than to block any aspect of the proposed legislation.

I move amendment 25.

The Convener: Bill Aitken makes a fair point. The committee pressed a number of witnesses on the definition of

"the proper administration of justice".

Although there is precedent for common law or case law to be developed around that concept, we spent a bit of time on that issue. We noted that one qualification concerns protection of the privacy of a complainer. We felt that that needed proper scrutiny.

Dr Simpson: I thank Bill Aitken for clarifying some of the background to amendment 25. The amendment would alter the definition of the proper administration of justice to include specific reference to the rights of the accused. The Executive believes that the amendment is not necessary. The proper administration of justice is not defined exhaustively in the bill, but is stated to include two specific things, the first of which is the rights of the complainer. The definition is not restrictive. The courts will also automatically take into account in a case any additional factors that would be relevant to the proper administration of justice.

The purpose of the definition in the bill is to direct the courts to consider matters that they might not have considered previously in making

such decisions, or to which they might not have given sufficient weight in the past. That is why the bill refers to the "complainer's dignity and privacy". The courts have always vigorously protected the right of the accused to put forward a legitimate defence—they do not need us to tell them to do that.

Members of the committee will remember Professor Chris Gane's comment at stage 1 that the courts did not need an exhortation to do something that they would do anyway. We should also bear it in mind that proposed new section 275(1)(c) will balance the probative value of the evidence against ways in which the administration of justice might be prejudiced if that evidence is admitted. Essentially, the rights of the accused are taken account of in the first part of that balancing exercise. It might seem to be a little odd to refer to them specifically under the second limb of that exercise, which is concerned with how the administration of justice might be harmed if the disputed evidence is allowed. As a result, I ask Mr Aitken to withdraw amendment 25.

11:30

Bill Aitken: I am tempted to say that the minister was arguing against himself in some respects. His reference to Professor Gane's comment about the courts' being exhorted to do something that they already do could apply equally to a number of measures in the bill.

I will leave that aside for the moment and acknowledge the minister's helpful remarks. Inevitably, in circumstances that require a definition of the proper administration of justice, there will from time to time be appeals over judicial decisions. On balance, I think that it might be better for the law to be determined as a result of those appeals. I will not press amendment 25.

Amendment 25, by agreement, withdrawn.

The Convener: I am pleased to inform the committee that we are bang on time for when we had planned to finish. As I said, we will not go beyond this point on this first day of stage 2.

That ends the first meeting at stage 2 of the Sexual Offences (Procedures and Evidence) (Scotland) Bill. The final day of stage 2 will be Tuesday 18 December. The final day for lodging amendments prior to that meeting will be Friday 14 December. I thank the minister for attending; he did exceptionally well on his first appearance before the committee. Long may that continue.

11:31

Meeting adjourned.

11:46

On resuming—

Young Offenders

The Convener: Members may remember that HM chief inspector of prisons for Scotland invited a member of the committee to HM Young Offenders Institution Polmont and that we agreed to send Scott Barrie, as he is reporting on youth offending. As there were no other volunteers, I asked whether I could go with him on 3 December. I want to record in the *Official Report* that we are grateful for the approach that the HM prisons inspectorate team has taken with the justice committees and for its co-operation in allowing us to view what it does while it is carrying out an inspection in an institution.

Members should have a copy of Mr Fairweather's general assessment of Polmont, which was distributed to the Scottish Prison Service headquarters yesterday. The report is not yet public, so members should bear in mind its sensitivity.

Scott and I will speak briefly about the visit.

Scott Barrie: I had not been to Polmont for 12 years. I should add that I was not an inmate—I visited through my previous occupation.

Bill Aitken: I thought that you were telling lies about your age.

Scott Barrie: I was favourably impressed by some parts of the estate. I remembered that the physical condition of the institution had been quite poor, but it is a lot better now and there is new build. Two halls are still to be updated, but in general, conditions were unrecognisable compared to those that we witnessed on our visit to Longriggend remand centre with the then convener of the Justice and Home Affairs Committee, Roseanna Cunningham. There, we were appalled at the conditions in which many inmates had to reside. I do not think that the convener of this committee came on that visit. The majority of inmates at Polmont do not seem to live in such conditions, although, in two halls, there is no internal sanitation and the fabric of the building is considerably poorer.

I was struck by the ease with which we could walk through the institution. Neither the way in which prison officers addressed inmates nor the atmosphere among inmates seemed oppressive. In adult prisons, an underlying current of unease is often noticeable, but we did not notice that on this visit—although it was only brief.

I was concerned—as was the inspector with whom I went round—that, in Lomond hall, where

the under-18s are kept, most of them were still in their cells and had not taken up the opportunity to go to work or recreation. The officers said that that is a particular problem with the 16 to 18-year-olds. They said that people are, in effect, turning night into day; they are staying awake most of the night and are therefore either too tired to do things during the day, or cannot be bothered. I find it sad that they are not taking up learning and work opportunities and are therefore leading a pretty unstructured existence. That does not augur well for their future outside the prison. That is the biggest disappointment for me and it was commented on by most of the staff.

After the visit was over, we heard adverse comments about the post-prison reintegration of inmates with society. The assistant governor expressed his concern that local authorities seem reluctant to take people on any sort of programmes after their release, whereas the private sector is very good and has links with the institution. I was disappointed to hear that local authorities are poor at offering opportunities to people on post-release programmes. I have lodged a question to the Scottish Executive on that matter. If we are serious about offering a future to people after prison, job opportunities will be key.

There may be good reasons for that reluctance among local authorities—I am sure that the Rehabilitation of Offenders Act 1974 has a lot to do with it—but, given the number of staff that local authorities employ, there must be positions for some of those young men.

The Convener: It was very useful to have a look at the young offenders institution and to learn about the education provision and so on. Dan Gunn, the governor, has been there for five years. That has been deliberate because it was felt that, in that environment, some stability was needed at the top.

Statistics show that the male population of prisoners is going down but that they are serving longer sentences—although the governor raised the concern that more than half the population were serving short-term sentences of less than six months. That length of time means that officers cannot do the correctional rehabilitation work that they would like to. I am not sure what their conclusion was—whether they were asking for longer sentences—but we certainly noted the point.

The prison was overcrowded when we visited. Its capacity is 422 prisoners, but it was holding 452. That is a recurring feature of the Prison Service. The new block that is being built will house more than 200 prisoners. There has been talk of housing some of the long-term prisoners from Dumfries but there is resistance to that suggestion. What would be the point of improving the facilities if more prisoners were then added until the institution was back to square one? Reinvestment is needed at Polmont if people are to remain there. Important work is under way.

The prison has the only swimming pool in the Scottish Prison Service—we were told to keep quiet about that—and particularly good gym facilities. That is one way in which prisoners can be encouraged to participate and order can be kept in a young offenders institution. As Scott Barrie said, the assumption cannot be made that every young person wants to get out on the treadmill, but the opportunity is there and the swimming pool is well used. However, gym facilities and swimming pools are resource intensive and there are not enough staff to ensure that such facilities can be used as much as one would like. Those issues were raised.

The prison has a system called throughcare—I think that Saughton prison in Edinburgh is the only other prison in the estate that uses that system. The system tries to bring together what a prisoner might need on being released and brings benefit issues together.

Educational needs are also identified. There is an impressive set-up of teachers in classrooms. Prisoners' basic skills were identified and they are expected to undergo tests. A further assessment during sentences has been introduced in which levels of literacy are established and prisoners are asked whether they want to progress their literacy and do mathematics or other subjects. A lot of good work that ought to be well supported is going on in the institution.

As Scott Barrie said, the prison cannot really get behind the issue of how to continue prisoners' rehabilitation on release and thinks that more initiatives are needed to get people back into work.

That is an overview of our findings. Probably in January, Scott Barrie will report to the committee with more information on other findings. The committee will need to determine whether it wishes to continue with that work. The service has a number of good aspects and things that need to be done were drawn out. We could consider those issues in more depth.

Scott Barrie: I want to add something for the *Official Report*. Senior prison staff referred to the disproportionate incidence of certain characteristics among young inmates, many of whom had a disruptive school history and left school with no formal qualifications. A huge number were excluded from formal education for a large part of their latter school years. That message comes up over and over and we need to consider it in a wider sense.

Bill Aitken: I am concerned that there seems to be a dearth of activity. If those youngsters are to

have any chance in life, they must adapt to a pattern that will make them suitable employees in the future. If they are lying about in their cells all day and not doing anything, that is completely unconstructive. What steps are being made to encourage them to carry out useful work? I accept the point in Clive Fairweather's paper that the wage differential between doing nothing and doing something is derisory. I understand why, in financial terms, they would not think that it is worth while to do anything. What encouragement is offered to them to do something that might make them a better option in the job market? If they come out of prison and do not work, they will fall back into their old ways. The sentence will simply have taken them out of circulation for three months, which is not the entire answer.

The Convener: That is a fair question. I am sure that Scott Barrie and I do not want to give the impression that a great number of prisoners are lying about in cells. On the contrary, physical activity and work is on offer. I cannot remember if we saw any work being done, but there is a kind of working day. There is also an education centre so that prisoners can spend time in the classroom. People cannot duck all activity, but they cannot be forced to go out and run in the gym. The prison has awarded four individuals lifesaving certificates, which the prisoners concerned were able to use in gaining employment. That success is quite unusual, and the prison officers would like to make more use of the pool facility, as they see a link between skills gained there and employment.

We visited the medical centre, which was also impressive. The figures for suicide at Polmont are low in comparison with, say, Cornton Vale prison. We were interested in comparing the reasons for that difference. Polmont is the only prison ever to have been awarded charter mark status for its medical centre. Although I am not entirely sure what that is, I was told that it is a significant award that comes from the Prime Minister's office, so the work of the medical centre has certainly been recognised. As with the rest of the prison estate, we saw a lot of good rehabilitation work going on that people do not know about. However, a lot of work still needs to be done.

12:00

Stewart Stevenson: I will make an observation before I ask a question. I do not think that I will tell the pupils of Mintlaw Academy that they can gain access to a swimming pool if they commit offences. The community in Mintlaw has managed to raise £250,000, but the council cannot underpin the necessary guarantee for a pool to be built. The academy is the only school in Aberdeenshire that does not have a pool.

That was my girn for the day—I will now move on to ask my question. Clive Fairweather's report says that 10 prisoners started on the STOP 2000 programme on 19 November. It was with some concern that I noted his comment that those prisoners attend classes five days a week. The clear indication from Professor Bill Marshall, who has been helping Peterhead prison with sex offenders, is that international experience suggests that classes should be held on no more than three days a week, because the prisoners require time to study and address the issues that come up during the sessions. That is a precursor to my simple question: did you have an opportunity during the visit to talk to anyone about the prison's sex offenders?

Scott Barrie: No.

The Convener: No, we did not, although the existence of the unit for sex offenders was explained to us. Was it called Rannoch, Scott?

Scott Barrie: I get the names mixed up.

The Convener: There was no substantial discussion about the sex offenders.

Scott Barrie: To respond to Bill Aitken's point, I do not want to give the impression that all the prisoners are lying around their cells. There is a difficulty motivating prisoners in the hall that houses the younger members of the prison population. However, that may be more to do with their experience of how their life had become unstructured and why they got into trouble in the first place. That difficulty was simply pointed out to us. It appears from the inspections that have taken place over the past two years that there has been quite an improvement. Previously, a large number of prisoners were spending a large part of their day locked up because prison staff were undertaking other duties, such as court escort duties. Those duties have been reduced, so staff are able to offer more consistent opportunities for work in the sheds, for example, than was the case previously. The provisional report contains favourable comments on that point.

The Convener: I do not think that there would be a difficulty if you wished to pursue the issue of sex offenders at Polmont, Stewart. In compiling the report that Scott Barrie is working on, there is no reason why we should not exchange correspondence with the Scottish Prison Service to obtain a few more statistics and further information, if that would be helpful.

Stewart Stevenson: I am particularly interested in the issue because it is also a constituency matter for me. I can hardly criticise Polmont for taking action and adopting the STOP 2000 programme, which it has just started in the past few weeks. However, experience from elsewhere suggests that it may be counterproductive to go at the programme with the enthusiasm that Polmont

demonstrates.

The Convener: I thank members for their comments. We will hear more from Scott Barrie on his report in January.

Petition

Asbestos (PE336)

The Convener: Members will be aware that we need to replace Mary Mulligan as our reporter on PE336, which deals with asbestosis, as she has now been appointed as a minister. The committee's position is that we want to pursue fully many of the issues mentioned in the petition, particularly those about delays in the civil court system and the way in which asbestosis victims have been treated. We are now compiling information so that we can see what Lord Coulsfield's report, which deals with some of those aspects, provides in terms of the petitioner's wishes and where there might be a gap between that report and the petition. We have not had a chance to consider that yet.

We need someone to co-ordinate the activity so that, when we have a slot next year, we can call the Lord President of the Court of Session and the petitioner to speak to the committee and progress some of the work. Do we have a volunteer to become a reporter? I would be happy to assist but I think that we need a main reporter.

Mrs Ewing: Before the committee makes a decision, I indicate that, although I assisted Mary Mulligan in the initial stages of the issue and worked with Fiona Groves, it seems unlikely that I will continue to be a member of the committee after the Christmas recess. Therefore, although I am interested in the subject and would have been willing to take on the task, it would be wrong of me to do so, given the importance of the subject to the petitioners and the committee. We were unanimous in how strongly we felt about the issue.

The Convener: Thank you. I should have said that you were assisting Mary Mulligan. I expected that we would appoint you as the reporter because you had done all that good work on our behalf. We are grateful for your work on the issue and for advising us that you may not be on the committee in future. I am sorry to hear that you may be leaving us. I know that otherwise you would have stepped in and continued the work.

I am happy to assist anyone who is willing to take on the job. I could defer the decision until the next meeting but I feel strongly that we must progress the work.

Stewart Stevenson: Until I am aware of who my political colleague might be, and as I am a member of the Rural Development Committee as well as the Justice 2 Committee, which adds to my work load, it would be difficult for me to do justice to the concerns of Frank Maguire and the asbestosis group. I share the view expressed around the table that we want to pursue the issue.

We have all been concerned about the way in which the civil justice system has responded to the problems of asbestosis victims. We all have constituency interests in the issue. I suggest, with regret, that we postpone making a decision for two further business weeks, or until the first week of the new year. I would like to think that the membership of the committee will then be known and perhaps others could also consider that.

The Convener: Thank you. That is helpful.

I propose to maintain continuity on the issue, subject to our appointing a reporter. I would like to give as much of a commitment as possible, for the record, so that the petitioners see that I will ensure that, as far as possible, there is no delay in our progress. However, appointing a reporter would allow us to drive the work on. I will do that work in the next few weeks and we will return to the issue once things are clearer in the new year.

Mrs Ewing: I will help you for the next few weeks until I hear my fate.

The Convener: Thank you. That will be helpful.

Item 6 is the Land Reform (Scotland) Bill. As agreed, we will meet in private to discuss the evidence that the committee would like to take in relation to the bill.

12:08

Meeting continued in private until 12:55.

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Printed in Scotland by The Stationery Office Limited

ISBN 0 338 000003 ISSN 1467-0178