JUSTICE COMMITTEE

Tuesday 28 October 2008

Session 3

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JUSTICE COMMITTEE
† 25th Meeting 2008, Session 3

CONVENER

*Bill Aitken (Glasgow) (Con)

DEPUTY CONVENER

Bill Butler (Glasgow Anniesland) (Lab)

COMMITTEE MEMBERS

*Robert Brown (Glasgow) (LD)
*Angela Constance (Livingston) (SNP)
*Cathie Craigie (Cumbernauld and Kilsyth) (Lab)
*Nigel Don (North East Scotland) (SNP)
*Paul Martin (Glasgow Springburn) (Lab)
*Stuart McMillan (West of Scotland) (SNP)

COMMITTEE SUBSTITUTES

Aileen Campbell (South of Scotland) (SNP)
John Lamont (Roxburgh and Berwickshire) (Con)
Mike Pringle (Edinburgh South) (LD)
Dr Richard Simpson (Mid Scotland and Fife) (Lab)

*attended

THE FOLLOWING GAVE EVIDENCE:

Sandy Brindley (Rape Crisis Scotland)
Susan Gallagher (Victim Support Scotland)
Louise Johnson (Scottish Women's Aid)
Kenny MacAskill (Cabinet Secretary for Justice)
Frida Petersson (Victim Support Scotland)

CLERK TO THE COMMITTEE

Douglas Wands

SENIOR ASSISTANT CLERK

Anne Peat

ASSISTANT CLERK

Euan Donald

LOCATION

Committee Room 1

† 24th Meeting 2008, Session 3—held in private.

Scottish Parliament

Justice Committee

Tuesday 28 October 2008

[THE CONVENER *opened the meeting at 10:15*]

Decision on Taking Business in Private

The Convener (Bill Aitken): Good morning, ladies and gentlemen, and welcome to the meeting. As usual, I ask everyone to ensure that their mobile phones are switched off.

We have received one apology, from Bill Butler, who has, unfortunately, had a family bereavement.

Agenda item 1 is to decide whether to take item 6, under which the committee will consider whether to accept late written evidence on the Sexual Offences (Scotland) Bill, in private. Is that agreed?

Members *indicated agreement*.

Subordinate Legislation

International Criminal Court (Remand Time) Order 2008 (Draft)

10:16

The Convener: Item 2 is consideration of a draft order under the affirmative procedure. I draw members' attention to the draft order and the cover note.

Before we move to the formal procedure on the motion at item 3, members may ask the Cabinet Secretary for Justice and his officials questions. I welcome to the meeting Kenny MacAskill; Iain Hockenhull, who is a policy manager in the Scottish Government's criminal procedure division; Dianne Drysdale, who is a policy executive in that division; and Andrea Summers of the Scottish Government legal directorate.

I invite the cabinet secretary to speak to the draft order.

The Cabinet Secretary for Justice (Kenny MacAskill): Thank you. I welcome the opportunity to contribute to the committee's consideration of the draft order. It might be helpful if I briefly explain why it is required.

The International Criminal Court is an independent, permanent criminal court based in The Hague. It operates under the auspices of the United Nations and tries only persons who are accused of the most serious international crimes.

Part 2 of the International Criminal Court Act 2001 put in place an expedited procedure to execute ICC requests for the arrest and delivery of persons. An arrest may be made under section 2 of that act where the request is accompanied by a warrant of arrest that has been issued by the ICC or where it relates to a convicted person and is accompanied by certain documentation; or under section 3, where a request is made for provisional arrest on the ground of urgency and the documentation that is required in support of a section 2 arrest cannot be delivered in advance.

Section 4 of the act sets out what is to happen if a person is arrested under a provisional warrant. It reflects article 92 of the Rome Statute of the International Criminal Court. The person must be brought as soon as is practicable before a competent court, which is required to remand him until such time as a section 2 warrant is produced. If a section 2 warrant is not produced in the required time, the court is required to discharge him.

A time limit was not included in the act because, at that time, the rules, like various other subsidiary documents to the ICC statute, had not been finally

adopted and the time limit had not been finally agreed. That agreement did not occur until the first meeting of the Assembly of States Parties, which took place only after 60 states had ratified the statute. For that reason, section 4(4) requires a period of remand to be specified in an order in council.

The order completes the power to remand persons following a request for provisional arrest from the ICC. We do not expect that there will be a large volume of such requests. It provides for limits on the length of time that a court may remand a person who has been arrested under a provisional warrant that has been issued under section 3 of the act pending the production of a warrant issued under section 2. It sets 18 days as the period for which a person may be so remanded at any one time, which reflects the time limits in the Rwanda and former Yugoslavia tribunals. That means that the matter will require to be brought before the court after each period of 18 days. The order sets a maximum total period of remand of 60 days, so if the appropriate documentation has not been received from the ICC within 60 days from the date of provisional arrest, the person is entitled to be discharged.

The order is necessary to comply with the requirements of the International Criminal Court Act 2001, which implements the United Kingdom's obligations under the Rome Statute of the International Criminal Court. It requires the approval of the Scottish Parliament and of both Houses of the Westminster Parliament before it can be made by Her Majesty on the advice of her Privy Council.

I understand that the Home Office laid a draft order in the same terms as the one that is before the committee in the Westminster Parliament on Monday 6 October. It is hoped that that order can be made following the December meeting of the Privy Council. I invite the committee, for the reasons that I have given today, to recommend that the draft order be approved by the Parliament.

The Convener: Thank you, Mr MacAskill. That seems to be fairly straightforward. Do members have any questions?

Robert Brown (Glasgow) (LD): I understand what the cabinet secretary says about the need to comply with the international arrangements. However, 18 days and 60 days seem to be quite long periods of time for what appears to be a relatively technical issue to do with the production of the warrant and appropriate documents. What is the reason for having limits of those lengths?

Kenny MacAskill: It is to do with the international nature and complexities of the cases that we are dealing with. You are right to say that 18 days and 60 days are substantial periods of time, but we are not dealing with minor breaches of the peace; we are dealing with matters that have transnational implications. For that reason, some latitude has to be given.

As I said, we do not anticipate a great number of these cases. The previous cases have involved Rwanda and Yugoslavia, where there have been international complexities. The reason for picking these fairly arbitrary time limits is to provide some balance between the protection of the rights of the individual, and the complexities of issues that have significant baggage and international implications.

It is also important that the court has a duty and a reasonable opportunity to keep matters under review. The time limit of 18 days that we suggest is in line with the equivalent provisions in relation to provisional arrest under the United Nations (International Tribunal) (Former Yugoslavia) Order 1996 and the United Nations (International Tribunal) (Rwanda) Order 1996. Those were successfully adopted, so we are to some extent proceeding on international precedent.

The Convener: I see that there are no further questions, so we move to item 3, which is formal consideration of the motion to approve the order.

Motion moved,

That the Justice Committee recommends that the draft International Criminal Court (Remand Time) Order 2008 be approved.—[*Kenny MacAskill*.]

Motion agreed to.

The Convener: I suspend the meeting to allow the witness panel to change.

10:22

Meeting suspended.

10:23

On resuming—

Sexual Offences (Scotland) Bill: Stage 1

The Convener: Item 4 is our first evidence session for the Sexual Offences (Scotland) Bill. The committee will take evidence from Rape Crisis Scotland, Scottish Women's Aid and Victim Support Scotland.

I welcome the first witness panel: Sandy Brindley, national co-ordinator of Rape Crisis Scotland; and Louise Johnson, national legal issues worker for Scottish Women's Aid. We are grateful that you have already made written submissions, which we have found particularly useful. That being the case, we will go straight to questions.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): Good morning. In their evidence on section 1 of the bill, both your organisations agree that there should be an offence of sexual assault by penetration. What sort of conduct would be covered by such an offence?

Sandy Brindley (Rape Crisis Scotland): It would be penetration by objects. Committee members will remember that, in its first consultation report, the Scottish Law Commission proposed a separate offence along such lines. However, the commission changed the proposal in its final report and subsumed the offence within an offence of sexual assault. We would prefer to revert to the original proposal.

Louise Johnson (Scottish Women's Aid): Scottish Women's Aid agrees with Rape Crisis Scotland's interpretation.

Cathie Craigie: Have you had any discussions with the Government on possible amendments to the bill to incorporate your proposal?

Sandy Brindley: The Government's position seems to be that it would prefer to keep the offence within sexual assault. I think that the Government thinks that it would be too complicated to have three types of charge—rape, sexual assault, and penetration by an object.

Cathie Craigie: But have you had discussions with the Government on this?

Sandy Brindley: Yes, we have had some discussions.

Cathie Craigie: What advantages would there be if your proposal were included in the bill?

Louise Johnson: It would emphasise the severity of the behaviour and of the act perpetrated on someone's personal integrity. We are talking in particular about violence against women, but the violation of someone's person by an object should be acknowledged as being equal in severity to rape. If that offence were enshrined as a separate offence, and not subsumed among other offences, it would give weight to that view of the severity of the offence.

Cathie Craigie: Is your view based on your experience of supporting women through difficult times?

Louise Johnson: Women have commented that violation of their person by an object is as distressing as penile penetration. Although we clearly wish to differentiate between penile penetration and penetration by an object, they are equal in severity. When someone's personal integrity has been transgressed and abused by someone else in either of those ways, the trauma is equal. From what women have told us, that has to be acknowledged.

Cathie Craigie: Those were very clear answers. Thank you.

The Convener: We will now turn to the questions of consent and reasonable belief.

Robert Brown: Good morning. I think that everyone would accept that these are tricky areas. Both of you have made observations on the question of advance consent. Rape Crisis Scotland has suggested that it is "absurd" to argue that advance consent given at 6 o'clock in the evening should still apply at 1 o'clock in the morning after people have got drunk. Will you elaborate on that, bearing in mind the indefinite nuances of human behaviour?

Sandy Brindley: We are really concerned about the introduction of the concept of prior consent into legislation. At the moment, if someone says that they were asleep, the Crown has to prove that they were asleep. If the notion of prior consent is introduced, it will make rape even harder to prove—and it is already extremely hard to prove. The Crown would need to disprove the existence of prior consent in a rape trial. That goes against the philosophical underpinnings of the bill, which are based on sexual autonomy—that is, that a person can withdraw consent at any time. The notion of prior consent is problematic.

If the bill is passed as it stands, it is not hard to imagine that every single accused person in rape trials will be considering a defence of prior consent. How can the Crown disprove a negative? I suppose that the Crown already has to do that, but we would have concerns about giving it another negative to disprove.

Robert Brown: Is this a question of principle, or a question of where the burden of proof should

lie? If the burden of proof lay with the defence, the proposition might be different.

Sandy Brindley: I think that, as drafted, the bill does not put the burden on the accused—although I could be wrong about that. However, it is unclear how the question of advance consent would be proved in court.

Robert Brown: I presume that whether people have consented is raised from time to time anyway. Often, that goes to the heart of the offence. Is it possible by however the thing is defined to avoid that being raised by the accused in such cases?

10:30

Sandy Brindley: Our experience with legislation on sexual offences is that we need to be cautious about unintended consequences. For example, the legislation on sexual history, which was supposed to improve protection, has had the opposite effect. That is why we are cautious about the wording of paragraphs (a) and (b) of section 10(2). We are concerned that introducing the concept of prior consent could have the unintended consequence of worsening the situation.

Robert Brown: One way or the other, does the law not have to deal with the huge practical issues that arise from such situations? That gives everybody problems. What arrangement would you prefer for dealing with the matter?

Sandy Brindley: I would not say that we have an absolute solution to propose. The concept is problematic. We feel that prior consent has no place in any legislation that is based on sexual autonomy. However, I understand the intention behind including it, which is not to criminalise consenting behaviour, such as that between a long-standing couple. Prior consent is problematic and we are interested in what solutions are possible.

Robert Brown: The committee is interested in any further views from you on alternatives that might be developed, because pulling all that out is important.

I will take the issue further. Consent is important in many other circumstances. One example that has been given to us is that people give consent to anaesthesia before an operation, although it is obvious that that is not quite the same situation. Given that advance consent is used in other realms of the law for perfectly legitimate purposes, why should it be considered "absurd"?

Sandy Brindley: The concept goes against the bill's principles that consent is not a contract and that consent can be withdrawn at any time. In our submission, we gave the example of someone who gives consent at 6 pm to sex at midnight but who is so drunk at midnight that they cannot withhold their consent. In that situation, the provisions would be contrary to the principle of sexual autonomy, because if that person was drunk to that extent, they could not withhold their consent.

Robert Brown: The difficulty is that people do not analyse matters in the legal way that we are trying to apply. We are dealing with a serious crime that leads to serious consequences for someone who is convicted of it. I still have difficulty in getting to the heart of what advance consent means. A common example, which you gave, is of someone who is all set for sex later in the evening but who becomes drunk. In those circumstances, is the conduct rape? Consent has not been withdrawn, but it has not been renewed, either. Where does the balance lie for the definition of the offence?

Sandy Brindley: I appreciate that the question is complex. Our view is that if somebody is so drunk by midnight that it is clear that they have no capacity to consent, any prior indication should not hold. Such consideration of sexual matters and how they are negotiated is difficult but, if somebody is almost unconscious, do we really think that it is acceptable for somebody to have intercourse with them because of something that they said at 6 pm? That approach is not helpful.

Robert Brown: The problem is that the matter often boils down to difficulties with the burden of proof rather than with the principle, which is—oddly—sometimes a little more straightforward.

Section 10(2)(c) concerns violence that has been used against the complainer, which is a tortuous subject for the same sorts of reasons. Under that provision,

"free agreement to conduct is absent"

when someone

"agrees or submits to the conduct because of violence … or … threats of violence".

Rape Crisis Scotland says that it is not convinced that that will cover agreement or submission because of earlier violence or threats of violence. In a slightly different way, we are dealing with the same issue as before. Why should that not apply? Obviously, under the bill, the submission or agreement has to be a consequence of the violence. Why is that unsatisfactory?

Sandy Brindley: The Scottish Law Commission made it very clear that it did not intend what it proposed to be interpreted as the violence or threat of violence having to take place at the same time as the rape. I am not clear that that is the message that we get from the bill. That may be the intention, but it is not our reading of the bill. In

asking whether the drafting has the same effect as the intent behind the legislation, we are being cautious.

Robert Brown: So, your proposition is that account should be taken of the threat of violence or actual violence, whether committed contemporaneously with the crime or at an earlier point, provided that it caused the result. Is that fair?

Sandy Brindley: Yes.

Robert Brown: That may be a matter of tinkering with the wording.

Sandy Brindley: Exactly.

Robert Brown: Do you have any suggestion as to how that could be done or is the question one for the lawyers to take forward?

Sandy Brindley: It is for the lawyers.

Louise Johnson: We would like there to be a reference in the bill to a pre-existing relationship of violence or sexual exploitation, to show that the violence or threat of violence would not have to occur immediately before the rape. For a woman who has been abused for a length of time, the threat of violence will exist, and will have done so for some time. The threat does not need to have been made at the time of the rape; it is enough for there to have existed a threat—or the threat of a threat—that violence could be used. The drafting needs to take account of the historical context of relationships in which violence or abuse are, unfortunately, present. I think that the Zero Tolerance Charitable Trust commented on that in its submission. The draftspeople could look at that.

Robert Brown: Yes.

Scottish Women's Aid suggested that a

"presumption of 'no consent' should apply in circumstances in which the complainer had been the victim of sexual or physical abuse at the hands of the accused on previous occasions."

For clarification, are you referring to previous convictions or allegations? What is the cut-off point for those?

Louise Johnson: That is an interesting point. Finding evidence of such abuse is one of the main difficulties. If there were evidence of a pre-existing relationship in which there was a history of one party—in our case, obviously, it will be the woman—being subject to violence or domestic abuse, and perhaps a history of complaints being made about coercion, it should be possible to use that. The problem is finding evidence of that and proving it. We are looking for a presumption that takes account of prior offences or behaviour.

Robert Brown: Is any qualification needed? Clearly, it is one thing for someone to have committed 10 offences of violence over the previous two years, but what if they had committed one such offence 10 years ago? What is the cut-off point? What would lead to the presumption that you propose?

Louise Johnson: A number of organisations raised the question of a cut-off point. I cannot say what it would be; the interpretation would have to be made by the Crown in prosecuting the offence. The Crown would have the evidence and it would have to take the decision.

It could be dangerous to put time limits on offences. Even if given evidentially, prior convictions do not fully reflect the fact that a relationship involved violence and sexual abuse—after all, we are talking only about someone who has been caught or reported to the police. Obviously, concrete evidence is required. The concept that we propose is inchoate and difficult to get across. As I said, we would like to see the bill reflect historical violence or sexual abuse.

Sandy Brindley: Obviously, the Crown would need to prove consequence. As Louise Johnson said, it would have to prove that the offence was a direct effect of previous violence. Ultimately, without the qualification of consequence, one would be saying that, where there is domestic abuse, there is no possibility of consensual sex. We are not saying that; we are saying that there are times when direct consequence can be considered.

Robert Brown: One has to be very careful about including things other than formal court convictions because, as with everything else in such cases, they would be subject to uncertainty.

Louise Johnson: We do not want to persecute women who, although experiencing domestic abuse, still have a consensual sexual relationship, but we want to cover the women who—frequently, I have to say—do not. As Sandy Brindley said, the Crown is probably the best source of advice on this matter.

Robert Brown: Bearing in mind that they are "without prejudice" to the general proposition in section 9, are the circumstances that are set out in section 10(2) adequate? Should anything be added or removed?

Sandy Brindley: We are concerned about the operation of section 10. For example, we are unclear whether the accused will still be able to use the defence of consent if the Crown has proved the existence of any of the circumstances in section 10(2). We—and, indeed, a number of other people—had assumed that that would not be the case but, having looked at the detail of the bill, we are not so sure. The point requires consideration because, after all, there is not much point in having such a list if the whole thing comes

back to the question whether the accused had a reasonable belief in consent. As a result, section 10(2) needs to be clarified.

Nigel Don (North East Scotland) (SNP): I wanted to come in much earlier, but I must say that I was interested in your comments about the presumption against consent in an on-going relationship in which there has been violence. I think that your responses have highlighted my own concern not only about the difficulty of knowing how much weight to give to evidence of something that is to an extent—however small—present in many relationships and how on earth we balance such considerations but about whether the presence of such evidence means that consent is impossible. Taking such a position might make good law but is actually a social nonsense.

I am not sure that I have even got a question for you. It is clear from what you have said that it is very difficult to be black and white on this matter. Given that this is a grey area, we must ensure that the provision is written in such a way that the court and the prosecution can, between them, consider the right issues and are forced to use their own judgment to sort out what is and is not substantial. We cannot do that for them.

I see that the witnesses agree with me.

The Convener: I think that they very fairly accept that fact.

Louise Johnson: We do.

The Convener: Paul Martin has some questions on reckless behaviour.

Paul Martin (Glasgow Springburn) (Lab): Why has Scottish Women's Aid recommended that a number of offences in the bill be extended beyond intentional wrongdoing to include reckless behaviour?

Louise Johnson: In examining this issue, we focused in particular on children. In cases of domestic abuse, a child might be present when other things such as the presentation of sexual images, indecent communication and sexual activity are going on. The person responsible might in certain circumstances not have any deliberate intention, but we feel that their recklessness in not considering the consequences of their behaviour on a child and whether their actions are incorrect should be enough with regard to these offences.

Paul Martin: Does existing legislation not cover that kind of behaviour?

Louise Johnson: I believe that the bill refers to intentional behaviour, which means that a person intends their actions to have certain consequences for a child. However, the bill should also recognise situations in which, without necessarily intending it, people recklessly participate in certain activities without being concerned that a child might be present or, indeed, recklessly encourage them to be present at a viewing of or to view pornography, for example.

Paul Martin: Do you feel that the matter should be dealt with through the various sentencing tariffs and that the available tariffs should be increased?

10:45

Louise Johnson: The problem is that recklessness is not included in the wording. You would have to speak to the Crown Office and draftspeople to do this, but we would suggest changing the wording to cover recklessness, in addition to intentional behaviour. We have not considered sentencing, but if a child was affected as a consequence of the behaviour, there would be a case for the sentencing to reflect that.

Paul Martin: Would you refer only to children in that?

Louise Johnson: Children are powerless in a number of situations. They can be in a situation—in front of a television or other people—that they cannot take themselves out of, and they can be prevented, intentionally or otherwise, from leaving. While they are unable to protect themselves, we have the responsibility to protect them by ensuring that people are held accountable for the consequences of their reckless behaviour on a child. That should be covered.

Sandy Brindley: We would be keen to consider the matter in relation to both children and adults. At the moment, the barrier of proof is set quite high, and the Crown Office would need to prove both intent and purpose. The purpose could be problematic to prove, so the concept of recklessness—or just removing the provision dealing with purpose—could deal with the concerns.

The Convener: We move now to the issue of sexual abuse of a position of trust with reference to mentally disordered persons.

Nigel Don: Scottish Women's Aid has expressed concerns about the availability of the defence under section 36(2) that the accused was the complainer's spouse or civil partner. Do you believe that it should never be a defence in such a case that the accused was married to the complainer at the time?

Louise Johnson: That question probably takes us to a discussion that is similar to our earlier discussion on consensual sexual relations in a relationship where abuse is present, and our argument is the same. We are concerned about a situation in which a mentally disordered person is not coerced but persuaded into a sexual

relationship that is not in their interest and in which they are abused.

I do not know how the issue of consent could be covered; you would need to ask the Crown how it would prosecute and what the best wording would be. However, we need to consider situations in which the original sexual relationship was not consensual. Again, proof might be an issue, but we are back to the same situation as with domestic abuse: a broad-brush presumption would not necessarily be the way forward, but the eventuality must definitely be covered.

Nigel Don: In all the situations that I can get my mind around, the partnership will surely have been of long standing.

Louise Johnson: Not necessarily.

Nigel Don: Is it really likely that people will form a partnership in which one party is mentally disordered? Are we not dealing with situations in which one party probably has a degenerative disease, which by definition takes time?

There is a serious risk of situations developing in which one party in a long-standing couple develops some kind of dementia—given the nature of human life these days—with the other party to that marriage of decades suddenly being told that sex is off limits because their partner can no longer give the consent that they gave before. Is there not that risk?

Louise Johnson: You would probably have to consider the nature of the relationship beforehand. If someone had a degenerative disease, the issue of on-going consent would have to be considered, including what the person was consenting to and their general relationship with the person with whom they were engaging in a sexual relationship.

We are more concerned about someone who has had a mental disorder from childhood and who is being preyed on. The situation that we envisage is that of a woman who, for whatever reason, is being preyed on by someone in a position of trust such as a friend or acquaintance—they are abusing that position for the sole purpose of sexually abusing that woman. In that situation, we would have to consider whether the person, when they entered into the sexual relationship with the person with a mental disorder, had checked what was going on with that individual and whether there seemed to be acquiescence or consent. That can be explored. Obviously, the issue depends on how the Crown can prosecute. Again, that comes down to checking consent and reasonable belief.

Nigel Don: Does the provision not presume that there is a marriage or civil partnership? That is what section 36(2) says.

Louise Johnson: It actually mentions spouses, civil partners and, I think, sexual partners. Is that right? I think that there is wording about sexual partners so, off the top of my head, I do not think that a formal relationship needs to be involved.

Nigel Don: I confess that that is not my reading. To me, section 36(2) says that person B is person A's spouse or civil partner.

Louise Johnson: It would be a defence if they were a spouse or civil partner. However, we are also talking about situations in which people are in sexual relationships and are not spouses or civil partners. We are back to the situation of rape in marriage—that is a parallel. A civil partner or spouse has the same protection as anyone else, whether or not they have a mental condition. I think that the section is trying to refer to people who are in a long-standing relationship. As I said, we would need to consider abuse within such relationships, which could be comparable to rape in marriage. However, we are mostly concerned about people who are having improper sexual relations with women who did not have the capacity to consent when the relationship started in the first place.

Nigel Don: In your defence, I point out that section 36(2)(b)(i) seems to cover sexual relationships. I think that that is what you were referring to.

Louise Johnson: Thank you.

Nigel Don: I correct myself—I see where you are coming from.

Now that we have had that discussion, I would still like to know how, in general terms, you want the provision to be modified. The text is a matter for lawyers, so we will not consider that, but what would you like to be added or perhaps taken away to deal with your concerns?

Louise Johnson: Somewhere along the line, we would like a statement to the effect that the giving of consent to one sexual act does not by itself give consent to a different sexual act. If I remember correctly, that was mentioned in the Scottish Law Commission's recommendation. Our submission on the bill states:

"However, it is perfectly possible for the spouse, civil partner or sexual partner to exploit and abuse the other person, which can happen in relationships where the person does not have a mental disorder, as highlighted in Recommendation 6 of the 2007 consultation which states, '*The giving of consent to one sexual act does not by itself constitute consent to a different sexual act*'."

We perhaps need reference to consent. We probably need to speak to the Crown and perhaps the draftspeople about the precise wording that we could use. That would be a good idea.

Nigel Don: I accept entirely the general point about consent to one thing not being consent to another—I suspect that that applies throughout. Forgive me, but I am still slightly confused about how that relates to section 36(2), because that is about defences to charges under section 35, which, as I read it, is about abuse of trust, rather than consent to one thing or another.

Louise Johnson: Let us take rape in marriage as a parallel to a situation in which there is an abuse of trust. Just because someone is a spouse or civil partner, that does not mean that their partner cannot commit an offence against them if they did not consent on a particular occasion. Off the top of my head, I cannot tell you the exact wording that we are looking for in sections 35 and 36. However, I would welcome additional discussions with the Crown and the draftspeople about the wording that we could use to cover all the bases, as you said, but not in a way that would be overly restrictive and therefore penalise people who did not have intent. Part of the wording should address intention—when the Crown considers prosecuting a case, it should ask what the person's intention was. Mens rea would be very important in that regard. I hope that that answers your question.

Nigel Don: I do not think that we can take it any further at the moment, but thank you for the discussion.

The Convener: Stuart McMillan has a question about relationships between older children.

Stuart McMillan (West of Scotland) (SNP): Good morning. In its evidence to the committee, the Church of Scotland said:

"We believe that the law is brought into disrepute if legislation is passed which is not intended to be enforced."

Rape Crisis Scotland says in its submission that it supports the Scottish Government's policy of continuing to criminalise sex between older children

"as long as this is supported by a policy of non-prosecution in cases which are genuinely consensual."

What value is there in enacting criminal laws that everyone knows will not result in criminal proceedings?

Sandy Brindley: We have taken a pragmatic approach to the provisions. Our concern about moving to the decriminalisation of consensual sex between older children is based on the question whether there is a difficulty with the current position, which is that such sex is criminalised but cases are not actively prosecuted when there is genuine consent. We are not aware of evidence that there is significant difficulty with the current position.

In being pragmatic, we are aware of the conviction rate for rape. As it is almost impossible to get a conviction, having a possible charge of unlawful sexual intercourse at least gives prosecutors an option in cases in which, although there might not be enough evidence for rape, the sex was not consensual but coercive.

Louise Johnson: I agree with Sandy Brindley. Our view is that there should be a case-by-case approach and that prosecution would take place where it had to take place, as it were. We cannot move away from protecting children. If the relevant provisions were not in the bill, children would be at risk. We have to protect children from situations in which consent is not present. There is a great debate about what consent means to young teenagers who are under pressure from the media and their peers to acquiesce, be grown up and engage in a sexual relationship with someone. There has to be the opportunity to protect children in such circumstances, which is why the provisions would be used when they had to be used—if that makes sense.

Sandy Brindley: The area is difficult. I get the impression that England and Wales really struggled with it and have not come up with a helpful solution. Having weighed up the policy's implications against the proposal from the Scottish Law Commission to decriminalise, our pragmatic view is that the policy in the bill takes the best approach, although there are arguments on both sides.

Stuart McMillan: The bill extends the criminal law to bring young women within its ambit as offenders. For example, a 15-year-old girl who allows or encourages her 15-year-old boyfriend to have intercourse with her does not, under the current law, commit an offence; however, she would commit an offence under section 27(4) of the bill. Does Rape Crisis Scotland support the extension of criminal liability to include young women?

11:00

Sandy Brindley: It depends what the prosecution policy is. I certainly would not support prosecution in situations in which activity was genuinely consensual. I do not think that that would be in anyone's interests. It all depends on the circumstances. I see the provision being used in cases in which there are questions about whether the activity was genuinely consensual.

The Convener: If we were not to prosecute in such circumstances, what would you consider to be the appropriate response?

Sandy Brindley: It would depend very much on the circumstances. It would not necessarily be helpful for every single case to be referred to the

children's panel. For a start, the children's panel would struggle to cope with the level of referrals. We would need to respond on a case-by-case basis, depending on whether there were concerns about the behaviour.

The Convener: You may well be right—that is a sad commentary on our times.

Nigel Don: Ms Brindley said that the section on older children should be used when it needed to be used—it should be available. Can you envisage circumstances in which that section would need to be used but in which the use of section 1, section 2 and the following sections would be inappropriate? Most of the things that I conceive of as being non-consensual would be covered by the general principles in section 1, section 2 and the following sections.

Sandy Brindley: At the moment, the Crown has the option of going for a conviction of unlawful sexual intercourse where it is not able to prove rape. There could be an alternative charge in such cases.

Nigel Don: Section 2 covers unlawful sexual intercourse without consent. Are we talking about considering prosecuting older children in circumstances in which consent was present? That seems to be the only circumstance in which section 1 and section 2 would not apply.

Sandy Brindley: Although those sections might apply, the question is whether the offence can be proved. We know that in Scotland the conviction rate for rapes reported to the police is 2.9 per cent. There might be circumstances in which using section 27 is another option for prosecutors.

Nigel Don: Forgive me, but I still do not see why that is another option. I do not think that the burden of proof for offences under section 1 and section 2 is different from the burden of proof for offences under section 27, which covers older children. I am struggling to see why we need the provisions in section 27 as well as the provisions in section 1 and section 2 if we are dealing with cases in which the behaviour is non-consensual.

Louise Johnson: The difficulty is proving when activity between children who are over 13 and under 16 is consensual and when it is non-consensual. I do not know whether the policy intention was to say to children who are engaged in such conduct that we are not going to charge them with rape. I have no idea whether the policy intention was not to stigmatise such behaviour.

Sandy Brindley: This is about questions of consent. With rape, it is obvious that lack of consent needs to be proved. Rape is incredibly difficult to prove, and that will continue to be the case if the bill is passed as drafted. The provisions in section 27 would provide another option in cases in which there were serious concerns about non-consensual behaviour. The way that we formulate the offence of rape makes it very hard to get a conviction.

Nigel Don: I will put my teenage hat on at this point. If I were a teenager in circumstances in which there was consent, as I saw it, I would think that you were generating an offence that was specifically designed to penalise me. It would seem to me that you could not prove lack of consent, but you were going to get me anyway.

Sandy Brindley: We are taking a pragmatic approach. Ideally, we would have a formulation for rape that was provable in more than 3 per cent of cases. Prosecutors are being offered another option in cases in which there are serious concerns about a pattern of behaviour around non-consensual or coercive sex, to which our law cannot currently respond because of the way in which it is formulated.

Nigel Don: If I may, I will play devil's advocate for a little bit longer. As I understand it, we are proposing that the law should be a convenient tool for the prosecution to use in cases in which there are serious concerns—those are your words—leading to a criminal conviction and record, but that we will turn a blind eye in the majority of cases. If I could turn the clock back to when I was a teenager, that would seem a tad unfair to me. I am not sure that I am desperately happy that we should be writing the law of the land in that way.

Sandy Brindley: Both options have significant consequences, such as criminalising or decriminalising, or having a policy of non-prosecution. I understand why the Scottish Law Commission has recommended not legislating for an offence when there is no intent to prosecute in most cases. We support the bill's approach for a pragmatic reason. There are real concerns about coercive sex and the pressure on young people to have sex, and there are also worries about what decriminalising consensual sex would mean for children under the age of 16.

Nigel Don: I am not sure how we write the law; perhaps we should let the people who use the words worry about that. Could the law say that, in some sense, it is unlawful to have sex in such circumstances and, if someone does, they will be liable to be referred to the children's panel—although I take the point about resources—and leave sections 1 and 2 as the criminal part? In other words, we would still have the adult law on rape and sexual assault, but we could make sure that it is understood that sex between the ages of 13 and 16 has consequences, albeit not criminal ones. That was all very convoluted, but does it sound like a way forward?

Sandy Brindley: I think that the Scottish Law Commission's proposal has been changed in the bill.

Louise Johnson: If I remember correctly, the Scottish Law Commission's original proposal in its draft bill was that such cases should be referred to the children's hearings system, about which there were a number of concerns. For example, people were concerned about the possibility of the children's hearing making an order to send a child to a residential establishment. What would that mean? Are we going to lock up young people for having sexual relations, whether consensual—obviously, the cases that we are discussing involve consent—or otherwise?

Sandy Brindley and I acknowledge that this is a very difficult area of law. How do we deal with making sure that children are protected, that the Crown has discretion to decide when to prosecute and when not to prosecute, but that young women—with whom we are concerned—are protected when consent might not necessarily be what we, as adults, would recognise as consent? As adults, we would consider the pressures that are put on young children.

Unfortunately, I do not think that we have any answers. I agree with Sandy Brindley that the situation is difficult and that neither of the two options is ideal, but what do we do? It is dangerous to give out a carte blanche, which would not protect young people at all; it would also remove the consequence of young people looking at and taking responsibility for their behaviour.

The Convener: It is fair to say that under schedule 2 to the bill there is the facility for alternative charges—if, of course, the Crown is disposed to prosecute in the first place—on the basis that one cannot change in an indictment any allegation about what the accused person has done. Interpretation would be a matter for the court and subject to judicial direction.

Robert Brown: Could the discretion of the Lord Advocate and the children's reporter in such circumstances square the circle? The bulk of cases in which there was no real concern—beyond the fact that underage sex had taken place—would not go any further. However, in cases in which there were extra elements, such as an age gap or other causes of concern, people could be prosecuted or taken to the children's panel. Would discretion for the prosecution not square the circle in those circumstances?

Sandy Brindley: I agree. Each case would have to be considered according to its circumstances, but if there is genuine consent, no cause for concern and no pattern of behaviour, it is hard to see how it would be in the public interest to prosecute. There might be other cases in which it would be in the public interest to prosecute.

Cathie Craigie: I am concerned by part 4 of the bill, and in particular by the suggestion that neither the option of reporting someone to the children's hearings system nor what is proposed in the bill is ideal. Given that we are talking about a very important group of young people, is it right that the Parliament should legislate when the situation that the legislation would create is not ideal? We may have an opportunity to consider the matter more widely. Children 1st points out in its evidence to the committee that sex before the age of 16 is not the norm—a minority of young people engage actively in sexual activity before the age of 16.

Sandy Brindley: Both the Scottish Law Commission and the Government, in its consideration of the SLC's proposals, have given the issue significant consideration. I am not aware of a better formulation. The formulation in the bill is far better than the legislation down south, which criminalises all sexual activity between older children. That is not helpful. I am not sure that there is a better formulation, as long as we square the circle, as Robert Brown said, through giving the prosecution discretion.

Louise Johnson: I agree with Sandy Brindley. Prosecution discretion and the guidelines from the Lord Advocate are probably the way to ensure that the approach will work.

The Convener: Angela Constance has some final catch-all questions.

Angela Constance (Livingston) (SNP): Ms Brindley said in previous answers that the conviction rate for rape in Scotland is 2.9 per cent. I understand that Rape Crisis Scotland has intimated that the bill's proposals will not change that significantly. What measures would change the conviction rate for rape?

Sandy Brindley: The bill, which represents a welcome tidying up of the law, is important. It is positive that it broadens the definition of rape, particularly to include male victims, but we must be clear about its limitations. It does not look at evidence at all. We are particularly concerned about sexual history and character evidence. As I said, the evaluation puts it beyond doubt that the current legislation fails to protect complainers from such evidence. We still need to give serious consideration to issues of evidence in sexual offence trials. Medical records are increasingly being brought up in such trials. If someone has had a mental health problem in the past and has been on anti-depressants, that is often used to suggest that they are not a reliable witness. We are concerned that women are increasingly deterred from reporting rape because of the use of sexual history evidence and medical records. We

must consider such issues, which cause us grave concern.

We need much better information about why cases are dropping out and where in the system that is happening. We need a full attrition study for Scotland. The data are currently so poor that we do not even know how many cases fall because of complainer withdrawal as opposed to prosecution decisions. We need much better data about what is happening.

Angela Constance: Is the bill the place to make those changes? What you describe is essentially court practice. Does that require action elsewhere or could the issues be addressed in the bill?

Sandy Brindley: I would be reluctant to suggest that sexual history and character evidence should be dealt with in the bill, because in Scotland we have now tried twice to legislate on the matter and we have failed. We should not try quickly to resolve the problem as the matter requires serious consideration.

We are unclear at this stage whether the referral to the Scottish Law Commission included consideration of sexual history and character evidence, but that would be a helpful way forward. We need to consider how to address the difficulties that exist with rape trials in Scotland and why it is difficult to get a causal link. Is our conviction rate so low because of the use of medical records and sexual history evidence? We know that most cases do not get to court.

Our priority is for the bill to address the issue of prior consent—that is the thing that we are most worried about. I believe that it will make rape harder to prove, and I do not think that any of us wants the conviction rate to fall any further.

Louise Johnson: We are concerned about the prior consent issue, and we are also concerned about expanding the definition of violence or threat of violence. We need to concentrate on what is going on. I defer to Sandy Brindley's superior knowledge of which legislative provisions should be considered, but I echo her comments on the attempts that have been made so far to deal with character evidence. Unfortunately, the legislation has not worked. That is a shame, because there is nothing to prevent it from working. Perhaps the committee will investigate that further.

The Convener: Thank you for your evidence this morning. We are dealing with sensitive matters that are also difficult and complex. Issues of human behaviour will always be difficult and complex, but your evidence has been welcome and useful. Thank you.

11:16

Meeting suspended.

11:17

On resuming—

The Convener: The second panel of witnesses is from Victim Support Scotland. I welcome Susan Gallagher, head of policy and research, and Frida Petersson, policy executive. Thank you for your written submission. The fact that you provided it in advance enables us to move straight to questioning, which will be led by Nigel Don.

Nigel Don: Good morning, ladies. Thank you for waiting patiently. I hope that we will continue to get an appropriate balance between the sensitivity of the subject and the robust debate that we recognise we need, because this is difficult stuff.

My reading of your submission is that you want all forms of non-consensual sexual penetration to be defined as rape. Your nods suggest that that is the case. Why do you believe that penetration with something other than the penis should be regarded as rape?

Frida Petersson (Victim Support Scotland): Although we accept that the penis is a sexual organ, we do not accept that that fact alone adds another dimension of severity to the attack. Along with Children 1st, we question the distinction that is made between vaginal, anal and oral penetration and ask how the separation has been made. In our experience, victims experience the same distress and psychological impact regardless of what is used to penetrate. In some situations, the victim might not even know what is used. That is the case if, for example, a blindfold is used, or the victim is in such a position that they cannot see the attacker.

Furthermore, penetration with an object has potential to cause more internal damage. Due to physical proportion, the damage that can be done by penile penetration is limited, whereas in the case of penetration with objects, longer and sharper objects can be used.

Extending the definition of rape to include objects and other body parts would create a gender-neutral crime. We are happy to note that both men and women can be recognised as victims of the crime, but the crime can currently be committed only by men. If objects and body parts other than the penis are included in the definition, the crime will be completely gender neutral. That would also remove the need for an overlap between the current offence of sexual assault and that of rape. We find it somewhat confusing that the same act can be tried under two different sections. The offence is fairly easy to define if we encompass the non-consensual penetrative acts.

We discussed whether to include oral penetration. There are many situations in which oral penetration by an object or by any other body

part might not be seen as a crime at all, especially not a sexual crime. We propose to keep that in, because it is already included in the bill, under sexual assault in section 2. Oral penetration is already included in the same offence as penile penetration, and it gives access to the same range of penalties. We do not choose to argue for the removal of that offence, but we do not argue for the addition of anything new to the offences. We simply wish to collect all non-consensual penetrative acts into one section.

Nigel Don: Do you agree that everything that you wish to be considered as criminal is covered by sections 1 and 2, and that your concern is more about where those offences are put and how they are described?

Frida Petersson: Yes.

Nigel Don: One of the defences that has been used by those who drafted the bill—the people who put the words together—is that some overlap or uncertainty is almost inevitable. The analogy that springs to my mind comes from sailing. It is easy for someone to say that they are sailing on the sea, or up a river, but it is relatively difficult for them to say at what point they penetrate the river. Sometimes it is pretty obvious, but the precise location of the mouth of a river can be uncertain. Without wishing to overdo it, I suggest that that describes some of the relevant body parts. If it is not known in court, as a matter of fact, quite what happened, some uncertainty and overlap in the law is surely useful. Is there a particular value in segmenting the various offences in that regard?

Frida Petersson: We understand that comment, and a case may be heard under either section 1 or section 2, but it would usually be known whether there had been penetration. We believe that it would be more difficult to know what was used to penetrate. Therefore, it would be beneficial to have all penetrative acts under one section.

Nigel Don: If we accept that everything is covered by sections 1 and 2, and that the maximum penalty is the same for offences under sections 1 and 2, then why worry, why distinguish and why fret about it? In section 1, we have simply codified the law of what we have historically called rape. We have covered absolutely everything else that we want to worry about as sexual assault in section 2. Why is it an issue? I understand that it is, but I would like to clarify why you feel that it is an issue. It seems to be only a matter of words.

Frida Petersson: We do not want to make a judgment that all non-penetrative acts are necessarily less serious. However, we would like the law to distinguish between penetrative and non-penetrative acts and we would like such acts not to be assembled in the same section, as they are currently, as sexual offences, in section 2. We listened to our colleagues from Rape Crisis Scotland and Scottish Women's Aid speaking earlier, and they suggested an alternative, particular crime of penetration by objects being specified. We would be quite happy with that, too.

The Convener: I have some slight difficulty with what you are suggesting. Some years ago, there was an appalling case in Aberdeen, in which a man inserted a police baton into a woman's vagina. That was an appalling offence. Suppose that that offence had been carried out by a woman: would you define that as rape?

Frida Petersson: Under our definition, yes. Our definition would make the crime completely gender neutral, which would have the effect that women, too, could be convicted of rape.

The Convener: Fine.

Stuart McMillan: Your submission suggests that the law should be changed so that the crime of rape might be committed when a person forces their tongue into a victim's mouth. Is there a danger that that could be seen to downgrade the crime of rape? Would juries be willing to convict a person of rape in such circumstances?

Frida Petersson: Absolutely. We acknowledge that oral penetration both with body parts other than the penis and with objects is an extremely difficult area of consideration. We thought long and hard about whether to recommend that it be included in section 1. We decided to do so because it is covered under section 2 on sexual assault. We have simply suggested moving the offence into section 1. The danger that you mention exists, but the range of penalties that is available under section 1 would enable the severity of the act to be mirrored.

Stuart McMillan: Do you have anything to add, Ms Gallagher?

Susan Gallagher (Victim Support Scotland): I concur with what Ms Petersson said.

Stuart McMillan: Does Victim Support Scotland think that there is a role for an offence of sexual assault by penetration that is different from rape and non-penetrative sexual assault?

Frida Petersson: We do not see a need for such an offence.

The Convener: We turn to the issue of consent and reasonable belief.

Robert Brown: I think that you heard some of the previous witnesses' evidence on a difficult area. You take issue with the bill's definition of consent as "free agreement". Will you elaborate on that? In your submission, you suggest that

"'free agreement', involving understanding and knowledge of the other person's will (as opposed to indifference),

expressed through dialogue or actions, would be the most suitable definition."

What would be the advantages of such a definition? Your proposed definition sounds more complex, without adding much.

Frida Petersson: We are happy to see the introduction of the reasonable belief provision, whereby the accused must have had reasonable belief that the victim consented to the act. It would be interesting to consider what different steps the accused took to ascertain that there was consent. That is what we are referring to—the steps that were taken, which are mentioned in section 12 on reasonable belief. Section 12 states that it is important to establish what steps the accused took to ascertain that there was consent to the act.

Robert Brown: Is that not a different aspect of consent, which the bill deals with quite adequately in section 12, which objectifies the issue?

Frida Petersson: Yes. We are happy with that section.

Robert Brown: So what would be the advantage of extending the definition of "free agreement" in section 9?

Frida Petersson: We believe that the issue is covered—we are quite happy with the definition in the bill and the steps that the accused must take to ascertain that the other person has given consent.

Robert Brown: So you are not seeking a change in the terms of section 9, notwithstanding what you said in your submission.

Frida Petersson: No. We are happy with the bill.

Robert Brown: Okay.

On section 10, in general, you welcome the list of circumstances in which consent would be considered to be absent. Should any other examples be included? Do you have any other comments about the effectiveness of section 10?

Frida Petersson: Yes. It is important that we stress that the list is a non-exhaustive statutory list and that it is not a complete checklist of situations in which consent is not given. It is important that it is stated in the bill that the list is non-exhaustive and that if a situation that arises is not on the list, it could still be the case that consent was not given.

Robert Brown: Section 10(1) says:

"without prejudice to the generality of"

section 9,

"free agreement to conduct is absent in the circumstances set out in subsection (2)."

In other words, section 10 makes it clear that the circumstances described are examples. Do you have concerns about that phraseology?

Frida Petersson: We just think that it should be stressed further that the list is non-exhaustive, to ensure that the meaning behind it is taken into account when the bill is used in court. We are quite happy with the general idea of the introduction of a non-exhaustive list and the fact that when the Crown has established that one of the situations that are listed has occurred, it will have proved lack of consent.

However, we have a problem with the idea of someone giving prior consent. It is extremely important that consent is given at the time that sexual activity takes place, which is why we have a problem with section 10(2)(b). As was mentioned in the previous evidence session, the bill does not state for how long such consent is valid. If one accepts the interpretation that consent is valid until it is withdrawn, the victim must surely have an opportunity to withdraw it, which he or she would not have if they were asleep or, indeed, unconscious.

11:30

Robert Brown: As we touched on before, this issue is tricky to pin down. When people go out, they may over the course of the evening move from being sober to being more or less drunk or more or less incapable of giving consent afresh. We are dealing with human circumstances that may be difficult to establish in situations that come before a jury. What is your position on prior consent that is given at an early stage? I refer to instances in which people go out on the understanding that they will end up in a sexual situation, but one of the parties gets drunk during the evening and is not capable of giving consent anew. People could be landed with a serious criminal offence. Is the proposition that, unless there is a specific further agreement, we are dealing with a crime of rape?

Frida Petersson: Yes. We wish to remove the possibility of prior consent. Only consent that is given at the time when the sexual act takes place should be valid. That would take away the worry about whether consent must be renewed and when it must be withdrawn.

Robert Brown: It would, but would it not cause a considerable hiatus, given that criminal statutes are normally to be construed strictly? If people were convicted in the circumstances that you describe, they could go to jail for a long time. Are we not getting away from the reality of human behaviour in some sexual situations?

Frida Petersson: We are dealing with very difficult situations. The bill states that consent can

be withdrawn at any time—we believe that it should be possible for a person to withdraw consent. It is suggested that someone who is asleep or unconscious is incapable of doing that. The policy memorandum states:

"The definition makes clear that people who are asleep or unconscious lack capacity to give or express consent while in that state."

They are also incapable of withdrawing consent at that stage. The notion of prior consent is problematic. Arguably, it would lead court cases to focus on whether the victim gave prior consent, rather on whether consent was given at the time when sexual activity took place, which is the most important issue for us.

Robert Brown: Is that not a slightly overanalytical approach to the matter, given that people do not sign written documents in this context? Will not having prior consent not land us in as many problems as having it would?

Frida Petersson: We do not see the benefit of prior consent. We believe that it takes away some of a person's sexual autonomy and her ability to change her mind. It is up to the person to consent or not at the time when sexual activity takes place.

Robert Brown: We are dealing not with situations in which someone has changed their mind, but with situations in which nothing is said.

Susan Gallagher: The onus must be on the accused to demonstrate what reasonable steps they took to ensure that consent was given.

Robert Brown: Or that consent still exists.

Cathie Craigie: Your evidence on this provision is very strong. You may want to suggest a form of words to amend the bill. If a woman agrees at 6 o'clock at night—in company, within the hearing of others—to have sex with someone but withdraws consent later in the evening, could that be a defence for the accused under the bill as drafted?

Frida Petersson: We wish to remove the notion of prior consent. In our view, it could be used as a defence under the bill as drafted, which we find extremely problematic. It contradicts the possibility of the victim withdrawing consent.

Cathie Craigie: I think that the committee would be keen to hear any further suggestions from Victim Support Scotland on this issue.

Under the bill as drafted, if a man touched his sleeping wife in a sexual manner on the basis that consent had been given prior to her falling asleep, would that be a sexual assault?

Susan Gallagher: It is very problematic. That is the reality. It must be based on a reasonableness in the context of the particular relationship and what goes on in that relationship generally. We would state categorically that, if what goes on between a man and a woman as part of normal practice includes a threat of violence or attack against the woman and she has not given her consent, it could be a problem if the law offered a justification for what happened.

Another question that must be raised is how the victim feels about the act once it has been perpetrated or even before it has been perpetrated if the victim wakes up. If the victim does not consent during, after or before the act, we believe that there is an issue with consent.

Robert Brown: Let us assume that the provision on prior consent was removed from the bill. With the rape definition under section 1, we would still be left with an issue about consent or reasonable belief that the other party had consented. Would there not still be an issue that prior consent could be part of the circumstances that led to A having a reasonable belief that B had consented? The thing must be dealt with one way or the other, either by the interpretation of judges and juries or in the legislation.

Frida Petersson: I see your argument, but we do not believe that the one issue has to do with the other. It is difficult to pinpoint what reasonable belief would be, but we do not believe that it has to do with prior consent.

Robert Brown: Surely, reasonable belief could be the fact that there had been an indication of consent at an earlier stage, such as in the circumstances that Cathie Craigie mentioned.

Frida Petersson: But that does not categorically have to be prior consent.

Robert Brown: I take that point. Would it be preferable to have the greater uncertainty of the general definition without the specific reference to prior consent?

Frida Petersson: Yes.

Robert Brown: I think that we would be interested to receive any further thoughts that Victim Support Scotland has on that very complex and difficult issue.

The Convener: It is a difficult matter. As I said earlier, we come down to human behaviour and human relationships. Sometimes, one has great difficulty in codifying law under those headings.

Paul Martin: Victim Support Scotland's written submission suggests that there is too great a disparity between the penalties, on the one hand, for rape or rape of a young child and, on the other, for the crime of having intercourse with an older child. The submission suggests that such crimes should be prosecuted only in the High Court. Can you provide some background on how you reached that conclusion?

Frida Petersson: The crimes of rape and of rape of a young child can be prosecuted only in the High Court, whereas the crime of having intercourse with an older child can be prosecuted in a summary court, which has a lower range of penalties available to it. We believe that there is too big a disparity between how cases would be dealt with depending on the age of the victim. We believe that having intercourse with an older child should still be seen as a very serious crime. We should show victims aged 13 to 15 that we take such crimes seriously. We should show the general public that offences involving that age group do not fall in a gap between rape and rape of a young child. We should not grade the severity of the attack based on the age of the victim. There is nothing to say that an older child will have a lesser or better reaction to a sexual offence than a younger child. Therefore, we do not agree that there should be a big gap between offences involving a 12-year-old and those that involve a 13-year-old.

In addition, there can be big differences between two people aged 13. Whereas some 13-year-olds might be very mature and able to fend for themselves, others might be still very much children. We believe that there is too big a difference between how the bill deals with offences involving young children and those involving older children. Given the severity of the attack, the penalty should be based on the merits of each case. Older children should be able to be heard in the same court and have access to the same rights as younger children and older victims.

Paul Martin: So the issue that has been raised involves the rights of the victim as well as the sentencing tariffs that are available only in the High Court.

Frida Petersson: We believe that such victims should have the right to have access to the same penalties as would apply in the case of younger victims and in the case of offences under section 1. Those who are aged 13, 14 or 15 do not have access to the same penalties, because their case can also be heard in a summary court.

Paul Martin: I share your concerns, but there may be issues to do with whether activities have been wholly consensual. Have you raised that matter?

Frida Petersson: With regard to older children? No. We have not commented on that.

The Convener: Would you summarise your position? You are not suggesting that someone aged 16 years and one month who has had consensual sexual intercourse with a girl aged 15 years and 11 months, for example, should be indicted in the High Court.

Frida Petersson: No.

The Convener: That is clear. Thank you.

As there are no more questions, I thank you very much for taking the time and trouble not only to submit your views in writing, but to submit yourselves to questioning. That is appreciated.

11:41

Meeting suspended.

11:42

On resuming—

Petitions

Abusive Parents (PE997)

The Convener: The committee has two petitions to consider, the first of which is PE997, by Peter Cox, on behalf of the Mothers for Justice Campaign. The petition calls on the Scottish Parliament to urge the Scottish Executive to provide greater protection to the children and partners of abusive parents.

This is the third time that the matter has come before us. When the committee considered the petition previously, it was agreed to consider judicial training in the context of the committee's scrutiny of the Judiciary and Courts (Scotland) Bill and thereafter to reconsider the petition. Now that that bill has completed its progress through the Parliament, the committee is invited to consider whether to take further action or close the petition. I invite members to consider position paper J/S3/08/25/3 from the clerk and draw specific attention to the section entitled "For Decision".

Do members have any comments? It seems to me that the committee has dealt with the matter accordingly, in that we highlighted the issue of judicial training when we considered the Judiciary and Courts (Scotland) Bill. That seems to have solved the problem, so do members agree that we should close the petition?

Members *indicated agreement*.

Legal System (Fee Arrangements) (PE1063)

The Convener: PE1063, by Robert Thomson, calls on the Scottish Parliament to investigate the apparent conflict of interest that exists between solicitors or advocates and their clients in the present system of speculative fee arrangements—generally known as no-win, no-fee arrangements—and to urge the Scottish Executive to overhaul the existing speculative fee arrangements framework and procedures to make people in the legal profession more accountable to their clients.

The committee has also dealt with this petition before. We considered it at our meeting on 25 March 2008 and agreed to write to the Cabinet Secretary for Justice about the wider issues that it raises as opposed to specific matters relating to the pursuer's personal experience. We agreed that the petition would be considered further on receipt of a response from the cabinet secretary. As we have now received a response, we require to reconsider the matter.

I invite members to consider paper J/S3/08/25/4 from the clerk, and specifically draw attention to the section entitled "For Decision". Do members have any comments?

Nigel Don: I confess that it is tempting to dive into the individual's specific case, but obviously we should not do that, and we will not do that. That said, it seems that there is a point of principle lurking somewhere and that there is at least the potential for a conflict with what is in the professionals' interests. I am not going to accuse anybody of being unprofessional, but we are all human. Lurking somewhere behind the issues that have been raised is something that we should not let go of, so I wonder whether we should at least hold on to the petition while other things are going on. I am not suggesting that we should make any work for ourselves, but we should not lose sight of it. We could wait until the publication of Lord Gill's report and the results of other things that are going on have come back to us and return to the petition in due time, whatever that means.

11:45

The Convener: That is a pertinent issue, of course. As it says in the paper from the clerks, in due course we will consider the Lord Justice Clerk's submissions on his review of civil procedures, and it is obvious that the matter that is raised in the petition is pertinent to that. In the circumstances, the committee might want to retain a hold on the petition, as Nigel Don suggested, and to consider it again when matters have been advanced following Lord Gill's submissions.

Cathie Craigie: I have no objection to our doing that. Another option would be to advise the petitioner that we have not lost sight of the points that he raised and assure him that we will consider those points and all aspects of Lord Gill's report. I suppose that a third option is to write off the petition just now while offering a guarantee that we will keep an eye on the issues.

Paul Martin: It is not a bad thing to hear people's personal experiences—we should welcome them—although I appreciate that information needs to be verified and other commentary is needed. When we take evidence on Lord Gill's review, it might be helpful to hear from the petitioner and anyone else who has a personal experience to relate. All too often, committees do not hear from individuals who have experience of the processes that we are considering. The best way forward would be to invite the petitioner to give evidence to us during this parliamentary session.

The Convener: I have no objection to your suggestion, although I offer the normal caveat that hard cases make bad law. Mr Thomson is entitled

to submit written evidence to the committee when we take evidence on the review, as is any member of the public. The committee might well decide that the evidence that he has to offer is particularly pertinent.

Nigel Don: I reassure Paul Martin that I was not saying that we should not hear from the petitioner. My concern is that we ensure that that gentleman does not think that we can act as a sort of court of appeal on matters that are and must remain in the legal system. We must make it clear that we cannot substitute our opinions for those of the courts.

The Convener: That is wise counsel.

Robert Brown: I should declare my membership of the Law Society of Scotland, albeit that I am not practising.

We should be careful not to try to second-judge individual cases, as members have said. There is no doubt that all sorts of issues arise in no-win, no-fee cases, but the judgments that the solicitors and advocates who are involved in such cases must make are not necessarily distinct from the sorts of decisions that must be made in other cases.

I single out the point about a litigant's ability to recover the cost of the insurance premium, which is mentioned in the letter in annex B of our paper. That is a limited aspect of the matter, but given the cost of premiums it is significant, and we should not lose track of it. I do not mind how the issue is dealt with. We could come back to the matter or keep it open. I do not think that there is a major issue of principle in that regard. I am not sure that I see huge advantages in keeping the petition open per se, but I do not have a strong view on that.

The Convener: I think that there is a fairly consensual view among members that issues need to be addressed. How we address them is the decision that we must make. My preferred option is simply to close the petition and to stress to Mr Thomson that he will have the opportunity to give evidence in the light of the on-going action taken by the Lord Justice Clerk and this committee. However, we would have to stress that it might be some time before we are in a position to pursue matters further. Is that agreeable to members?

Paul Martin: I think that we should hold the petition open. If we do so, we will be able to use commentary on the petition when we start to take evidence. If we close the petition, we will be saying that we are happy that the issue that the petition raises has been concluded.

It would not be controversial to hold the petition open so that it becomes part of the evidence. If people go to the trouble of submitting petitions, we should not close them unless we are entirely satisfied that the issue has been concluded.

The Convener: I am perfectly relaxed about that. All the points that have been made are eminently sensible. Do we wish to keep the petition live?

Nigel Don: I am a member of the Public Petitions Committee and I was there when this petition came in. As I understand it, the committee tries to keep a petition live if there is a prospect of getting the result that the petitioner is looking for. The petition calls on the Scottish Parliament

"to investigate the apparent conflict of interest".

It might be three or four years until we get round to that investigation, but until then I would be happy to keep the petition open.

We are not neglecting the petition, and we acknowledge that it raises a point. We are simply saying that other things are going on and we will deal with it in time.

The Convener: Does anyone hold strong views to the contrary? I am not disposed to go to a division on what is a fairly simply matter. Does the committee conclude that we should keep the petition live, and that we should consider the matter in conjunction with our evidence on reforms to civil justice?

Members *indicated agreement*.

11:51

Meeting continued in private until 11:52.

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