JUSTICE COMMITTEE

Tuesday 4 November 2008

Session 3

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JUSTICE COMMITTEE
26th 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:

Karen Brady (Scottish Children's Reporter Administration)
Martin Crewe (Barnardo's Scotland)
Jan McClory (Children 1st)
Netta Maciver (Scottish Children's Reporter Administration)
Kathleen Marshall (Scotland's Commissioner for Children and Young People)
Dr Jonathan Sher (Children in Scotland)

CLERK TO THE COMMITTEE

Douglas Wands

SENIOR ASSISTANT CLERK

Anne Peat

ASSISTANT CLERK

Euan Donald

LOCATION

Committee Room 2

Scottish Parliament

Justice Committee

Tuesday 4 November 2008

[THE CONVENER *opened the meeting at 10:26*]

Decision on Taking Business in Private

The Convener (Bill Aitken): Good morning. I apologise for the slightly delayed start, but we had to deal with certain administrative matters.

Under item 1 on the agenda, I ask the committee to agree that item 3, which is a discussion of the main themes arising from today's evidence-taking session on the Sexual Offences (Scotland) Bill, be taken in private. Is that agreed?

Members *indicated agreement.*

Sexual Offences (Scotland) Bill: Stage 1

10:27

The Convener: Our main business this morning involves the taking of evidence on the Sexual Offences (Scotland) Bill.

Early in our consideration of the bill, we identified certain themes that we were particularly keen to explore. In today's evidence-taking session, which is our second on the bill, we will discuss aspects of the bill with specific relevance to children and young people.

On our first panel are Jan McClory, the assistant director of children and family services at Children 1st; Dr Jonathan Sher, the director of research, policy and practice development at Children in Scotland; and Martin Crewe, the director of Barnardo's Scotland. We have received written submissions from the panel, so we will go straight to the questions.

Children 1st suggests that section 10 of the bill, which deals with situations in which there is no consent, should be extended to include cases in which the victim has previously been the victim of physical or sexual abuse by the accused, and cases in which the victim agreed to or submitted to the act because he or she was subject to emotional or psychological abuse. Can Jan McClory explain a little more about the kind of situations that she envisages? Why does Children 1st feel that they could not be included in section 10(2)(c)?

Jan McClory (Children 1st): We raised those two areas in recognition of the imbalance of power, because we are concerned about the impact of previous or current abuse by a perpetrator on any young person. Consent could not possibly be considered possible in a situation in which there is a differential in power between the two parties. The kind of situation that we anticipate would involve some form of previous coercive behaviour—whether sexual or otherwise—towards a young person, and cases in which a young person has been pressurised, either physically or emotionally, by a person who could be considered to be in a position of trust or who has power over them.

10:30

The Convener: So you are saying that section 10(2)(c), which refers to violence, would not cover such coercive behaviour.

Jan McClory: Yes.

The Convener: I would like to probe things a little further. The bill proceeds on the understanding that children under the age of 13 cannot give proper consent to sexual relations. Do members of the panel share that view?

Martin Crewe (Barnardo's Scotland): Barnardo's Scotland's view is that drawing a line in the sand at the age of 13 may not be perfect, but it is perfectly reasonable to do so. Therefore, we are happy with that approach.

Dr Jonathan Sher (Children in Scotland): Drawing age boundaries is a necessary tool in legislation, and because doing so is a necessity, we agree with the approach that has been taken. It is worth noting that all such age definitions are no more than proxies; levels of maturity and knowledge and abilities vary widely among children of such ages. However, law cannot be created around individual variations among young people. Therefore, it makes sense to us that the line be drawn at that point.

The Convener: That is in line with the evidence that you submitted yesterday.

Let us take things further. The bill raises the possibility of children under 13 being guilty of a criminal offence if they engage in sexual activity of a consensual nature with other children under that age. What are the panel members' views on that?

Jan McClory: We would argue—we agree on this—that if young people under the age of 13 are incapable of giving informed consent to sexual activity, a contradiction exists in the bill, in that they could be charged with a criminal offence. We would argue that young people under 13 are not capable of sexual offences of such a nature.

Martin Crewe: Our position is similar, but subtly different. We accept that there are occasions when children under 13 can commit offences, but we strongly suggest that, if the bill as it currently stands is passed, the Lord Advocate should issue guidance to the police and, by implication, to the child protection agencies that says that considerable discretion exists with respect to handling prosecutions. I say that because some cases that our services have dealt with are primarily child welfare and child protection cases.

The Convener: The Lord Advocate has, of course, unfettered discretion in all such matters.

Martin Crewe: Our concern is that, whether or not a charge is progressed, the police should have discretion in individual cases. The cases that we deal with, which sometimes involve charges of lewd and libidinous behaviour, are generally dealt with through the hearings system. The bill ups the ante, so that a child could be charged with the rape of a young child.

Dr Sher: I have two additional points to make. There are precise definitions of what constitutes sexual activity for the 13 to 15-year-old age range, but things are much less well defined for the under-13s. It appears that there are various sexual explorations that fall well short of the definition of penetrative sexual intercourse used in other parts of the bill that would subject younger children to a criminal charge and a criminal record. We think that that is not in children's best interests, and that anything that leads to regarding younger children below the age of 13 as criminals and treating them as such is a mistake, especially when we are talking about their involvement in non-coercive, non-exploitative sexual explorations with each other. The bill should be clearer that there is no intent to criminalise young children when they engage in sexual explorations that are neither coercive nor exploitative.

The Convener: I think that Paul Martin will want to pursue that issue further, but in the meantime I call Nigel Don.

Nigel Don (North East Scotland) (SNP): I have listened to what the panel members have said, and I do not disagree with the tenor of the suggestions.

Do any of you agree that it would be unsatisfactory to have a law that says that something is illegal but which is routinely not enforced, and is only occasionally enforced when the Lord Advocate happens to think that the circumstances require it? The Lord Advocate may very well be right, but it is the general idea of having a law that is not enforced that worries me. Does it worry any of you?

Martin Crewe: I think that you are right, but the cases that we deal with, particularly those that involve young children, are complex. I can give examples of cases in which behaviour has occurred that we would agree we do not want to see, but such things happen, and it is rarely in the best interests of the children to go ahead and prosecute.

Nigel Don: I would like us to try to write the law in such a way that we know what it is that we are prosecuting. I appreciate that that may mean that we have to use rather difficult words, and that we might end up with grey areas, but would it not be better to say that we will prosecute in situations in which—for example—there is a degree of coercion? Would that cover the circumstances in which one would hope the Lord Advocate would proceed?

We are struggling with the whole idea of underage criminality, but I would prefer there to be a form of words that tells the prosecution system when it should roll, rather than leaving that wholly to the—albeit perfectly reasonable—discretion of

those who do not tell society on what basis they operate.

Martin Crewe: Based on our casework, it would be quite a challenge to write a form of words that would actually be practical in the circumstances that we are dealing with. At some point, there has to be discretion in the system. A more direct line to take, if you wanted to do so, would be to ensure that a case that is referred to the procurator fiscal is also referred to the children's hearings system at the same time; that could then be negotiated.

Nigel Don: Can any of the other panel members help me out? My primary concern is with creating criminal offences that we do not routinely prosecute. In other words, we say, "This is the criminal law but, actually, we don't mean it."

Jan McClory: I agree that we do not need more offences as a way of protecting children and young people. The crucial element with regard to what is written and enshrined in law on this issue is the accompanying guidance on the implementation of the law, in relation to the understanding of professionals who are working around it.

Angela Constance (Livingston) (SNP): I hope that I am not going too off-beam here—I have listened carefully to the evidence so far. Do you have any views on how the bill should or could impact on the age of criminal responsibility? You have already raised concerns about a contradiction in the bill with regard to children under 13—they are not eligible to give consent and yet can commit an offence—which led me to think about the age of criminal responsibility, which I appreciate is sometimes regarded as a rather contentious issue. Do you think that there is a crossover on those issues?

Dr Sher: That is an important issue, and the Government or Parliament might wish to consider it. However, if the age of criminal responsibility is going to be considered, it needs to done directly and with a great deal of thought. The bill cannot sort out that much larger and more complex issue. If the bill has a relationship with the issue, it might be in signalling that there is an issue worthy of further consideration in other circumstances.

The Convener: If that were to happen, it would have to be done comprehensively, rather than in a piecemeal fashion, in relation to a particular type of offence.

Robert Brown (Glasgow) (LD): I will stick with section 15 for the moment. I accept the background about the age of criminal responsibility. However, most of us might be concerned not so much about discretion and going forward with proceedings that should not be taken up as about the offences in section 15 to do with kissing and touching involving young children who are under the age of 13—I will forget about the matter of the different age groups for the moment. Most people would not regard that behaviour as being criminal in any sense, or even necessarily reprehensible. Do you have any further concerns about the definitions in section 15 that you could tell us about today or on which you could come back to the committee?

There is also the subsidiary issue of criminal prosecution or referral on offence grounds to the children's reporter. Nevertheless, something that ends up being an offence can end up giving someone a criminal record, which might have to be disclosed later under disclosure legislation. Do you have any thoughts about a way around that, leaving aside the age of criminal responsibility problem?

Jan McClory: I can only agree with you that many of the activities that are listed in section 15 would not give cause for concern about young people who are merely developing and growing as individuals in society. We do not want to see anything in the bill that underlines that such behaviour is offensive—within a criminal context—in any way. That is why it important that we remove from the bill the notion of an offence being committed by a child under the age of 13.

Martin Crewe: I go back to the earlier point about appropriate guidance. Quite a lot of the provisions in the bill that deal with children will rely on people exercising a degree of common sense in practice, and different parts of the bill lend themselves more to that approach. Good guidance could prevent such cases from being progressed.

Robert Brown: I am still concerned about the idea of there being criminal offences that most people would not regard as criminal offences but which could leave people with a criminal record—albeit theoretically in most cases. This might be a matter for the lawyers in your respective organisations, but is there scope for any form of defence under that heading, or any other way of getting at the problem that would allow the legal exclusion of such potentially criminal but, in fact, non-criminal situations?

Dr Sher: In the sections that deal with 13 to 15-year-olds, there are much more precise definitions of the activities that are considered to be criminal and those that are not. You will know that Children in Scotland favours decriminalisation rather than criminalisation, but even within that, there are much more precise definitions for the activities of older children than there are for those of younger children. Perhaps the way of moving the issue forward, if that is the path that the committee wants to take, would be to use more precise definitions that exclude all the behaviours that common sense and collective experience suggest

are not regarded as, and are not in fact, criminal behaviours. That can be done within the law.

10:45

I underscore my colleagues' point that one of the worst outcomes would be for younger children to be labelled as criminals for engaging in such activities and, therefore, to begin to think of themselves as criminals. One of the developmental truths about children under 13 is that they begin to live up or down to the expectations that we adults place on them. It would make much more sense, and would be much more helpful to their development, for them to be regarded as children who are engaging in behaviours that raise concerns that can be dealt with in a health and welfare context rather than a criminal justice context. In this arena, there seems to be remarkably little value in labelling children as criminals or having them label themselves as criminals. It is not helpful.

Paul Martin (Glasgow Springburn) (Lab): My question is for Children 1st first of all. From its written evidence and from what Jan McClory has said this morning, Children 1st seems to be calling for a complete ban on criminal proceedings being taken against children under the age of 13 in any circumstances. I ask her to clarify whether that is the case.

Jan McClory: It is completely inappropriate and unacceptable for an under-13-year-old to be charged with a sexual offence.

Paul Martin: I will provide an example of something that might happen in real life. If a 12-year-old assaults a two-year-old, should criminal proceedings against the 12-year-old not be considered?

Jan McClory: When we deal with a young person under 13 who behaves inappropriately towards other children or causes them harm, there is great concern about the welfare and needs of that young person. The behaviour must be considered as a care and protection issue, not only for the other young children involved but for the young person who is behaving inappropriately. It would be more appropriate to make a referral that examined other concerns—such as whether the child is in moral danger themselves and whether they are beyond parental control—in an environment in which the young person can be looked after and supported, rather than prosecuting them for an offence that we believe they would be largely incapable of understanding.

Paul Martin: Will you go into more detail about that? You have made it clear in your written evidence and what you have said that there are two different forums—the children's hearings system and criminal proceedings—and that you do not believe that criminal proceedings are the way forward because you are concerned about the possibility of the individual being labelled if they receive a criminal conviction. Apart from that, is there no possibility of using criminal proceedings as an intervention, perhaps to send a message to such young people that their activities are unacceptable?

Jan McClory: The reality is that situations in which young people are likely to cause grave harm to other young people are extreme—they are not representative of the behaviour of the vast majority of young people—and dealing with such behaviour as a care and protection issue through the children's hearings system sends the right message. If a young person under the age of 13 is engaged in behaviour that is harmful to others, that needs to be understood, and they and their family need to be helped to seek to resolve some of the difficulties that the young person faces, instead of that young person being criminalised. It is important that the message that goes out to young people, their families and communities is that under-13-year-olds who cause grave harm need help and support and have little true understanding of the impact of their behaviour.

Paul Martin: So you want a complete ban on criminal proceedings, you do not want the Lord Advocate to be involved in any intervention and you want such behaviour to be reported to the children's hearings system. Is that the only way in which you would proceed, no matter the circumstances?

Jan McClory: As I said, we would like the notion of charging under-13-year-olds with a criminal offence to be removed from the bill. Obviously, there is the possibility of a very extreme situation—which I think is what you are referring to—but we would say that the most appropriate way for an under-13-year-old to be dealt with is through the hearings system, rather than referral to the Lord Advocate.

Paul Martin: I ask the same question of Barnardo's, which has given some indication of its views. Will Martin Crewe clarify how his organisation would proceed?

Martin Crewe: We run three services throughout Scotland that deal with harmful sexual behaviour by children. Even in those services, the situation that you describe is very rare. However, in extreme cases, we have to face the fact that criminal proceedings might be appropriate and will happen.

Paul Martin: So Barnardo's view is that the bill should not be amended and that the option of criminal proceedings should remain available to the Lord Advocate.

Martin Crewe: Our line is that although that option should be used extremely rarely, we do not contest that it should be provided for in the bill.

Paul Martin: I ask Dr Sher for his view on the same question.

Dr Sher: As a general principle, Children in Scotland is not in favour of the criminalisation of young children. Whether that presumption of non-criminalisation would be put aside in particular instances defined as very extreme is a matter for the committee to decide; I cannot bring you evidence about it.

I can say two things, however. First, what we know from many years of research and work in the area is that it is extraordinarily rare for young children to become sexual predators of any kind if they have not first been victims of severe sexual abuse. By and large, it is the children who have been badly harmed by adults who perpetrate such rare crimes.

That leads to my second point. Members might have discerned from my accent that I am not originally Scottish. One of the things that attracted me to come to Scotland is the tradition that is represented first and foremost by the children's hearings system, which has found a middle course between simply ignoring unpleasant social realities and unpleasant and bad behaviour and, conversely, turning everything into a criminal offence. There is a great deal of value in that Scottish tradition of viewing and treating children as children, even in the aftermath of their negative or worrying behaviour. I hope that the bill will reflect or extend that noble Scottish tradition of finding a middle path that neither ignores nor approves of such activities, and which does not criminalise them either. The Scottish approach understands that they are children and that it is overwhelmingly likely that they are children who have been harmed. There needs to be an appropriate welfare response both to help them get over the harm caused to them and to stop them harming anyone else as a result.

Paul Martin: I cited an example of a 12-year-old harming a two-year-old. Can you think of no examples in which criminal proceedings would be more beneficial than using the children's hearings system? There can be welfare interventions through the criminal prosecutions route as well.

Dr Sher: It might just be a failure of my imagination and there might be extreme circumstances that warrant an extreme response, but I cannot bring you evidence about that.

The basic principle is that we should not criminalise young children. If the committee can identify exceptions to that, that is the committee's prerogative, but I have no evidence to offer one way or the other; I have the principle.

The Convener: We will move on to sexual activity between older children.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): Before we do, I would like to pursue the same line a wee bit further, with your good will.

The Convener: It is infinite.

Cathie Craigie: The committee has been advised that in 2006-07 slightly fewer than 16,500 children were reported to the children's reporter for offences, whereas 99 children under the age of 16 went on to be prosecuted through the Scottish criminal court system. Is that the right balance? Do those figures provide enough comfort to the people who work with young children that the system is working on the social grounds that Dr Sher mentioned?

Martin Crewe: Broadly, yes. The ratio of prosecutions is very low compared with the number of cases that are referred to the children's hearings system.

Jan McClory: A major concern to our organisation, in addition to whether cases involving children lead to prosecution, is the help and support that are available to young people who, technically, commit offences through involvement in inappropriate sexual behaviour. Regardless of whether a case is dealt with through the criminal justice system or the children's hearings system, when it comes to the outcome that we are looking for, which is a change in the behaviour of young people, our greatest concern is about the absence of support services and treatment programmes for young people who exhibit sexually inappropriate behaviour. Regardless of the system that deals with them, if that behaviour is not addressed while those people are still relatively young, the chances are that it will not be resolved and their behaviour will not change. That is of as much concern as the legal process.

Cathie Craigie: To avoid any confusion, the figures that I quoted did not relate only to sexual offences; they relate to offences across the board.

Jan McClory: Yes—you were talking about offences across the piece.

Cathie Craigie: I will now move on to the next area of questioning. I note from its submission that Children 1st consulted young people on their sexual behaviour. It was one of the few organisations, if not the only organisation, to do so. How did you go about that? How many people were involved in the consultation exercise? What was the age range of the group that you worked with?

Jan McClory: As we mentioned in our submission,

"we held a conference in June 2008 jointly with ChildLine in Scotland to debate the issues raised within the Scottish Law Commission recommendations."

That national event involved participants from the many different agencies in the statutory and voluntary sectors, as well as children and young people who were users of the services of ChildLine and Children 1st.

Following on from the issues that were raised at the conference, consultations were held in some of our young people's services, most prominently among users of our young people's chill-out zone service in West Lothian, which has provided sexual health guidance and support to young people for about seven years. We held focus groups and the service's staff conducted a specific consultation of 12 young people—young men and women—that dealt with a range of issues around the key areas that the bill addresses, particularly the age of consent and decriminalisation. We undertook that consultation internally to enhance the evidence from the conference in June.

Cathie Craigie: How many people were involved in the conference and the focus group?

Jan McClory: More than 120 people were involved in the conference in June and the more recent consultation involved a group of 12 users of our service in West Lothian.

11:00

Cathie Craigie: You have drawn together some interesting evidence from your consultation. As I said, Children 1st is one of the only groups to go that far, so I congratulate you on that work.

How did you express the findings of the consultation in your submission? Some of the points that the young people made do not marry up with the conclusions in your submission. I am thinking in particular about the messages that are sent out. The age of consent is not changing, but if a feeling exists out there that it is changing, the protection from pressure that some young people mentioned will be taken away.

Jan McClory: In our written evidence, we tried to embrace the different perceptions and concerns that young people expressed to us. We also tried to acknowledge that, although the age of consent will remain the same, as you say, the message might be communicated to them that, with decriminalisation, the age of consent will be reduced. We tried to embrace the difference of opinion that exists among young people, which is a major concern for us. We carried out a small consultation within our own services because we believe that consultation has been lacking and that it must take place.

We are all here because our major concern is the protection and wellbeing of young people. Children 1st does not want young people under 16 to engage in sexual activity without support, information and education. We believe that, for most young people, the age of consent is absolutely right. We accept that some under-16s will be involved in sexual activity and we believe it is important that Scotland has an equal distribution of services that young people can access to seek support, information and guidance.

We know from providing such services ourselves—and from other organisations' experience—that being open to dialogue and discussion and being there for young people to raise issues around sexuality does not automatically lead to their engaging in sexual activity. It helps a lot of young people to make safe and wise decisions for themselves, which often equates to their disengaging from sexual activity or deciding not to become involved in it.

We heard from young people that changing the law to decriminalise could send out a clear message that, although the age of consent is still 16, sex between young people aged 14 to 16 is permissible and therefore an expectation. That was a particular concern for young women, although interestingly some of the young men who were involved in our consultation felt strongly that the message should remain that 16 is the absolute limit. They had concerns, perhaps not surprisingly given the group of young men, about predatory behaviour.

In our submission, we tried to embrace the complexity of the situation and the need to have messages that can be clearly understood by young people and everybody who is involved in working with them and providing support and guidance.

Cathie Craigie: Some of my colleagues might take the point a wee bit further.

Mr Crewe or Dr Sher, do you have any comments?

Martin Crewe: Barnardo's position is that we unequivocally support the Scottish Law Commission's position that sexual intercourse should be decriminalised for 13 to 15-year-olds—boys as well as girls—because of the difficulty with the current situation with an activity that is so common. I refer to Nigel Don's earlier point about the intention of the legislation. If up to a third of children engage in sex before the age of consent but we consider prosecuting only a tiny minority of them, is it worth having the law in place at all? We acknowledge that the activity happens.

Our line is that persuading young people not to indulge in sex is less about making sex criminal and more about providing easy access to appropriate advice. I do not know whether anybody saw the awful Channel 4 programme "Embarrassing Teenage Bodies", but the thing that seemed to bring home the message to young people was showing them the effects of sexually transmitted diseases and what it means to be a teenage mother. Opening up the advice will be far more effective in discouraging that behaviour.

Cathie Craigie: The reason why I raised the point is that Children 1st consulted with young people, who

"spoke about using 16 years old as a form of 'buffer' … to withstand peer pressure to have sex earlier than this age boundary."

Some young people felt that an "actual or perceived change" in the age limit might lead to more pressure,

"more early sexual activity and more unwanted pregnancies."

Has Barnardo's spoken about the issue to young people who are involved with the organisation? Do you accept that point that young people are making?

Martin Crewe: It is admirable that Children 1st has undertaken that work, but I am sure that Jan McClory would agree that the sample was not statistically significant. We run services for children who have been sexually abused and services that deal with harmful sexual behaviour. I have spoken to the front-line workers, whose view is that criminalising will not have a significant deterrent effect on the sort of disadvantaged young people who, disproportionately, have sex early. I support more research on that, but it is too early to tell what would really have the effect that we all seek.

The Convener: To an extent, we may have anticipated some of the other members' questions.

Stuart McMillan (West of Scotland) (SNP): I have a question for Dr Sher that is based on Children in Scotland's written submission. In the section on criminalisation versus decriminalisation of consensual sex between 13 to 15-year-olds, which is in part 1 of the bill, you discuss the fact that very few children and younger people view consensual sex with people of their own age as a criminal activity and you highlight a few examples. Could it not be suggested that, if younger people in the 13 to 15-year-old category do not understand that 16 is the legal age of consent, they are not mature enough to have sexual activity in the first place?

Dr Sher: Children in Scotland, my colleagues who are giving evidence, committee members and the Scottish Government all agree that we ought actively and effectively to discourage sexual intercourse, not only among everyone who is under the age of consent—16—but among older teenagers who are not ready to become fully sexually active. There is no disagreement anywhere that I know of. No one argues that underage sexual intercourse is a good thing—it is not and all of us should discourage it actively through whatever means we have.

However, that must be coupled with our actively and effectively encouraging all children below the age of consent who, despite our robust and sincere advice to the contrary, choose to engage in sexual activity and intercourse—which we all regard as an unwise and unhealthy choice—at least to behave in a manner that will have the fewest and least serious negative consequences for them, their partners and society as a whole. We all agree that that means providing easy and confidential access to first-rate information, providing support for avoiding pregnancy and preventing the transmission of sexually transmitted infections, and dealing well with the social and emotional problems that arise.

What is the message of the bill? As we stated in our written submission, we think that there is a problem with having an empty threat, but also with criminalisation. Our suggestion—together with the Scottish Law Commission and a variety of other groups—is to decriminalise consensual sexual intercourse below the age of consent, but to couple that with a new robust public health campaign, which says that the age of consent is still 16. All of us believe that it is unwise and unhealthy for people to engage in sexual activity below the age of 16. However, if people are going to do so, they should not make things worse: they should not compound the problem by becoming pregnant, by transmitting STIs or by causing other problems.

We all understand that there is an intended message in the bill. The problem is serious and under-16s should get the message that it is so serious that it has been made a crime, and therefore not engage in sexual activity until they are over 16. I hope that everybody will take that message on board. Frankly, however, I have no confidence that that is the actual message that will be taken on board by under-16s. In our submission, I specified a set of plausible other meanings and interpretations that young people will give to the bill as it stands. In my view, those are unhelpful—but very likely—interpretations.

The best strategy is twofold. First, it is to decriminalise, and to couple that decriminalisation with a robust public health campaign saying that the age of consent is still 16, and that we do not approve of the behaviour of engaging in sexual

activity under that age. Those two things should tie together.

Secondly, we should now do what should have been done by the Government earlier. As commendable as the efforts of Children 1st are, they cannot replace a meaningful full-scale Government-led national consultation of a wide cross-section of children and young people. That should happen now, so that whatever the provisions of the bill that is passed, the guidance and practice are informed by what will actually work with children and young people, because we will know what they are thinking, instead of guessing what they might be thinking or how they might interpret our messages. That last element has been missing, so we need to engage in a broad national consultation of the children and young people whom we are trying to help and give good counsel.

The Convener: That was a comprehensive answer.

Angela Constance: Dr Sher has given a detailed response on the advantages of decriminalising consensual sexual activity between older children. I understand that Barnardo's Scotland also supports that. Does the panel see any disadvantages or potential risks in such a move? We have already heard Cathie Craigie speak about how young people themselves view the situation. They have intimated that there is a protective factor from the law as it currently stands in respect of resisting peer pressure.

Jan McClory: That is covered in our evidence, and we have listened to young people's views on that. To return to what Jonathan Sher was saying, we took a small sample of views from among our services, and we consulted people at our conference. There is much more that could be learned and understood about how young people will receive the message. We do not want unnecessary criminalisation where consensual sex has taken place, but we caution that sex is not always consensual in the age group that we are discussing. There is still a need for protective factors for young people. Our position on that is clearly laid out in our evidence.

The Convener: Would anyone else like to add anything?

11:15

Martin Crewe: The only risk is the risk of sending a message that could be misunderstood. As Dr Sher said, we have to manage the message carefully. It is important to say that we are not changing the age of consent. If we adopt the proposals of the Scottish Law Commission, we are not saying that Children under 16 can have sexual relations with whomever they want.

Nigel Don: The point that underage sex might not be consensual is entirely obvious to us, as adults. However, is there any reason why that lack of consent is not covered by the criminal offences in sections 1 and 2, the latter of which seems to be all-embracing?

Jan McClory: It is covered by those sections, obviously. However, our concern is to do with the message that is sent to young people, how they understand it and how they cope with the notion of when sex is permissible in terms of their own personal decision making and when it is an offence for anyone to be sexually active. Our concern is about young people's decision making and the pressures and permissions that exist in society.

Cathie Craigie: The evidence that we are hearing seems to suggest that, in relation to sexual activity between older children, part 4 of the bill is not yet right. The Government did not consult young people, and the children's commissioner has suggested that we seek to ensure further involvement with and consultation of young folks. Given that we all seem to agree that what we have before us is not ideal, do you agree that we should not rush to legislate but should, instead, leave that part of the bill for another day, by when we will have been able to listen to young folk and examine legal issues and the needs of young people?

Martin Crewe: It is fair to put some sort of caveat on any research of that nature. We need to remind ourselves what we are talking about. It would be good to undertake that research, but you would be asking young people to talk about a situation that they would not be in at that moment in time. Two 15-year-olds, in a moment of passion, might not behave as rationally as they might do when surveyed. I support going ahead with wider consultation, but we also need to have a reality check and ensure that we understand what is happening on the ground.

Angela Constance: Does the panel think that older boys and girls should be treated equally with regard to the criminal law in this area? Does the panel approve of the extension of the criminal law to older girls who engage in consensual sexual relations with older boys, given that under the present law under-16s are protected by criminal law but are not subject to prosecution?

Jan McClory: We are in favour of gender equalisation in legislation. It is unacceptable that young men and young women are treated differently. However, there are questions around identifying someone as a sex offender in the first

place—doing that to women is no more appropriate than doing it to young men.

The Convener: That is in line with your earlier point.

Martin Crewe: Our position is that we support gender equality, with the decriminalisation of the activity for both sexes.

The Convener: We will now turn to defences in relation to offences against older children.

Stuart McMillan: Children 1st expressed concerned about confusion in the bill, especially in relation to the age difference defence in section 29(3). In what regard is the defence confusing? Do other aspects of the bill present a confused picture? I have done some research on the matter and I gather that Austria, Italy and Latvia have similar provisions in their legislation.

Jan McClory: You know something that I do not know; I am afraid that my research was not as full as yours was.

As we said in our submission, we are concerned that the criminalisation of non-exploitative relationships between 16 or 17-year-olds and 14 or 15-year-olds would be confusing and unworkable in law. The arbitrary notion of a two-year rule—and the boundary between a two-year age difference and an age difference of one year and 11 months—would be hard for young people to absorb and understand and would lead to confusion.

Martin Crewe: Section 29(3) is a difficult provision, but we considered the matter and concluded that it would be difficult to come up with anything better. The problem relates to Dr Sher's point about how children reach maturity at very different ages. Whatever approach is put in place, it must be acknowledged that we might be talking about a 15-year-old girl who is as sexually and emotionally mature as the 17-year-old boy or about two young people between whom there is a big difference.

We deal with quite a few cases that involve children who have learning disabilities. In such cases age is much more of a proxy than it is in other cases. Section 29(3) is not ideal, but we want such a provision in the bill and we have not been able to come up with better wording.

Robert Brown: The underlying issue is whether a sexual relationship between older children is exploitative. A general point that has been made in favour of the approach that is taken in the bill is that the existence of offences that do not rely on proof of consent would give the prosecution more scope when a child had been sexually exploited by another child but there was not enough evidence to secure a conviction under sections 1 and 2. That sounds like a difficult argument in criminal law terms; is it a good reason for supporting the criminalisation of certain sexual activity without requiring proof of consent?

The Convener: Do you want to answer that, Ms McClory?

Jan McClory: Me again. I am not sure that I can add anything without repeating what I have said.

The Convener: Do the other witnesses want to augment their previous answers?

Dr Sher: Another way of considering the two-year rule is to regard it not merely as a defence against a criminal charge, which will be used at the back end of a case, but as a presumption—at the front end—that there will be no prosecution when the age difference between two consenting older children is less than two years, unless there are extraordinary circumstances. Instead of the provision being regarded as relevant only as a defence when a charge has been laid, it could be regarded as a presumption that no charge will be laid in the first place, unless there are extraordinary circumstances.

Bill Butler (Glasgow Anniesland) (Lab): In response to a question from Cathie Craigie, Ms McClory mentioned the need for support for young people whose sexual behaviour gives rise to concern. Will the witnesses comment on the type, effectiveness and availability of services, including sexual health services, in Scotland? Why not start with Mr Crewe and give Ms McClory a break?

Jan McClory: Thank you.

Bill Butler: No problem.

Martin Crewe: Throughout Scotland, there is a wide variety of services giving some sort of generic sexual advice to young people. Our concern is that specialist services for children with harmful sexual behaviour are few and far between. We provide services in three locations in Scotland. What is particularly interesting about those services is that if the children come to us young—usually under 12 or 13—there is little difference between those children who have exhibited harmful sexual behaviour and those who have been abused. There is a willingness among children to address their harmful sexual behaviour, especially at a young age, and the success rates are good. As an investment for addressing those behaviours, specialist harmful sexual behaviour services are invaluable.

Jan McClory: I agree. Specialist services that support changes in the behaviour of young people can produce startling results. However, such services are few and far between, and many are under constant threat because of the funding situation. That does not help us to build a sustainable model of support for young people who present us with challenging behaviour.

Services throughout Scotland are inadequate and are not necessarily located in the right places.

We consulted young people on the availability of sexual health services. We asked them whether the Government could spend more money on sexual health and, if there could be an increase in investment in their locality, what they would want. What was interesting was that they did not say that they would make more contraception available—that they wanted more condoms or anything like that. What they said was that they wanted to have more people to talk to about sexual relationships, and indeed about relationships in general.

It is important for us to understand that young people see sexual health as related to relationships and social development. They want to be able to talk about that, as part of their life and their future, in a safe environment. Sex education and sexual health issues are still closeted, and young people feel that there is still a risk to them, even within education and mainstream school activities, in engaging in discussions on those issues. If they disclose things to teachers, they worry about what is done with that information. They are concerned about becoming the subject of staffroom gossip, or about the impact on their relationships with teachers.

Interestingly, some of the young people whom we consulted said that they would like to have more school nurses, and that they would like to have school counsellors. They would like sexual health to be integrated into the curriculum, rather than just being part of the personal and social education programme. In terms of investment and return, what they were really asking for was not more sexual health equipment but more support and more understanding about where they are coming from and what their dilemmas are.

Bill Butler: So, in general, young people exhibited more common sense than some adults.

Jan McClory: My experience, from working directly with young people in the field of sexual health for many years, and from my role in Children 1st, is that young people show sensitivity and an insight into their behaviour that contrasts slightly with the behaviour of the adults around them. Without fail, they try to wrestle honestly with issues and talk about the pressure that they are under. They find it confusing that, although the adults in their world have high expectations of them to behave responsibly, to know the score about everything and to be open about sexuality, those adults do not exhibit that behaviour in return.

We have a population of young people who are prepared to accept support when it is offered and who value guidance. They value being taken seriously and being respected for who they are and the position that they find themselves in. Many young people will talk about the fact that their first sexual encounter might have taken place when they were under the influence of alcohol. They are able to open up and discuss that, and to say that that is not the way that they wanted it to be. However, it is difficult for them to find a location for that dialogue that values and respects them.

11:30

Dr Sher: I have two quick points. There seems good reason to increase the investment in helping not only the young people who have been victims of sexual exploitation or abuse but the young perpetrators. For example, one of our member organisations—the Kibble education and care centre in Paisley—receives a number of referrals, primarily from local authorities, of boys who have been victims and then become perpetrators of sexual abuse. It is not easy, quick or inexpensive, but the centre has had good results in its work with those boys. That suggests that it is not a waste of time, energy or money to invest in helping to turn their lives round.

Bill Butler: Is there enough such investment?

Dr Sher: Across Scotland, no there is not.

Bill Butler: Is investment in those services minimal?

Dr Sher: It is less than adequate. I do not have all the figures at hand, but I know that the demand for such services cannot be met through current resource allocations.

The other relevant point is that there is a precedent for a public health information campaign and increased education in this arena. That is what the Government has done, rightly in our view, in dealing with the rape-related part of the legislation. It accurately noted the need for, and its responsibility to provide the resources for, a significant public awareness campaign to spread the right message about rape. It was concerned that the public in general and potential jurors in particular would not understand the new law and that it therefore needed to make an active, positive effort. Such an active, positive effort to spread the right messages and provide the right support and assistance to young people needs to happen in addition to the passage of the best bill possible.

Bill Butler: Thank you.

Nigel Don: I want to pick up on Dr Sher's comment on the inadequacy of the resources. I want to get a feel for the order of magnitude of the issue from the three folk who are here to give evidence. Everybody would like more resources, but are the services that we are talking about underresourced by 10 per cent, or do resources need to be increased by a factor of two or 10?

Roughly, what is the resourcing position for guidance and remedial work with youngsters who have such problems?

Martin Crewe: My guess is that, if they were available, about five times as many facilities could be used to good effect.

Dr Sher: I cannot make an estimate, but I can say that Kibble is an example of there being some resources at the deepest end. It is clear that similar resources are not available for the earlier interventions that might help to keep people out of places such as Kibble in the first place. Additional help is most needed in early interventions.

Jan McClory: I would hesitate to put a number to the question, but it is clear that there is a disparity in sexual health support services for young people between urban areas and rural environments, where access to such services is extremely limited. In rural areas, there are many issues of confidentiality, which particularly affect young people's access to services. The distribution and provision of services in different areas have to be considered.

Investment is an issue, but so is looking at current resources and how sexual health issues are dealt with in the curriculum and by school nurses at the moment. It is not a question of simply increasing investment; we must understand how young people engage with adults and how we can use existing resources to better effect to produce better results. Investments in time and in hearing from young people about what works are required. Massive additional investment may not be needed; rather, better organisation of what we have may be required.

The Convener: Those matters will no doubt be followed up in another place under the aegis of the committee.

I thank the witnesses for coming to the meeting and for giving evidence so clearly. I thank Ms McClory in particular for being so cheerfully behind the 8-ball for much of the proceedings. Your evidence is extremely useful.

There will be a brief suspension so that the panels can change.

11:36

Meeting suspended.

11:37

On resuming—

The Convener: I welcome Scotland's Commissioner for Children and Young People, Professor Kathleen Marshall. I thank her for her attendance. We shall move straight to questions.

Paul Martin: Professor Marshall, your written submission recommends that the Scottish Government engage with young people in order to formulate law, policy and practice on underage sexual activity. What form should that engagement take?

Kathleen Marshall (Scotland's Commissioner for Children and Young People): Jan McClory of Children 1st gave a clear steer on that. It is important that that organisation consulted service users, although only a small sample was involved.

The issue is sensitive. I do not think that the committee could, for example, simply invite a panel of young people to the Parliament and ask them about it. One must work through agencies and people who already have or who can build up relationships with young people so that sensitive issues can be discussed in an appropriate way. The group dynamics must be right. Some of the young people whom we are most concerned about might be vulnerable to peer pressure. Are they likely to speak up in a focus group in which there are powerful voices?

Obviously, I have considered the matter. I have standing groups with young people, but we do not have a service-type relationship with them that would mean that it would be appropriate for me to go to my reference group, for example, and immediately talk about such issues.

We have submitted ideas about how such consultation could take place. It needs to be done sensitively. I applaud Children 1st for its work with its group, although only a small sample was involved. We need to progress the issues more widely with young people who have different backgrounds and experiences.

Paul Martin: What age groups are you referring to? Is there a minimum age? What age groups should be consulted?

Kathleen Marshall: Above all, this issue shows the sense in article 12 of the United Nations Convention on the Rights of the Child, which is about taking account of young people's views on matters that affect them. We are all struggling to come to some kind of resolution on this issue without knowing about the realities of young people's lives from their perspective. Lots of age groups could be consulted, but that does not mean that the information should be presented in the same way. There are parallels here with sex education. Some of the detail in the bill is very graphic and you would not want to go and present it in that way to young people.

The bill is very complex—this is a complex subject—so different kinds of scenario could be developed from it for different ages, and the information could be presented in that way. If young people are going to be affected by the

legislation, they should be consulted. Certainly, those aged 13 and upwards should be consulted because the bill has particular resonances for them.

Paul Martin: That was almost a ministerial answer until the end.

Kathleen Marshall: Certainly 13, 14 and 15-year-olds must be consulted.

Paul Martin: That would be the minimum that you would recommend.

Kathleen Marshall: That is an absolute minimum. We have to consult them because it is their lives that we are talking about.

Paul Martin: Have you carried out any work in that respect?

Kathleen Marshall: No. As I said, I would not do that directly. My office has a health group and a care group, with which we work closely on those issues, and we also have another general group. However, proper consultation must acknowledge the relationships that need to be built up to get a proper response.

Years ago, before I had this job, I used to do quite a lot of work on HIV and sexual health education for young people. I remember an initiative in Lothian to help to inform young people by using teachers who were no longer working as teachers but who were trained in sexual health education to lay the groundwork in a school. They got the class to divide itself into friendship groups and then talked in those groups, because they found that the young people often had similar issues. I remember one of the workers telling me that, in one class, one of the groups had only two young women. Her initial reaction was to integrate them into a bigger group but, when she talked to them, she found that they were involved in behaviour that was off the scale as far as other young people were concerned and that it was therefore appropriate to work with just the two of them.

I have always remembered that as a good example of making sure that we create a situation in which young people can talk freely because we have shown that we trust them and take them seriously, and they do not have to expose themselves to their peers. It is not about bravado or the converse—the young people who might feel that they are under peer pressure to consent to things, say things or exhibit behaviour that they do not feel comfortable with. The consultation will have to be carefully designed.

Paul Martin: As the children's minister, are you—

The Convener: Not minister.

Kathleen Marshall: I thought that something had happened there.

Paul Martin: I am sorry. As the children's commissioner, are you disappointed that the Government has not carried out such a consultation to date? The bill is significant and it will affect children.

Kathleen Marshall: It is disappointing that the bill has come this far without young people having been consulted. However, it is not too late.

It would take a lot of groundwork for the kind of consultation that I am talking about to be effective, well planned and sensitive, and the question is whether that will be possible within the bill's timescale. It would not be helpful to rush something through to get a piece of legislation, because that would mean that everyone would think that the issue has been dealt with—people will say that the issue has been the subject of recent legislation and that we should not revisit it.

The current situation is not ideal or principled. I am thinking specifically of the gender inequalities that young people face. The question is about whether we try to patch that up and then believe that we have done it, or whether we say that there is still a lot of unfinished business.

People are not polarised about this issue. Everyone here wants the same thing. I have not come across anyone in the debate who says that they are happy about underage sex. Everyone wants to support young people to make the right choices. If we are serious about doing that, perhaps we should look more widely at the issue. A legal provision is only one part of this; it is simply a tool. We need to find out about the realities of young people's lives and where the law can support them in making the right choices. We must not do something that has unintended consequences.

11:45

Paul Martin: You said that the minimum age for consultation should be 13. However, the statistics tell us that those under 13 are involved in underage sex. If the minimum age for consultation is 13, how do we consult those under 13?

Kathleen Marshall: I did not say that; I said that it should be at least 13. Thank you for raising the matter. It gives me the opportunity to clarify what I said, which is that, at minimum, we should consult 13 to 15-year-olds. There is a case for also consulting those who are under 13, but we would need to think carefully about how we do that. Also, there should be segmentation of the questions and issues that we put to those young people who have been involved in that kind of behaviour and those who have not. I said that, at minimum, we

should consult those who are 13 and up, but there is a case for consulting those under that age, too.

The Convener: That was my recollection of your evidence.

Robert Brown: In your submission, you said that the bill should be amended

"to exclude younger children from criminal consequences in relation to the 'strict liability' offences".

For the avoidance of doubt, to which offences are you referring in the context of the bill?

Kathleen Marshall: Any offence that involves sexual activity. An associated issue is the age of criminal responsibility—we can get on to that if you want to do so.

The Convener: No. I would prefer not to do that today.

Kathleen Marshall: In my submission, I said that I find it strange that we are prepared to criminalise younger children for engaging in behaviour that they are legally deemed to be incapable of consenting to. There should be no possibility of criminal liability in sexual offences that involve children under 13. I could expand on that, but I will not; I have taken to heart the convener's message.

Robert Brown: That said, will you expand a little on the kind of extreme cases that previous witnesses have raised. For example, we heard of a 12-year-old having some sort of sexual activity with a two-year-old. Is there not scope for having a different approach in those extreme cases?

Kathleen Marshall: No, not at all. If a 12-year-old is engaged in that sort of behaviour with a two-year-old, the matter is one of extreme concern. We need to take significant measures to address the situation, but the criminal law is not the appropriate way to address the matter. A 12-year-old is still a developmental being. Of all our population, we have to regard our children as redeemable. We have to try to help and encourage them towards a better way of life. The example raises serious issues about the life and experience of that young person that led them to do that.

Without getting into the debate on criminal responsibility, I think that there is something about the phrase that is unhelpful. For example, when we talk about raising the age of criminal responsibility, people tend to think that, because we are talking about responsibility, we are talking about moral responsibility—whether someone knows the difference between right and wrong. That is not what it is about. When the Scottish Law Commission produced a report on the subject a few years ago, it talked about how unhelpful the language is. What we are really talking about is how we respond to such behaviour. It is about the age of criminal liability and the age of criminal prosecution. It is not about saying that there is no moral responsibility or differentiation between right and wrong; it is about asking what we do about the young person involved and how we try to get them back on the right track so that they become a confident, positive and contributing member of society.

Robert Brown: However, in addition to the welfare of the perpetrator child—if that is the right way to put it—the issue of public safety is involved. I want to explore two aspects of that, the first of which relates to whether a different approach needs to be taken in such cases, including different procedures. The second aspect relates to disclosure certificates and the issue of the rehabilitation of offenders, which we touched on earlier. Should a distinction be made between public safety-type cases where a child under 13 is involved and consensual sexual activity by young people who are equal in age when determining whether a record should be made that may materialise later on and have an evil effect on the progress of someone's career or whatever?

Kathleen Marshall: The public safety issue must be of concern. If we go down the criminal route and do not get to the nub of what has happened to a young person and find out why they are behaving in the way that they are and whether they are dangerous in the short term or long term, we are doing the public a disservice as well. I fully accept the public safety argument, which is about trying to create a safe and secure society for everyone, including young people.

Unfortunately, if we extend the criminal record part—as we know, even a referral on an offence ground to the children's hearings system would count as a conviction for the purposes of the Rehabilitation of Offenders Act 1974, although not for other purposes, and such things could show up in disclosures later—we are devaluing the disclosures system. If people can rubbish it by saying, "Well, you can get a sexual offence record for having sex with your girlfriend or boyfriend when you're 15, so that doesn't mean anything," that will devalue something that is a useful tool for identifying people who are a danger to children or other adults. There is a genuine issue, not only for the young people in relation to whose actions there would be a completely disproportionate response, but for the perception of the disclosure system.

Robert Brown: Can you tell the committee what situations you are thinking of when you talk about public safety issues? Do you accept that, in the interests of public safety, certain exceptional cases ought to show up in disclosure checks? That number might be small, of course. How might

we define those that should show up? What mechanisms might we put in place in order to ensure that that happens in a way that is rational and fits in with other legal concepts?

Kathleen Marshall: I have no problem at all with the principle of safeguarding the public. Very few young people will genuinely be a threat to public safety. It is not in the interests of those who will be a threat to the public that that should go unnoticed or unremarked and that they should not be catered for. However, the question of how we can fit that into the welfare-based system is not an easy one to answer today. You have to watch what route you take. There is a question about what comes through the doors that you open when you follow such a course.

The public safety issue is one thing, but consensual sex between two young people does not sound to me like a public safety issue. We have to disentangle those issues.

Robert Brown: Accepting that the bill is not going to deal with the age of criminal responsibility, are you concerned that the definitions in section 15 might criminalise kissing, touching or similar consensual activities between children who are under 13?

Kathleen Marshall: Yes, that is a serious concern. All sorts of innocent behaviour could be caught up in that, and we could end up cornering children into a no-touching approach, which is an issue that we have talked about previously in relation to the unhealthy, clinical environment that we are creating between adults and children, wherein adults are afraid to talk to a child or comfort them when they fall and teachers are afraid to put sun cream on a nursery child. We are going to end up giving children the same message and telling them that touching and any display of affection or intimacy is dangerous. That is not helpful. We have to get the balance right.

The Convener: We will now turn to the issue of consensual sex involving older children.

Cathie Craigie: I get the impression that you think that the bill's provisions on sexual activity between older children are not ideal. In what ways could those provisions be improved?

Kathleen Marshall: My problem with the bill is that we are proceeding on the basis of insufficient information. The act that set up my post says that I must take account of the United Nations Convention on the Rights of the Child and involve children and young people in my work. It also says that I must encourage others to take account of the views of children and young people in their work, so I am putting it to the Parliament that wrote the act that set up my post that on this issue above all, it is necessary for us to understand the situation from young people's perspective. I think that there is a hole in the information in that regard.

When I responded to the Government's consultation, although one would not know it from the media reports, I gave a cautious welcome to the decriminalisation proposal. I recognised that there could be a downside if it were received in a way that made it look as if the age of consent would be lowered, with the result that young people might feel under pressure. I said that any such measure would have to be accompanied by an extremely high-profile public health education campaign to counter that effect. I also said that we could not progress the idea until we had spoken to children and young people, whose lives, experiences and motivations are at the centre of the issue.

The recent survey that showed that 34 per cent of 15-year-old boys and 30 per cent of 15-year-old girls were sexually active demonstrates that, whatever message the law is giving out, it is certainly not being universally accepted. The people who have been concerned about decriminalisation are worried that sexual activity among the young will increase further and that being sexually active will become normal among young people. The convener does not want me to talk about the age of criminal responsibility and is probably even less keen on me talking about the physical punishment of children, but what is fascinating about the debate—

The Convener: I am in no way trying to inhibit you. I just do not want such issues to be discussed here and now. I am more than happy to have that debate elsewhere, but I ask you to confine your remarks to the bill's provisions.

Kathleen Marshall: Yes, but one of the phrases that was used constantly in the debate on physical punishment was, "We do not wish to criminalise ordinary loving parents." I find it strange that the same people who said that seem to be quite keen to criminalise ordinary loving teenagers. There is a strange link between the two subjects, both in that sense and from the point of view of what we describe as the symbolic use of the law, which is about whether it sends out a strong message. The fact that people who argue one thing in one debate argue the opposite in the other shows that we have a great deal of thinking to do about the purpose of the law, which, to an extent, is a highly academic issue.

Neither I nor, with the greatest respect—I say that sincerely, rather than as lawyers use the phrase—the committee has the information to proceed on the issue at the moment.

Cathie Craigie: Thank you for that response. I accept what you are saying. You are batting the

ball back into our court, which the act that set up your post entitles you to do.

In your submission, you explored the issues of "principle", "effectiveness" and "unintended consequences", but you did not come to a final conclusion. Have you had further thoughts on those issues? Will you expand on the principles that you think should govern the law in relation to consensual sexual activity between older children?

Kathleen Marshall: I did not come to a conclusion because I do not think that we have the information that allows us to do so. We must start with the reality of young people's lives; it is not just about subsections in an act. We must start from there and ask how the law can help young people. I want a resolution that respects the international standards to which we are committed. The Convention on the Rights of the Child seeks to protect young people, to ensure that they are listened to and to divert them from criminal responsibility, where that is possible.

12:00

There is also a new Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse. We have not ratified it yet, but it addresses the issue. Article 18 states:

"Each Party shall take the necessary legislative or other measures to ensure that the following intentional conduct is criminalised:

a engaging in sexual activities with a child who, according to the relevant provisions of national law, has not reached the legal age for sexual activities".

However, the convention goes on to say:

"The provisions of paragraph 1.a are not intended to govern consensual sexual activities between minors."

So there has been debate about the issue at international level, too.

We have heard that young people are interested in relationships, not just the mechanics. We want to promote something that encourages them to behave in a way that is respectful of themselves and of other people, and we want to ensure that they are supported in doing that. We risk unintended consequences by bringing in the weight of the criminal law and the fear of prosecution when a young person has done something that, in retrospect, they regret—and a lot of the research shows that they do regret it. So we need to think further about that.

Those are my thoughts. I do not pretend to be able to get into the head of a 14 or 15-year-old—they live in a different world. We really need to set up a context in which we can hear from them and start from their lives.

Nigel Don: Good afternoon, Professor Marshall. How unhappy are you about the idea of having a law that is routinely not enforced?

Kathleen Marshall: That is an interesting question. I noticed that you posed it at last week's evidence session. At the heart of this is the argument about the symbolic use of the law. People seem to be in agreement that we do not want to apply the criminal law to cases in which the activity is consensual, but the argument is that the law sends out a strong message. The possible unintended consequence of not enforcing the law is that young people will get the impression that there are laws that do not need to be obeyed. There is a parallel with physical punishment, as I mentioned in a footnote to my written evidence.

The Convener: We have read it.

Kathleen Marshall: Relying on the basis of existing principles—not on the de minimis rule that the law does not concern itself with trivialities—we argued that minor assaults between adults, such as taps, are not prosecuted and neither should they be when they occur between children. I have some sympathy with the symbolic use of the law. We do not catch all muggers, murderers or rapists, and the conviction rate is not a guide to whether the law should make a clear statement.

One of the problems is that already, when the activity is known to be consensual, there are no convictions. The phrase, "If it ain't broke, don't fix it" springs to mind. There is a sense in which we have let the genie out of the bottle. We have had big debates about the issue and now have it in the act along with binding instructions for the police. What are they going to say? Are we going to come out and say, "Right. This is what the law says, but we're not going to prosecute"?

There are some precedents. The Crown Office has a prosecution code on its website, which shows the principles that it applies in deciding whether to prosecute. I seem to recall—although I have not checked this—that in one case, concerning Travellers sites, there was a presumption against prosecution. That is not unknown in our law.

There is a symbolic use of the law, but we must be prepared to prosecute in appropriate circumstances. That then leads to the question of how those circumstances can be decided unless there is an investigation. How can it be known that the activity was consensual? That takes us into the unintended consequences to which I referred, which apply across every part of the population. We are talking about our children, not some group of people out there. Is a police investigation helpful to someone whose 15-year-old daughter is standing before them pregnant by her 15-year-old boyfriend? Unless we say that there will be no

investigation, there will always be a criminal dimension because there will always be an associated question about an investigation. Even that is quite scary for people.

I have not answered the question cleanly, because there is a symbolic side to the law. At present, and in the debate about the bill's provisions on consensual underage sex, we talk about sending out a strong message to young people, but 30 per cent of them are not taking the message on board now. Will a strong message combined with a direction not to prosecute actually make any difference?

Nigel Don: That is helpful and I am glad that it is on the record. I would like to explore a further point that needs to be on the record.

I understand what you mean when you say that you cannot get your mind around being a teenager. My increasingly grey beard tells you that it is some time since I was a teenager, but at one level I well remember being a teenager and I know perfectly well that as a 15-year-old I would have wanted to know what the law actually said. I am wondering what to tell my 15-year-old son that the law really says. Should I tell him not just that the law is not routinely enforced but that, when it is enforced, it will be at the Lord Advocate's discretion?

I have nothing against the Lord Advocate either personally or in principle, but if we do not know how her discretion will be exercised, we do not know what the law is. The first rule of law is that it applies to everybody and the second is that we know what it means. How unhappy are you with the idea that children do not know and cannot find out what the law actually is?

Kathleen Marshall: I listened to your discussion about that with the previous panel. The Lord Advocate's discretion is written throughout the criminal justice system and not just into particular laws. What matters is not just the sufficiency of evidence but that prosecution is in the public interest, and there are other principles that apply. It would be difficult to have a system with no such discretion about whether to prosecute. As I recall, the policy memorandum does not mention the policy thinking behind leaving the decision to the Lord Advocate's discretion, but it has been suggested in discussions that, in general, we will not prosecute, which seems to counteract the strong message that the law is meant to send out.

There is another issue. Is the criminal law the only or the most appropriate way in which to set standards for young people? Do we always need a command with the threat of punishment, be it empty or not? Are there other ways in which we can encourage young people to understand what is best for them and other people and to have standards that are based on something other than the threat of punishment? How can we encourage them to have standards that come from within and are about dignity and respect?

People respond to different things. Some people will never park on a double yellow line, for example, but others will do it just to show that they can. People have different views of the law and they respond to it differently. Some people like to challenge it and some people like to undermine it. Some people are law abiding and scrupulous, but other people respond to something quite different that comes from within themselves. When the UN committee scrutinised the United Kingdom's performance, one thing that came out was that we demonise our young people. In particular, other parts of the UK have a hard-punishment ethos, although we are better about that in Scotland.

I like to think that we can proceed in a way that respects our young people and tries to treat them positively, rather than that we have the criminal route as the fallback position.

Nigel Don: So would you support the idea that those who engage in sex before we say that they should are not treated by the criminal law but are referred to the children's panels or wherever? I am not sure where the idea came from; it might be the original Scottish Law Commission proposal. It would send the signal that underage sex is not right and will have consequences, but not criminal consequences.

Kathleen Marshall: The children's panel is a more appropriate route for dealing with such behaviour than the criminal law because it also focuses on the welfare of the young person concerned and we are talking about consensual activity. There is also the question whether all such children should be referred to the children's panel. The panel system would be completely swamped by it, but a consideration of whether referral was appropriate in some cases would be valuable.

To avoid a swamping and to take account of what previous witnesses said, there is a huge need for young people to have access to services to talk about such matters and to get friendly and helpful support and guidance in a way that respects them and helps them to respect other people. We should be looking at the issue from that angle. When issues need to be addressed, cases could be referred to the children's hearings system, but I do not think that we could deal with all cases in that way.

The Convener: A depressing answer. The final question will come from Cathie Craigie.

Cathie Craigie: Professor Marshall, you said that we are basically talking about 30 per cent of young people; I remind us all that 70 per cent of

young people are taking on the message. It is important that we get that across.

Nigel Don referred to the original proposal from the Scottish Law Commission, which I accept, that all the young people in question should be heard through the children's hearings system, although I understand that it could be swamped by the level of complaints. Do you have any information on the number of young people who come before the children's panel in cases involving sex?

Kathleen Marshall: You would be better asking the reporters on the next panel of witnesses. From my previous work in the Scottish Child Law Centre, I know that there has been a debate in which some reporters wanted all underage pregnancies referred to them and social work departments said that that was not appropriate. We would have to be discriminating.

The Convener: The question might more properly be pursued with the reporters in the next panel.

Kathleen Marshall: The Scottish Law Commission was working on the basis that the only available ground of referral was offence and that such an issue could not be fitted into other grounds. I have since heard some reporters say that they have used other grounds of referral. That would be interesting to explore as a matter of fact.

The Convener: We will try to tease that out.

Professor Marshall, we are much obliged to you for coming along this morning and answering in your usual frank style. I mean that in a complimentary way—your honest responses will be of considerable assistance to us in formulating a view on the matter.

12:13

Meeting suspended.

12:14

On resuming—

The Convener: I welcome the final panel of witnesses this morning: Netta Maciver is principal reporter and Karen Brady is head of practice at the Scottish Children's Reporter Administration. We will go straight to questioning, led by Robert Brown.

Robert Brown: Can we go back to square 1 and start with current law and practice? How are allegations of unlawful sexual conduct between children and young people under 16 dealt with? That is the background to questions of prosecution, children's hearings and the numbers that are involved. Can you give us an insight into that?

Karen Brady (Scottish Children's Reporter Administration): At the moment, for young persons under 16, anything that falls to be dealt with as a criminal offence is jointly reported to the procurator fiscal and the children's reporter, who then discuss the most appropriate place for dealing with the matter. If it is decided that the children's reporter will deal with the referral, the reporter will then decide whether there is a need for compulsion. Therefore, the test for determining the need for intervention in a young person's life is based on the grounds of the referral and on the need for compulsion. At the moment, I am unable to provide figures for the number of offences that are dealt with in that way.

The Convener: We would appreciate it if you could provide them in writing.

Robert Brown: Are you able to give us a flavour of the kind of things for which, under the current arrangements, a very limited number of cases have gone to court?

Karen Brady: The procurator fiscal tends to deal with cases that have more serious coercive elements. The general assumption is that cases involving young people under 16 will be dealt with by the reporter: the criminal courts deal with only a very limited number of cases involving such behaviour.

If any criminal activity is involved, the reporter is likely to refer the matter as a criminal offence. However, if the behaviour predominantly constitutes a criminal offence, current case law restricts us in referring that kind of behaviour on non-criminal welfare-based grounds. In general, however, the majority of such incidents will be dealt with by the reporter.

Robert Brown: Professor Marshall said that she had heard that some reporters had used welfare-based grounds to take such matters forward. Do you have any knowledge of that?

Karen Brady: That might happen in cases in which a young person has not been referred for such behaviour by the police. As you know, young people can be referred by any source, and it might well be that concerns have been referred through some other route and that, as a result, the fiscal and the reporter have not been able to discuss the matter.

If behaviour has begun to form a pattern or has given rise to a series of concerns about the child being outwith parental control or exposed to moral danger, and if those concerns are not solely to do with criminal behaviour, the reporter will be able to use those separate concerns and that pattern of behaviour, which can very often reflect, but is not exclusively linked to, sexual behaviour that is cause for concern. However, reporters tend to use such grounds in cases that give rise to wider

concerns and which reflect a pattern of behaviour that goes wider than the particular issue.

Robert Brown: Are you able to give us a flavour of the situations that would be referred under the criminal grounds that, as you say, are more normally used? I assume that they are not used in, for example, consensual arrangements between children of 14, 15 or whatever.

Karen Brady: Are you talking about the cases that are prosecuted?

Robert Brown: No. I am talking about cases that are referred to the children's hearings system.

Karen Brady: Those cases are likely to be referred to the reporter, but very few will end up at a children's hearing. The reporter will base his or her decision on the behaviour that has been presented and all the other matters related to that young person, including their parents, their living environment and their development.

The reporter must also consider the need for compulsion. Only when there is a need for compulsion will the young person be referred to a children's hearing. If a young person is not referred to a children's hearing, it does not mean that there will be no response or action to address concerns. Measures are often put in place to engage the young person and their family voluntarily. However, the decision to require a children's hearing will be based on two factors—the young person's behaviour and whether there is a need for compulsion.

Robert Brown: Am I right in assuming that a case that would be rape for an adult will be dealt with by the procurator fiscal, through the criminal courts, or is the position not quite that straightforward?

Karen Brady: No—it depends on the circumstances of the child. The more serious the offence, the more likely it is that the Crown will be interested in prosecuting the case. The presumption with all under-16s, irrespective of their offence, is in favour of the matter being dealt with through the children's hearings system. However, the fiscal may decide to prosecute. The cases in which very young children are dealt with by the criminal courts are likely to relate to serious offences.

Robert Brown: If the bill is passed in something like its present form, will the Scottish Children's Reporter Administration have to make significant changes to the approach, philosophy and practice that it adopts when dealing with such matters?

Karen Brady: We will want to look at the matter in the context of our decision-making framework, which involves consideration of various aspects of a child's life. I am not sure that I can go beyond that at this point.

Robert Brown: I refer you to the arrangements for 13 to 16-year-olds. Although there are differences of legal principle, there is also a recognisable echo of previous law. Do you envisage there being significant changes to the way in which you approach the question of what cases are prosecuted, which are referred to the children's hearings system or in any other regard?

Karen Brady: I do not think so—the presumption will remain that young people under 16 should be dealt with through the children's hearings system. The same process will be followed and the same presumptions will apply in respect of offences that are committed by that group.

Robert Brown: Originally, the Scottish Law Commission debated the possibility of having, as an alternative to criminal prosecution, a non-offence ground for referral to the children's hearings system for 13 to 16-year-olds. Would having such a ground be of assistance to you in your work, or would it be a negative factor?

Karen Brady: We think that that would be the most appropriate way of dealing with the issue. From a child-centred perspective, it would provide an opportunity to address the behaviour and needs of a young person in the round and in a welfare-based way. It is difficult to know whether it would change the number of cases that the children's hearings system would receive; to a large extent, that would depend on referral practice. However, the appropriate way of responding to young people's behaviour in the children's hearings system is on a ground for referral that enables hearings to consider the wider welfare needs of young people, as well as their behaviour.

Angela Constance: What principles should govern the criminal law in relation to sexual activity involving, first, those whom the bill describes as "young children", and secondly, those whom it describes as "older children"?

Netta Maciver (Scottish Children's Reporter Administration): I see that I am not being allowed to escape that question. The bill currently distinguishes between young children under 13, who are considered to have no capacity to consent, and those between 13 and 15, who are considered to have limited capacity to consent. Our belief is that, as Karen Brady said, these concerns are addressed most effectively and appropriately as an issue of welfare, care and protection. The mechanism for that would be the new ground of referral, which has already been covered.

Angela Constance: So the underlying principle is the welfare of children.

Netta Maciver: Absolutely. We heard from earlier witnesses about the difficulty of legislating for individual cases. The hearings system allows for individual assessment.

Nigel Don: The bill treats older boys and girls equally when they engage in consensual sexual relations—it criminalises both of them. Do you think that that is the way forward or—assuming that we are sticking with the idea of criminalisation—do you think that it would be better to stick to the current position of being able to prosecute only the boy?

Netta Maciver: We do not think that it is acceptable that there is a different way of treating young men and young women. However, as the bill stands, there is the potential to criminalise both of them equally. We think that there are potential difficulties with that, which you might want to explore further.

Nigel Don: I would be happy to explore them further because, as the bill is drafted, we are talking about criminal responsibility. If you would highlight the potential difficulties, that would be of great assistance.

Karen Brady: As Netta Maciver said, we think that the behaviour should be dealt with as a matter of welfare within the children's hearings system. There are potential practical consequences of the bill in relation to the Rehabilitation of Offenders Act 1974 and in relation to any conviction or charge that will follow a young person throughout their life as a result of the disclosure provisions that we heard about earlier. Dealing with the behaviour in the way that the bill proposes has clear implications.

An issue that was highlighted earlier is how young people are dealt with and the response of professionals in relation to disclosures of underage sexual activity. If the bill remains as drafted, there will be issues around whether a young female who is pregnant is a victim of a serious offence or whether she has committed an offence herself. That will create challenges for some of the agencies that have to respond. The category that the young person falls into—whether they are treated as a victim or as someone who is accused of committing an offence—will affect how they are dealt with thereafter by the police in interviews and so on. There will be practical consequences of the bill as drafted. Our wider view is that the matter is better dealt with in the hearings system as a welfare issue.

Nigel Don: If we accept your point and given the possibility that the bill will go through as drafted—I have no idea what we will finish up with, because the issue is clearly difficult—do you think that the problems that you have just articulated could be dealt with by appropriate paragraphs that would allow freedom of work for those who deal with youngsters after the event? Should we be able to draft things in such a way that the appropriate professional services can be given without liability? Is that likely to be a problem? Should we be able to solve that problem if we put our thinking caps on and draft things correctly?

12:30

Netta Maciver: It is important that we make clear where we stand. We fully appreciate that the Government wants the law to continue to make clear that society does not encourage underage sex. However, we want to be able to respond to concerns about the sexual behaviour of children, whatever their age, and we want our response to be based on the principle of affording protection to children. You ask whether we can manage to do that; we think that if there is an appropriate ground of referral, we will be able to bring to a case the individual scrutiny that, allied with consideration of whether compulsory measures of care are needed, will enable us to make the decision that is best for the child.

Nigel Don: That takes us to the question that was asked earlier—possibly by me. From your perspective, what is the point of maintaining a law that we routinely do not apply, and which we apply only rarely, I presume in cases in which another aspect of the law could be applied?

The Convener: I note a degree of hesitation on the part of the witnesses.

Karen Brady: Our position is that a new ground for referral would be the more appropriate approach and would give us the opportunity to deal with the behaviour in the context of consideration of the young person's wider welfare needs.

Nigel Don: Does that mean that you see no purpose in having the criminal law on your side at that stage?

Netta Maciver: It is fair to reflect some of your previous witnesses' concerns about the messages that might be sent out. We are saying that, although we do not regard sex among the under-16s as particularly healthy for young people, we accept that the people on whom we are most likely to focus will generate a range of other concerns.

Stuart McMillan: The SCRA agreed with the abolition of the offence of lewd, indecent and libidinous practice but expressed concern that the bill might not cover conduct that is currently criminal. Will you explain your concerns?

Karen Brady: In our written evidence, we said that, in relation to that particular aspect of the bill, there would be a need to prove a purpose in the offences. Our concern is that by removing the

common-law offence of lewd and libidinous practices and moving to the offences that are created in the bill, some areas might not be covered and difficulties might be created if it were not possible to prove a purpose. The bill might therefore give less wide protection for young people than exists under the common-law provisions. We flagged up our concern because we do not want children to be less protected than they currently are.

The Convener: If there are no more questions, I thank Ms Maciver and Ms Brady for their extremely helpful evidence.

We move into private session. I thank the public for their attendance.

12:33

Meeting continued in private until 13:24.

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