JUSTICE COMMITTEE

Tuesday 18 November 2008

Session 3

£5.00

Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by RR Donnelley.

CONTENTS

Tuesday 18 November 2008

JUSTICE COMMITTEE
28th 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 ALSO ATTENDED:

James Kelly (Glasgow Rutherglen) (Lab)
Kenny MacAskill (Cabinet Secretary for Justice)

THE FOLLOWING GAVE EVIDENCE:

Professor Michele Burman (University of Glasgow)
James Chalmers (University of Edinburgh)
Ian Duguid QC (Faculty of Advocates)
Professor Pamela Ferguson (University of Dundee)
Professor Gerry Maher QC (Former Commissioner, Scottish Law Commission)
Alan McCreadie (Law Society of Scotland)
Bill McVicar (Law Society of Scotland)
Detective Chief Inspector Louise Raphael (Association of Chief Police Officers in Scotland)
Ronnie Renucci (Faculty of Advocates)
Temporary Deputy Chief Constable Bill Skelly (Association of Chief Police Officers in Scotland)

CLERK TO THE COMMITTEE

Douglas Wands

SENIOR ASSISTANT CLERK

Anne Peat

ASSISTANT CLERK

Euan Donald

LOCATION

Committee Room 6

Scottish Parliament

Justice Committee

Tuesday 18 November 2008

[THE CONVENER *opened the meeting at 10:20*]

Sexual Offences (Scotland) Bill: Stage 1

The Convener (Bill Aitken): Good morning, ladies and gentlemen, and welcome to the meeting. I make my usual intimation that all mobile phones should be switched off.

We have received no apologies so far, although Angela Constance has indicated that she has been detained. James Kelly MSP will attend for agenda item 2.

Under agenda item 1, the committee will take evidence on the Sexual Offences (Scotland) Bill. I welcome the first panel: Detective Chief Inspector Louise Raphael of the Association of Chief Police Officers in Scotland; and Temporary Deputy Chief Constable Bill Skelly of ACPOS's family protection portfolio. I welcome Mr Skelly in particular, as this is the first time that he has appeared before us.

I ask our first panel members—and all the other witnesses who are present—to give short and succinct answers. That would be greatly appreciated, as we have a heavy agenda.

We will go straight to questions.

Robert Brown (Glasgow) (LD): Good morning. I want to ask about consent and free agreement, which section 9 covers. The ACPOS submission states that although the use of the term "free agreement" is okay as far as it goes, it is a bit "simplistic" and that it would be helpful if the expression were expanded

"to include the terms 'voluntarily' and 'with knowledge of the nature of the act'".

Bearing in mind the need for juries to be able to reach views on such matters, will you give examples of situations that you have concerns about and explain how the concept of free agreement would benefit from the addition of the idea of voluntariness to the bill?

Temporary Deputy Chief Constable Bill Skelly (Association of Chief Police Officers in Scotland): Good morning. ACPOS does not underestimate the complexity of that question. The definition of the word "consent" is key to later provisions in the bill.

We do not think by any means that there should be an absolutely definite definition of the term "free agreement", but we would like there to be an extra little bit of guidance on how the public—juries in particular—and the police should interpret the meaning of the word "consent". As the bill stands, the combination of section 9, which defines consent as free agreement, and section 12, which deals with reasonable belief, go some distance towards giving an understanding of what is meant, but they do not go quite far enough.

For us, the definition of the word "consent" goes beyond merely the absence of denial. Section 10 deals with situations in which consent could not be seen to have been given, but it deals with negative attributes. We think that the bill should include positive examples, such as positive verbal affirmations of consent or behaviour that indicates that understanding and knowledge were present in the person who gave consent. It is a matter of going beyond saying that consent is merely silent or that consent/free agreement is an absence of negative indicators, and saying that consent can be the presence of positive indicators such as verbal or behavioural actions.

Robert Brown: I do not think that anybody would disagree with such an objective, but do the words "free agreement" not already imply an element of positiveness? I cannot read that term as meaning just the absence of denial.

Temporary Deputy Chief Constable Skelly: We are saying that the guidance on free agreement—or on the indications that there has been free agreement—should be expanded. I understand the complexities of the issue. The bill states that "'consent' means free agreement"; it then gives circumstances in which conduct takes place without free agreement—negative examples are given. We have suggested that it would be useful if the bill indicated positive things that showed that free agreement was present, such as indications of knowledge or of the person voluntarily taking part in whatever the act was.

Robert Brown: I want to return to the initial point, which you did not entirely deal with. Do you have any examples of types of situations that you or your colleagues have come across that would illustrate the point you are trying to make or the difficulties with the current arrangements?

Temporary Deputy Chief Constable Skelly: Often, agreement or consent is inferred by silence, or by nothing being given. With reference to section 12, the person who is accused of the crime is in some ways required to provide information as to their reasonable understanding or belief that free consent or agreement was present. As far as examples are concerned, we would look for positive consent or positive indications to have been given. That might be verbal agreement or behavioural indications that show agreement. That requirement is not intended just to benefit the

victim; it could also benefit the suspect or accused, who might be able to show that such indicators were present.

Robert Brown: Section 10(2) sets out some of the circumstances in which conduct takes place without free agreement. Does it not deal, in significant measure, with your point? That subsection illustrates a series of situations, whether raised by way of defence or otherwise, that have been the subject of legal cases over the past century and a half or more.

Temporary Deputy Chief Constable Skelly: Absolutely. As I said earlier, the bill as drafted goes some considerable distance towards tackling the issue of defining consent, using the interpretation of free agreement. The instances given in section 10 indeed go some distance towards dealing with our point, but ACPOS feels that the bill could go slightly further. That is not to suggest that the bill does not address the issue, however; it certainly does.

Robert Brown: Do you have any fears that making the definitions more complex will give rise to greater problems in what is already a difficult area for establishing and proving various facts, and that it will make it even more difficult to prove rape and similar offences?

Temporary Deputy Chief Constable Skelly: I understand those concerns, which I am sure the Crown can articulate far better than I can. It is thought that, the more that we put into a piece of legislation, the more proof might be demanded—therefore, the higher the level of evidence required. It comes down to the art of drafting and to the question whether provisions should be in the bill or in guidance to follow, which might expand on the points that we have been making. I accept those concerns around the idea that, the more we include, the more we have to prove and the more complex things become. We feel that the issue is worth bringing to the committee. Beyond that, it is for you to decide where that issue sits.

Robert Brown: I want to test the quality of what you are saying, and its evidence base. I will return to the initial point. From your experience, do you have in mind particular situations in which current definitions, or directions to juries, have given rise to problems following a police investigation and a case being brought to court?

Temporary Deputy Chief Constable Skelly: Discussions around consent are central to almost every case that goes through the court system. When it comes to drafting new legislation to redefine, or to define better, what is meant by "consent" in the judicial process, we have borne in mind the fact that that question comes up on every occasion, and that is why it is so hugely important. You ask whether we have any examples of the problem; I reiterate that, in practically every case that goes through the court system, the issue of consent comes under significant scrutiny. At this stage, when we are discussing new legislation and the definition of consent as free agreement, it is vital to get the provision right, as the matter will come under intense scrutiny in the courts.

We are not trying to address the specifics of one or two cases that have gone through court. We are not arguing that, if we had been able to show positive consent and positive affirmation in certain cases, the provisions before us would have been of assistance; we are saying that, if we are not firm and clear about what we mean by "consent", that will cause confusion and difficulty across the whole spectrum of cases that go through the system in future.

Although as drafted the bill goes a great way towards assisting us and the courts in understanding what is meant by "consent", amendments that further define what is meant by free agreement might need to be considered to provide the courts with a bit more help.

10:30

Robert Brown: As lay people, we need to get some flavour of the issue. I realise that highlighting such matters is going to be somewhat difficult, but I wonder whether you can come back to the committee with any practical examples—obviously anonymised—in which the police service found it difficult to prepare a case for prosecution.

Temporary Deputy Chief Constable Skelly: Absolutely.

Robert Brown: That would be helpful.

The Convener: Cathie Craigie will ask some questions on aspects of the bill that relate to children and young persons.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): In what circumstances are the police called to investigate the possibility that a child has committed a sexual offence? In answering, could you distinguish between younger and older children, cover consensual and non-consensual aspects and tell us about the number and outcomes of such investigations?

Temporary Deputy Chief Constable Skelly: Could you break that down a bit?

Cathie Craigie: Okay. First, could you distinguish between younger and older children in such circumstances?

Temporary Deputy Chief Constable Skelly: ACPOS has already provided written evidence on sex between or involving children, so I will try to keep my replies as succinct as possible.

Given the incidence throughout Scotland of older persons well beyond 18 or 21 having sex with people aged between 13 and 16 and of 13 to 16-year-olds having sex, we felt strongly that there was a need to maintain current age levels to allow the police to carry out appropriate investigations into cases of such sexual intercourse or activity. As a result, we welcome and concur with the provision set out in section 27(7), which gives the Lord Advocate the ability to issue us with guidelines and a discretionary power with regard to the way we report such investigations.

I am not able to present the committee with a huge amount of statistics, but if you can be specific about which statistics you want we will do our best to gather them from individual forces or from across Scotland.

The Convener: That would be helpful. We will intimate to you the statistics that we might find useful.

Cathie Craigie: It would be helpful if you could give us as much of a breakdown as possible on the numbers and ages of those involved in consensual and non-consensual sexual activity.

How will passing the bill in its current form impact on your ability to investigate allegations that a child has committed a sexual offence?

Temporary Deputy Chief Constable Skelly: It will allow the police to continue to make an appropriate and proportionate response to incidents involving sexual behaviour among older children. Earlier in the bill's development, we were concerned by suggestions that such a provision might not be included.

Cathie Craigie: So, as things stand, if the bill allows you to continue doing your job, there will be no change.

Temporary Deputy Chief Constable Skelly: Yes. We will support it if the amendments stand.

Cathie Craigie: No. I mean that if, as you say, the bill as it stands will allow you to continue to investigate as you do at the moment, there will be no change to what you do.

Temporary Deputy Chief Constable Skelly: The change is in balancing the issues around gender. The current legislation criminalises only one gender, and the bill will address that anomaly. The investigative process will be able to continue as at present. The bill will assist us in relation to the manner in which we will be able to treat gender in matters of sexual behaviour between older children, which will be a great help. It will allow us to approach investigations on a legislative footing; without it, we would not have such an opportunity.

Nigel Don (North East Scotland) (SNP): Good morning. Can you clarify for me the current process of investigation? Because sexual relations between youngsters are, by definition, illegal at the moment—albeit that only one party is criminalised—you have a duty to investigate. I presume that, if something came to your attention, you would do that as a matter of routine. Am I right in thinking that, once you have conducted whatever investigation you feel is appropriate—that is clearly for your discretion—it is up to you to decide whether to refer the matter to the procurator fiscal or to close the book on it? I am not sure how the process works. Can you please clarify that for me?

Temporary Deputy Chief Constable Skelly: I ask Louise Raphael to expand on that.

Detective Chief Inspector Louise Raphael (Association of Chief Police Officers in Scotland): As it stands, there is limited discussion following the police investigation. Ordinarily, we would report the circumstances to the procurator fiscal if that were appropriate; the decision regarding what happens after that rests with the procurator fiscal. Welfare services are engaged at that point as well.

Nigel Don: Sorry, but I am still not quite sure about this. I presume that you have discretion to decide that there is nothing in the case to worry about and that, therefore, you will not refer the matter to the procurator fiscal, or do you refer every case to the procurator fiscal, once it has been investigated, for the fiscal to make the decision?

Detective Chief Inspector Raphael: Yes.

Nigel Don: You mean the latter.

Detective Chief Inspector Raphael: Yes.

Nigel Don: Thank you.

The Convener: Louise Raphael used the caveat "if that were appropriate". Can you define that in wider terms?

Detective Chief Inspector Raphael: By that I mean when there is evidence to substantiate that an offence has been committed.

The Convener: I call Bill Butler.

Bill Butler (Glasgow Anniesland) (Lab): Nigel Don has covered the point that I wanted to raise, convener.

Cathie Craigie: The committee has been taking evidence on the bill for several weeks and has heard concerns from some quarters about our having unnecessary law that is not enforced. It is clearly a criminal offence for a person under the age of 16 to engage in sexual activity, although sometimes the whole force of the law is not

applied. There have been suggestions that it is wrong to have something in legislation but not to enforce it. We have been told that it would be better for such matters to be dealt with as a welfare case, rather than as a criminal case. Do you have any comments on that? I am sure that you have read that evidence.

Detective Chief Inspector Raphael: Our concerns revolve around the fact that the absence of the provisions would deny us the opportunity to investigate a case fully in order to establish whether there had been coercion or whether there had been informed consent. If the powers were not contained in legislation, we would not have the opportunity to investigate a case fully to establish such issues. Peer pressure is an extremely powerful aspect of older children's lives, and what may appear, on the surface, to be free agreement or consent might be revealed not to be that when we probe further. Our concerns revolve around our lack of ability to conduct a proper investigation.

The Convener: I ask Nigel Don to come in on that issue. He can pursue a separate matter later.

Nigel Don: I am confused. Surely, if there were any suspicion or evidence of coercion, we would be dealing with a section 1 or 2 offence, would we not? The fact that the person was under 16 would not be relevant. Why, therefore, do we need to create an offence relating to older children?

Detective Chief Inspector Raphael: Sorry, could you repeat that? I did not quite understand your point.

Nigel Don: My point is that, if there is any evidence or suggestion of coercion, it is an offence under section 1 or 2—it is rape or sexual assault.

Detective Chief Inspector Raphael: Yes.

Nigel Don: So you could investigate the matter on that basis. Why, therefore, do we need to create an offence relating to older children to enable you to investigate?

Detective Chief Inspector Raphael: I will give an example from our experience of dealing with girls aged between 13 and 16 who have engaged in sexual activity and become pregnant as a result. In one particular example, on initial inquiry, the girl offered the information that the pregnancy was as a result of sexual intercourse with a 15-year-old boyfriend. In the absence of legislation, we would have taken the matter no further. However, on further probing, it transpired that the girl had had sexual intercourse with a much older person. Our concerns revolve around our ability to ensure that we are conducting a proper investigation and establishing what offences, if any, have been committed.

Temporary Deputy Chief Constable Skelly: Our primary concern is over the safety and wellbeing of the child. We are not here to say that the police should be responsible for reporting all cases to the procurator fiscal because it is the procurator fiscal's role to protect children; it is everyone's role to protect children, which is our central aim.

In relation to legislation on sex between older children, we would not want the age of consent to move to 13; it should be kept at the current limit. We want to be able to investigate on a lawful footing, as opposed to one in which the law is absent, with the police acting ultra vires or in some other capacity to protect the child. That is not to say that the final outcome should be a prosecution or a conviction, but some other arrangements should be put in place to protect the child.

As I said, we will provide as much information as we can to give you a breakdown. For example, last year in the east end of Glasgow, there were 19 incidents of sexual behaviour in which one of the partners was aged between 13 and 16, including six incidents in which both partners were aged between 13 and 16. Therefore, six incidents involving sexual behaviour between older children were investigated by the police in the east end of Glasgow. Some of the remaining 13 incidents involved adults who were much older than 21. We are concerned about the issue, and we want to retain the ability to investigate.

Nigel Don: I will distinguish between the provisions that relate to sex between older children—the 13 to 16-year-olds—and those that relate to an older person having sexual relations with an older child. If we accept that the latter provisions should exist—that was the premise of my question to Ms Raphael, although I am not sure that she realised it and I apologise for not making that explicit—I am concerned about whether the police need the former, which relate solely to sex between older children, in order to investigate coercion. I am still not happy in my own mind if you are saying that you believe that, if there is any element of criminality in such cases, you cannot proceed under sections 1 or 2.

Temporary Deputy Chief Constable Skelly: Perhaps we have not been clear in our response to your questions. You are right; if a case shows elements of criminality, we have the power to investigate. That is not the basis on which we are saying the provisions that you are concerned about should be retained.

We want the legislation to give the police the ability to intervene in cases involving young people in which one or both parties are putting themselves at risk of significant harm. The bill would allow us to intervene at that point.

Nigel Don: Okay. Having now set out the ground rules of what is law and what is not, why

do you still think that there needs to be an offence of strict liability, although we will never enforce it, if older children have penetrative sexual relations with each other? Why do the police need that provision if you have sections 1 and 2 and the section that refers to older persons?

Temporary Deputy Chief Constable Skelly: Its absence would significantly restrict our lawful ability to carry out our duty to protect young people. It is not about criminalising individuals; it is about giving us the lawful ability to investigate, to ensure that we are protecting young people.

There might be other ways of doing that, and other agencies and bodies might require a different route and a different level of support, but for as long as the police are vested with a duty to protect young people and we have that role in society, we will need the tool to allow us to discharge that duty.

Nigel Don: Forgive me, convener, but this is a crucial point.

I do not want to disagree with you—I hesitate to disagree with a police officer about anything, and certainly ones with the experience that you folk clearly have—but it is still not clear to me why, if you have sections 1 and 2 as writ, you need the bill to provide another offence in order for you to investigate.

10:45

The Convener: Under section 21.

Nigel Don: Sorry—is it section 21? Let me check, to be absolutely clear.

No, it is not section 21. It is not about the older person. It is about children having—[*Interruption.*] Or is it section 21?

The Convener: It could be section 27.

Nigel Don: Right. Let us make sure that we are absolutely clear, for the sake of the *Official Report*. Yes—it is section 27, "Older children engaging in penetrative sexual conduct with each other".

Forgive me, but it is still not clear to me what section 27 adds to your investigative armoury. If you have prima facie evidence of sex and you want to investigate that, you can investigate it for evidence of coercion, or at least lack of consent. Can you not do that with sections 1 and 2 in your back pocket? Why do you need section 27 as well?

Temporary Deputy Chief Constable Skelly: In Scotland, we consider 16 to be the age at which consent can be given to sexual intercourse, or to the sexual behaviour that is described in the bill. When such behaviour takes place below that age, society is concerned, even when consent or free agreement appears to have been given. Society believes that such behaviour is inappropriate and should be investigated, and that the people who should investigate it in the first instance are the police. While society in Scotland takes that view, we need the powers to be able to investigate.

If you believe differently, and you believe that consensual sex between older children is something that should take place, you would argue for the removal of section 27 from the bill, but we do not believe that that would be appropriate. There are a number of professional reasons why we say that. For example, we find predatory sexual behaviour occurring from a very young age. Some instances that we investigate lead us to people whose journey into adulthood is such that they become predatory sexual offenders. There are reasons why we would want to intervene at an early age, because doing that helps us to protect people throughout their lives.

That is one reason—but by no means the only one—why we want to retain the power. However, it is for the Parliament and the public to decide whether they want us to protect people in that way.

Nigel Don: I am sorry, Mr Skelly—I am with you, and I see where you are coming from, but I have still not got what I understand as an answer that tells me why you need section 27. I think that you can do all the things that you mentioned under sections 1 and 2. I wonder whether Ms Raphael can help.

Detective Chief Inspector Raphael: Often, circumstances do not come to our attention in the first instance but are reported through schools or social services or by other means. In the absence of the provision, if a young person explained that they had engaged in sexual intercourse with a peer of similar age, there would be no requirement for those organisations to alert us, and we would therefore be denied the opportunity to investigate. The provision means that there is a legislative requirement on the bodies to report the matter to us, which allows us to investigate.

Basically, if a set of circumstances was highlighted anywhere other than within the police service, the absence of the provision would mean that we would not hear anything about it and would therefore be unable to investigate.

Nigel Don: Thank you. I am with you.

The Convener: Cathie Craigie has a question on this important point.

Cathie Craigie: The change in legislation would mean that the 15-year-old girl that you gave as an example earlier would be a criminal. Under the existing law, and given the way in which you operate, is every 14 or 15-year-old girl who

becomes pregnant in Scotland reported to the police?

Detective Chief Inspector Raphael: Sorry, is every—

Cathie Craigie: Is every young girl under 16 who becomes pregnant reported to the police?

Detective Chief Inspector Raphael: They should be.

Cathie Craigie: Are they?

Detective Chief Inspector Raphael: As far as I am aware, they are.

Cathie Craigie: Perhaps we can get some more statistics or information on that.

The Convener: I think that there is some difference between the theory and the practicality. I very much doubt whether every girl aged under 16 who becomes pregnant comes to the attention of the police.

Detective Chief Inspector Raphael: As I said, they should come to the attention of the police, because underage sexual activity has taken place.

Temporary Deputy Chief Constable Skelly: It would not be different from any other crime. It is up to people to report incidents to us.

Cathie Craigie: You said in response to Nigel Don's questions that there was a concern that some organisations and agencies, such as schools and the health service, would not bring such issues to your attention if there was a change in the law. I am trying to get at whether incidents of underage pregnancy are being brought to your attention at the moment. I know that, at the moment, a young girl in that situation is not committing an offence, but, if a girl aged under 16 has become pregnant, somebody has committed an offence. I am aware of the way that the law stands. I hear the evidence that you are giving, but I cannot quite understand where your concerns come from if incidents are not being reported at the moment.

Detective Chief Inspector Raphael: I have no idea of the numbers that are not reported to us, but whatever that figure is, it would be significantly greater in the absence of the proposed provision in the bill.

Paul Martin (Glasgow Springburn) (Lab): I want to follow up Cathie Craigie's point about the criminalisation of the girl. What is the police's approach? Do they consider the welfare of the girl? You mentioned predatory behaviour. Would the identification of the girl, who might not have come to your attention before, assist in identifying and dealing with the male, whose behaviour might have been predatory?

Temporary Deputy Chief Constable Skelly: Yes. The fact that the police are involved means that an investigation is carried out and both parties come to the attention of the care authorities, for example through social workers or the children's reporter. The police approach the case from the point of view of the wellbeing of the victim. Given that both parties may very well have consented—section 27 deals with situations in which both parties consent—we would approach the case from the point of view that both parties are potential victims. We can investigate the circumstances and then treat the parties appropriately, depending on what the investigation tells us. That means that both parties are on our systems, which means that we should be able to care for them better in future, whether they come to our attention because of their continued predatory behaviour or because they become a repeat victim. Vulnerable people who put themselves into positions of vulnerability often do so more than once. The point is to be able to prevent that from happening in the future through some kind of appropriate intervention, although not necessarily a policing one.

The Convener: I invite Robert Brown to make a brief final point under this heading.

Robert Brown: The nub of this is which cases get taken forward for prosecution. You referred to 19 cases in the east of Glasgow. Why do some cases get prosecuted and others do not? Is it to do with the presence of predatory behaviour or some other element?

Detective Chief Inspector Raphael: That is a very difficult question to answer. It relates not just to the conduct itself but to social background or other factors that influence the circumstances. I apologise for not being able to answer your question with any great clarity, but it is an extremely difficult question to answer.

Robert Brown: But you are saying that there are wider issues than just the behaviour.

Detective Chief Inspector Raphael: Yes.

Temporary Deputy Chief Constable Skelly: When we report cases to the procurator fiscal, the ones that go forward for prosecution are those in which there is concern that there has been significant criminality, beyond what we would see in most other instances, when the matter might be better dealt with in another way.

The Convener: We will leave that point. It is a complex issue and we accept that you were put in a position of some difficulty.

Nigel Don: Does ACPOS support the distinction that the bill draws between sexual intercourse between older children and other forms of sexual contact between older children?

Temporary Deputy Chief Constable Skelly: We support section 27, which is the section to which you refer. The only part of it that we would put forward for further discussion is section 27(3), which refers to sexual activity other than using the mouth. The inclusion of activity using the mouth would require careful drafting because we would not want to criminalise kissing between older children, but by explicitly excluding it from the section we are allowing some types of sexual behaviour, such as oral sex, that we feel should be included. Although, broadly speaking, ACPOS supports the section—we have discussed the issue at some length—we think that that anomaly is a matter on which there should be further discussion.

The Convener: That seems a fair enough answer.

Nigel Don: I presume that you would prefer section 27(3) to be removed and an exception to be made for kissing, as you and I would understand it.

Temporary Deputy Chief Constable Skelly: Careful drafting is required. We are happy to engage with those in the Scottish Government who are drafting the bill to establish what form of words might be better, but the solution would be something like the one that you suggest.

Bill Butler: Under what circumstances should consensual sexual intercourse between older children be the subject of criminal proceedings? Do you have a view on that, or, as you stated earlier, is it your view that it is up to the procurator fiscal—in other words, you present the evidence and the procurator fiscal takes the view?

Temporary Deputy Chief Constable Skelly: You have answered your own question.

Bill Butler: I want you to answer my question, as I have a small element of doubt in my mind. Can you allay it?

Temporary Deputy Chief Constable Skelly: It is for the procurator fiscal and the Crown to decide on prosecutions and how they go forward. We report the evidence as it is presented to us. I could foresee that when there is repeat offending we would be strong in our view that the matter should be dealt with by the criminal justice system but, ultimately, it is for the Crown to decide.

Bill Butler: Do you think that only in exceptional circumstances will consensual sexual intercourse between older children be the subject of criminal proceedings? You said earlier that you need the ability in legislation to intervene or investigate on the basis that, as a result of your investigation, although you will pass the case on to the procurator fiscal, other arrangements can be made to protect the child in question.

Temporary Deputy Chief Constable Skelly: Absolutely. There needs to be the ability to intervene and I foresee that, in sexual circumstances, it would result in conviction.

Stuart McMillan (West of Scotland) (SNP): Some of the issues were touched on earlier, but I am keen to clarify a couple of points. I come back to the extension of the criminal law to girls under the age of 16. Do you see any practical difficulties being associated with the extension of the criminal law?

Temporary Deputy Chief Constable Skelly: I do not, but perhaps my colleague might.

Detective Chief Inspector Raphael: No, I do not. It is probably only right and proper that the law is gender neutral in that respect and that there is equity between boys and girls. I do not anticipate any practical difficulties in the investigation process.

11:00

Stuart McMillan: Do you see any argument for treating young men and young women differently?

Temporary Deputy Chief Constable Skelly: I do not. ACPOS welcomes the fact that the bill broadly addresses gender issues and we support the move to address the apparent and real gender imbalance in current law.

Stuart McMillan: Your submission highlights section 29(3), on age proximity. You say that the section sets out

"straightforward, unambiguous parameters that are easily understood".

Temporary Deputy Chief Constable Skelly: As far as anything is straightforward and unambiguous, yes.

Stuart McMillan: Indeed. Surely making 16 the age of consent would be unambiguous and more straightforward than what is suggested in section 29.

Temporary Deputy Chief Constable Skelly: I am not entirely sure that I understand what you mean because the legislation attempts in a coherent way to set out various age limits and types of offence that are committed and the reasons behind that. Section 29, "Defences in relation to offences against older children", attempts to be very clear about the position when there is a two-year age difference between the parties involved and so on. I am not sure whether I understand what you are saying.

Stuart McMillan: It could be suggested that section 29 would allow sexual activity to take place even though one of those involved is under 16, although they will be in the older child category. If the section were not included in the bill, the bill

might say that the age of consent is 16 and there should be no exceptions, so if anyone has sex with someone under 16, they should face the full force of the law. It could be suggested that section 29 dilutes the law and reduces the age of consent.

Temporary Deputy Chief Constable Skelly: Thank you for helping me to understand. The bill attempts to introduce checks and balances in how the legislation should be implemented. It provides an opportunity for balance in that society would take the view that someone who is significantly over the age of 16 should be in a position of greater responsibility and understand that the person with whom they are going to have sexual activity should be 16 years of age, but when someone is close to the age of 16, it is reasonable for them to make the defence that they believed that the other person was their age. Section 29 is proposing that the age at which such a defence is reasonable should be within a two-year window. Our view is that that offers an appropriate balance to criminalising the behaviour. If there is a sea change of view that says, "Well, no, there should be no balance; there should be a cut-off at 16 and that's it," that is for a group beyond the police to decide. However, it seems to meet the test of reasonableness to allow the defence to be put forward if the people involved are within a certain age range. As with all statutory defences, the one in section 29 is intended to introduce a balance to the legislation.

The Convener: The final question will be on abuse of the position of trust.

Paul Martin: I note from ACPOS's submission that you welcome

"the provision in the Bill to extend the offences relating to abuse of trust from under 16 year olds to those under 18 year olds."

However, you state that there are persons

"who have attained the age of 18 but who are nevertheless extremely vulnerable".

Which vulnerable groups do you refer to?

Temporary Deputy Chief Constable Skelly: Our point is that a number of people who have reached the age of 18 remain in the care system and are still highly vulnerable. It is necessary to set an age limit at some point; we are not suggesting that the age limit should be set at 19, 20 or 21, for example. Rather than proposing that the age limit in the bill be changed, we are simply making a general observation that, as I have said, a significant number of 18-year-olds remain in the care system. It might well be that the Protection of Vulnerable Groups (Scotland) Act 2007 provides an opportunity to deal with the issue in a different arena in a different way. We merely comment on the position rather than put forward any hard-and-fast change.

Paul Martin: I want to clarify which vulnerable groups you refer to. Section 35 mentions specifically the abuse of trust of persons who are mentally disordered. Do you have in mind other vulnerable groups that you did not mention in your submission?

Temporary Deputy Chief Constable Skelly: I have no more detail. We would welcome the opportunity to clarify the detail that lies behind what we said in our submission.

The Convener: There are three outstanding matters to be dealt with in correspondence—you have a note of them. The clerk will give you precise notification of the statistics that we would like to be provided with.

I thank Mr Skelly and DCI Raphael very much for their attendance, which has been extremely useful. We will have a brief suspension to allow for a changeover of witnesses.

11:07

Meeting suspended.

11:08

On resuming—

The Convener: I welcome the second panel, which comprises Professor Pamela Ferguson from the University of Dundee, James Chalmers from the University of Edinburgh and Professor Michele Burman from the University of Glasgow. We have received submissions from some members of the panel. We will move straight to questions. I repeat my request to the previous panel: answers should be as succinct as possible.

Stuart McMillan: Good morning. Mr Chalmers and Professor Burman suggest that further changes to the law beyond what is proposed in the bill will be necessary if conviction rates in cases of rape or sexual assault are to improve. In general, will the bill have any positive effects?

James Chalmers (University of Edinburgh): It is reasonable to say that simply clarifying the definitions of the relevant offence should ensure that there is less possibility of a jury being misdirected, for example, which might be helpful. I do not envisage any detrimental effects coming out of the bill. All told, I simply do not envisage there being much effect one way or the other.

Professor Michele Burman (University of Glasgow): I think that the bill will have a positive impact. In particular, it marks an attempt to place existing common-law and statutory sexual offences in a single act, and represents an important attempt to bring clarity into this area of law. The provision of a statutory definition of consent is important, because it brings much-

needed clarity, and will be a positive impact of the bill. One of the previous witnesses referred to the centrality of consent in rape cases and other cases of sexual assault. Consent is, indeed, a central part; it is at the heart of sexual offence cases. Having a clear understanding of what consent means will be especially helpful to juries, as well as to complainers and, dare I say it, to the accused.

Professor Pamela Ferguson (University of Dundee): I agree. The bill is to be welcomed because it provides clarification. However, more needs to be done on the law of evidence, such as sexual history evidence. That needs to be looked into next. In addition, there is a greater role for education, particularly in schools, about what we mean by rape and sexual offences. We must try to get across to young people that it is never acceptable to have sexual intercourse with someone who does not welcome it.

The Convener: That leads us to the second question that we would like to pursue, via Cathie Craigie, on the definition of rape.

Cathie Craigie: Good morning to all the panel members. The bill makes it clear that only a man can be guilty of rape, although the victim can be a man or a woman. Do the witnesses support that limited gender neutrality?

Professor Burman: Yes. I support the view that penile penetration is a crucial element of rape. I think that I said in my written submission that rape is a powerful and weighty word that taps into complex symbolic meanings. It conveys in specific terms the nature of the offence and denotes a specific type of wrong, with characteristics that are quite distinct.

Cathie Craigie: That is clear.

James Chalmers: It is fair to say that penile penetration is a different form of wrong. Technically, the bill is gender neutral, because any person can commit the offences, so the bill therefore avoids the questions of gender that might arise due to gender reassignment. However, once the wrong of penile penetration is identified as being separate and distinct, it flows from that that essentially only men can commit the crime of rape—at least, as the principal actor.

Professor Ferguson: I agree. Women could be liable art and part if they became involved in rape. However, for the principal offender, it is appropriate that rape is defined as penile penetration.

Cathie Craigie: Over the past few weeks, the committee has taken evidence from a number of different interested parties who have suggested that it should be considered rape if a perpetrator abuses someone with an object. Can you comment on that? I do not know whether you have read any of the evidence that we have taken over the past few weeks, but it has been powerful.

Professor Ferguson: There might be merit in having a separate offence of penetration with an object. Currently, that offence is included in section 2 as part of sexual assault. However, it is a serious form of sexual assault and, for the point of fair labelling and having previous convictions reflect the gravity of the offence, having a separate offence has merit.

Professor Burman: I agree. The insertion of an object into the anus, vagina or other part of the body is extremely brutal sexual exploitation and a violation that can be as devastating as penile penetration and should be treated as no less serious a crime than rape. I support the proposal to have a separate offence that is distinct from sexual assault and equivalent in seriousness and maximum sentence to rape.

James Chalmers: I have nothing to add, save to say that any offence involving an object would obviously have to be gender neutral in a way that the offence of rape is not.

Professor Burman: I agree.

The Convener: We turn now to consent and reasonable belief.

11:15

Bill Butler: The definition of consent in section 9 has been welcomed by other witnesses. Are members of the panel content with "free agreement" as a general definition of consent, or could that definition be improved?

Professor Ferguson: Defining consent in terms of free agreement is a step forward, but I would prefer it if we simply used "free agreement" and left "consent" out of the picture all together. Rape would then be defined as penile penetration without the free agreement of the other party. Using "consent" in the bill can only lead to confusion. If, for example, a woman ultimately submitted to intercourse on the basis that she feared that she would be killed or seriously injured if she did not, that would be consent but not free agreement. It would be simpler to leave out "consent" and use "free agreement".

James Chalmers: The words "free agreement" are preferable to the convoluted definition that has been used in recent English legislation. The correct approach to the definition of consent has been reviewed in a number of countries in recent years and the words "free agreement" are the best that anyone has come up with. Recent evidence suggests that if we continue to use "consent" juries might enter the jury room with preconceptions of what that means and apply their own

understanding, rather than any statutory test that is given to them. I am not sure that that situation would be altered terribly much by leaving out "consent", as I think that such offences are still understood as non-consensual offences, and that understanding would permeate any discussion among jurors.

Professor Burman: I largely agree. In Victoria, in Australia, where "free agreement" is used, the fact that someone did not do anything to indicate their free agreement is enough to show that intercourse took place without it. That is the kind of direction that is given by the judge to the jury as a way of clearly explaining the idea of free agreement. There might be scope for the bill to incorporate something like that. The directions to the jury need to be clear about what is meant by "free agreement".

Bill Butler: Are you otherwise content with those words being used?

Professor Burman: Yes. The term has lots of advantages, especially when compared with the situation in England and Wales. The term is simple and succinct.

Bill Butler: Do you agree with Professor Ferguson's concerns about the use of "consent"?

Professor Burman: Yes. I had not thought about the issues that Professor Ferguson raised, but, having listened to her, I feel that there is something to be said for her view.

Bill Butler: Do you agree with Professor Ferguson that "consent" should be excluded entirely and that it should be replaced by "free agreement"?

Professor Burman: Yes. I can see that "consent" could lead to confusion.

Robert Brown: I would like to pursue the question of prior consent in sections 10(2)(a) and 10(2)(b), which has been the subject of some criticism, particularly from Professor Burman and other witnesses. I would like to be clear about the principles behind this matter. Is the objection that people should not be allowed to make a choice in advance in that respect? Is it that the idea of prior consent might allow spurious defences to be raised? Is there some other reason? It would be useful to clarify this matter in relation to the point about sexual autonomy.

Professor Burman: If the notion of prior consent is introduced, it will make rape very hard to prove. Rape is already extremely hard to prove, but the Crown would need to disprove the existence of prior consent in any trial. That goes against the philosophical underpinnings of the bill, which are based on sexual autonomy and the idea that a person can withdraw their consent at any time. The notion of prior consent is problematic if, at the same time, there is a recognition in respect of sexual autonomy.

Robert Brown: What happens under the current law when there is some suggestion that people gave consent at an earlier stage? I assume that that must arise from time to time.

Professor Burman: It arises a lot. Consent is at the heart of all sexual offence trials.

Robert Brown: Are you suggesting that the provision relating to prior consent be removed as a complicating factor or that it be amended?

Professor Burman: I would remove it.

Robert Brown: Would that cause any problems? What would be the effect of removing the provision?

Professor Burman: I do not think that it would cause any problems, but I defer to my criminal law colleagues on the matter.

The Convener: The issue of prior consent would arise in only a small minority of cases, when a person was insensible through either drink or drugs. It would not arise in every case.

Professor Burman: You are quite right.

Robert Brown: The bill provides no guidance on when a person is too drunk to consent to sexual activity, which is a complex issue. How should we deal with that? If prior consent is removed, will we criminalise something that is probably a common activity between adults who have had too much to drink, and one that is, arguably, not criminal?

Professor Burman: I can base my answer only on my empirical research in the area. At the moment, many rape cases are characterised by one or other party having had drink. There are endless debates in court about the amount that has been drunk and the extent to which someone is intoxicated. Often, such evidence is introduced to suggest that a woman is of a particular character, has a particular disposition and leads a particular kind of lifestyle, and opens the door to attacks on her credibility and character. There is a danger of opening the floodgates to discussions about character in relation to drink.

Robert Brown: I see that, but the central issue is that people have sexual relations after one, other or both parties have had too much to drink. That is a practical human situation with which we and the courts must deal. You say that character issues come into the picture. If we set aside such procedural matters, what guidance can you give us on how we should deal with the question whether people are too drunk to give consent and the issues that surround that?

Professor Burman: I am unable to answer the question just now. If you give me a moment, I will think about how to do so.

Robert Brown: Do your colleagues have any thoughts on this common and complex issue? If we set aside the procedural implications and character issues, there is still a central point with which we are often required to deal. We need clarity on when conduct is and is not criminal.

The Convener: Professor Burman, we have all found ourselves in your position from time to time. Feel free to respond to the question later, when you are able to answer it.

Robert Brown: Do Professor Burman's colleagues have thoughts on the matter?

James Chalmers: There may be little that we can do. It is difficult to lay down a precise test of when someone is too drunk to consent. In cases involving alcohol, it is inherently difficult to establish the precise circumstances and just how drunk someone was. I suspect that we can only reinforce the general test—that for sexual activity to be lawful there must be free agreement in all cases. That requirement is in no way diminished by the fact that someone has taken drink—drink is not a licence to exploit someone.

Robert Brown: That is a helpful comment. Do the definitions in the bill need to be changed to bring about the position that you describe?

James Chalmers: It is purely a matter of public education. I am not sure what can be done in the bill in that regard.

Robert Brown: Professor Ferguson, do you have any thoughts on the issue?

Professor Ferguson: Section 12 refers to the accused's belief as to whether a person consented and states:

"regard is to be had to whether the person took any steps to ascertain whether there was consent".

Presumably, if a woman is extremely drunk, it behoves the man to take at least some steps to find out whether she is past the point of being able to consent.

Robert Brown: That is helpful. Professor Burman, do you have any further thoughts? I will not press you if you have nothing to add.

Professor Burman: I agree with what has been said on the accused being requested to state the steps that he took to determine free agreement.

Robert Brown: I will move on to section 12. The bill tries to make the approach to consent objective rather than subjective, which most people accept is a satisfactory approach in principle. However, Mr Chalmers and Professor Burman have both questioned whether the bill will achieve that aim. Will you elaborate on your concerns and how we might deal with the question of reasonable belief against the background of trying to make the approach as objective as possible?

Professor Burman: Currently, consent requires an honest belief by the accused, regardless of how reasonable or otherwise that belief is. As you say, that enables a subjective interpretation to be applied, and it has allowed the accused in trials to maintain that the victim's behaviour amounted to what he believed to be consent.

The Crown currently has to prove that the accused knew that the woman did not consent, but there is no onus on the accused to set out what steps he took to ascertain whether the complainer consented. The current position means that trial proceedings are far likelier to focus on the actions of the complainer than on those of the accused, who is under no obligation to give evidence, while the complainer may be forced to undergo an intrusive secondary ordeal in the court room.

I support the move away from the subjective approach that is currently taken to establish mens rea. The introduction of a reasonable belief provision, whereby the accused must have reasonable belief that the victim consented to the act, is welcome. In a sense, the bill provides for a greater focus on the responsibility of the accused to demonstrate the steps that they took, but for me it is difficult to conceive how the accused could demonstrate that without taking the witness stand to describe those steps.

Robert Brown: Do you suggest, therefore, that there should be the right to draw an inference from the accused's failure to explain his position in suitable instances? I know that you touched on that in your submission.

Professor Burman: Yes, I would support the bill making it more explicit that some inference may be drawn from the accused's refusal to outline the steps that he took to ascertain free agreement.

Robert Brown: Mr Chalmers, do you agree with that approach? If so, do you have any fears about it moving the burden too far?

James Chalmers: At present, where the circumstances are crying out for an explanation, the jury can be directed to take into account the accused's failure to give evidence. However, it would be inappropriate simply to direct a jury that it could draw certain inferences from the fact that the accused had not given evidence, when the accused is entitled to do so.

As far as I can tell, the current law on the inferences that may be drawn from silence is not often invoked by judges in charges to the jury. If there were a desire to use it more often in such cases, it would be helpful to include something

specific in the statute. I am not entirely sure what form that provision would take, although I could consider it.

The Convener: Are you saying that there might be compliance problems with article 6 of the European convention on human rights?

James Chalmers: I doubt that there would be compliance problems if the rule were carefully drafted. At present, judges have discretion in appropriate cases to direct the jury that it may draw inferences from the fact that the accused has not given evidence when there are circumstances that cry out for an explanation. That is compatible with article 6.

The Convener: But are we not talking about going a bit further?

James Chalmers: If we went as far as saying that simply not giving evidence would count against the accused, it would cause problems with article 6.

Robert Brown: I have one final question. Is it possible or desirable to deal with that issue in the bill and in the context of the particular offences rather than consider it as part of a more general review of the laws of evidence and procedure?

James Chalmers: It would be far preferable to deal with the issue as part of a general review of evidence and procedure, although it might be some time before that opportunity presents itself.

Robert Brown: I accept that.

11:30

Nigel Don: I would like to pursue that point to its logical conclusion. Is there scope within the bill to say that the accused is duty bound to provide evidence in the particular circumstances of a rape or serious sexual assault accusation, or are we not able to say that in the context of human rights law?

James Chalmers: We could not say that. We can have regard to the failure of the accused to put forward an explanation, but we cannot drag them on to the stand to give evidence.

Nigel Don: Not no way.

James Chalmers: Not no way is the broad answer.

The Convener: We move to the question of those who are euphemistically described as older children.

Paul Martin: Professor Temkin, in her written submission, objects to the use of the term "older children" on the basis that

"A child is a child"

and that the use of the term

"undermines the general message that sex with all children under 16 is against the law."

Do panel members share that concern?

Professor Ferguson: I think that Professor Temkin is right, but it would be better to talk about children aged 12 and under on one hand, and children aged 13 and older on the other. It would be preferable for the bill sections to have those headings.

James Chalmers: I do not share that concern. Professor Temkin has made a similar point in the past about the use of terms such as "consent" in relation to children. The concerns that she expresses fail to give sufficient weight to the distinction between consensual sexual activity and non-consensual sexual activity by children under the age of 16. That is a serious distinction, and to say that the matter is as simple as recognising that children under 16 cannot consent does not acknowledge the complexity of the situation, nor does it recognise the law as it currently stands, in which there is a very sharp distinction between those two areas.

Professor Burman: I support what James Chalmers says. The area is very complex.

Cathie Craigie: I will ask James Chalmers a couple of questions based on his submission, but I welcome comments from the other two panel members. Section 4 deals specifically with children. James Chalmers states in his submission:

"it seems to me that it is inappropriate to pass criminal laws unless we are prepared to enforce them. The criminal law is too serious a tool to be used simply to 'send a message'."

He also states:

"It seems to me strange that any Parliament would pass criminal laws which it wished prosecutors to refrain from enforcing."

A number of witnesses who have written and given oral evidence to the committee agree that sexual intercourse and sexual activities among children under 16 are not generally good for those children. How should the Government and the Parliament reconcile that belief with the issue that James Chalmers rightly raises about passing laws that will never be enforced?

James Chalmers: Government has other tools at its disposal to put across the message that certain things are not a good idea. A lot of things that we all might do are not good ideas, but the Parliament has not yet proposed legislation to outlaw them. It is a matter of public education as much as anything else—I am not sure that there is an easy way to achieve that.

Criminal law is perhaps viewed as an easy educational tool, but we must be wary of patronising young children and assuming that they are not well aware that particular offences are not prosecuted. If children see that people regularly engage in certain activities and are not regularly prosecuted, they are not likely to take the legal message seriously. The danger is that they then might start to take other legal messages less seriously than they ought to.

Cathie Craigie: Do you have any thoughts on how the bill could be amended to address those concerns?

James Chalmers: The concerns could largely be addressed by taking the approach that the Scottish Law Commission proposed. I would not propose anything significantly different from what the commission had in mind. The possibility of referral to a children's hearing is a serious prospect, and I am sure that it would be viewed as such.

Professor Ferguson: I agree. The arguments are difficult, but I am persuaded by the evidence from people such as Kathleen Marshall. My worry is that, under section 27, in cases involving a pregnant 15-year-old, the police will have to treat her as a potential accused rather than as a victim. There will always be an allegation by the accused that the activities were consensual. The defence will be able to put it to that pregnant teenager that because she was worried about being prosecuted, she said that it was rape. Section 27 would open up all sorts of horrendous possibilities for girls to be accused of engaging in consensual activities that they did not agree to.

Professor Burman: I very much agree with that. As James Chalmers said, rather than make sex criminal, there are other opportunities for Governments to persuade young people not to indulge in sex. The issue is about providing easier access to appropriate advice and information. I support what Kathleen Marshall said the week before last about the need for a robust public health campaign that conveys a clear message that we do not condone sex for under-16s. That is a more appropriate route than criminalisation.

Cathie Craigie: My final question is for James Chalmers.

Many people have been waiting with great hope for legislation on how we address accusations of rape, so it is surprising that your submission states:

> "It should not be expected that the Bill, if enacted, will do much—if anything—to affect the fact that the conviction rate in rape cases"—

I will not go on, but I think that you state that the bill will not affect the conviction rate, or am I misreading that?

James Chalmers: No, you are not misreading. It is probably just as well that you did not go on, because that sentence is badly worded and does not make much sense. I meant to say that the bill will not affect the conviction rate if we continue to express the rate as a proportion of the number of rapes that are reported to the police, as we often do at present. That is different from expressing the conviction rate as a proportion of the number of rapes that are prosecuted, which is a small fraction of the number of reported rapes.

My impression—it is no more than that—is that most rape cases turn on two different accounts of events being put to the jury. It is a rare case in which the prosecution and defence in essence agree on what happened, but are not sure whether it was rape. The new law will help in clarifying those boundary issues, but in most cases the question is whether the jury believes one story that is well on one side of the boundary or another story that is well on the other side. Tightening up the boundaries, as the bill will do, is not likely to make any cases that would have fallen on one side of the boundary fall on the other side in future.

The Convener: Is that sufficient, Cathie?

Cathie Craigie: Yes—that is food for thought.

The Convener: I thank the witnesses very much for their evidence. It was given with great clarity and very succinctly, which is greatly appreciated.

The committee will suspend briefly while we change the witnesses.

11:38

Meeting suspended.

11:39

On resuming—

The Convener: I welcome Professor Gerry Maher, professor of criminal law at the University of Edinburgh, who will give evidence in connection with his former duties as a commissioner of the Scottish Law Commission. We have read the commission's discussion paper and report, which give the principles behind the proposals. We will proceed directly with questioning.

Nigel Don: Good morning, professor. The principles behind the bill were given in those earlier papers. Will you clarify for the committee what the principles of this reform of our law should be?

Professor Gerry Maher QC (Former Commissioner, Scottish Law Commission): There are a variety of interlocking principles, but first and foremost we are concerned about sexual

autonomy as a principle: the bill should both promote and protect sexual autonomy. Of course, the sexual autonomy principle has important implications for the provisions on consent.

Another fundamental principle is protection. There are people out there who are vulnerable to sexual exploitation and there are people for whom sex is not an appropriate activity. The law should be seen to protect such people.

We also had other aims. Clarity in law is an important aim for any law reform, and this is an area in which the law must be clear. We are talking not about a technical legal set of rules but an activity in which everybody has an interest. The law must be clear about what people are allowed to do and what is criminal.

Nigel Don: Are those principles present in the bill?

Professor Maher: I hope so. As I said, the protection and promotion of sexual autonomy require some sort of conceptual framework. That is what we had in mind when we considered the consent model. The bill contains a number of provisions on the protective offences. My hope is that the law will now be clearer. The present law, which does not define consent, is certainly much less clear than any other attempt—especially our attempt—on that fundamental concept.

Nigel Don: I will pursue the last question that I put to the previous panel. Will clarification and rewriting of the law change the number of convictions, or do you agree with the previous witnesses?

Professor Maher: I tend to agree with the previous answers. The conviction rate is a fairly complex issue that seems to me, however one interprets the problems, to involve many possible explanations and causes. Concurrently with the commission's project, the Crown Office conducted a review of the procedures for prosecution and investigation of rape and other sexual offences. It seems to me that the Crown Office's review will have as much impact—probably more than—as our project will have on the conviction rate.

I also think that there is value in the law stating things clearly; for example, there is value in the law making explicit the proper principles of sexual conduct. The commission took the view that many of our recommendations on the consent model would spell out what is proper and improper in terms of sexual conduct.

Cathie Craigie: Why did the commission believe that rape should continue to be defined as a crime that can be committed only by a man?

Professor Maher: We took the view that, in trying to separate out the different types of sexual assault offences, of which rape is one, it is important to make it clear that the law should reflect the specific type of wrong that has been done to the victim. It seemed to us that penetration with someone else's sexual organ is a distinct type of wrong that should have its own offence, which should be a separate offence from other types of sexual assault, including other types of penetration.

11:45

Cathie Craigie: According to written and oral evidence that we have received from women's organisations, the effects of being penetrated with an object can be just as bad—and, if we are talking about physical damage, can be worse, especially for women. What is your view on that?

Professor Maher: I totally agree. There is no suggestion that in confining rape to penile penetration we are saying that all instances of penile penetration are worse than other forms of penetration, or that there is some form of hierarchy in that respect. The question is how to find an appropriate label with which criminal law can refer to such conduct. Although all types of unwanted sexual penetration are horrible for the victims, we felt that being penetrated by someone else's sexual organ seemed to be a distinctive type of wrongdoing.

Again, I emphasise that we are neither suggesting some form of hierarchy nor saying that penile penetration is always worse than other types of penetration, or that other types of penetration are not as bad as penile penetration.

Cathie Craigie: What is your view of the suggestion that there should, in this respect, be another offence of similar seriousness to the crime of rape?

Professor Maher: The commission originally proposed a set of three sexual assault offences: rape defined as penile penetration; sexual penetration not just with objects but with other parts of the body; and a residual category of sexual assault. For a variety of reasons, we changed our minds. However, section 2 still refers to the offence of sexual assault by penetration, which suggests that the legislation marks out non-penile penetration as a specific type of wrong.

One of our pragmatic reasons for including sexual assault of penetration within the broader category of sexual assault was to do with the point about maximum penalties. It seemed to us that it would be better to keep sentences for all types of sexual assault within the range of the possible maximum of life imprisonment. Technically, it might be more difficult to attach a maximum of life imprisonment to what might be termed bare sexual assault—in other words, non-penetrative assault—but locating sexual assault by penetration within

the broader category of sexual assault might have advantages.

Cathie Craigie: I do not know whether you have followed the evidence that the committee has taken, but a significant number of people feel that the bill will not fully cover their various areas of concern, nor will it protect many men and women out there. I have to say, however, that we do not yet have suggestions for amendments in black and white.

Professor Maher: Are you talking about sexual assault?

Cathie Craigie: Yes.

Professor Maher: As we have argued, there is an offence of rape—in other words, penile penetration. The bill also sets out four types of conduct covering a wide range of sexual assaults. The common law would remain in force for anything that would not be covered by sections 1 and 2 including, for example, assault under circumstances of indecency. If a person is assaulted as a result of being urinated on by someone else, that might not fall four-square within the categories of sexual assault—indeed, it could be argued that it does not fall within those categories at all—but the Crown could prosecute on the grounds of assault under the aggravation of indecency.

The Convener: I want to be quite clear about the potential penalties. The maximum penalty for rape is, of course, life imprisonment, subject to a punishment part. How, under the bill, would a case such as we had a few years ago, in which a baton was forcibly inserted into a woman's vagina, be classified?

Professor Maher: It would be classified as assault.

The Convener: What is the maximum penalty that that would attract?

Professor Maher: Under schedule 1, the maximum penalty for a prosecution on indictment would be life imprisonment.

The Convener: So, the same maximum penalty will apply under each heading.

Professor Maher: Yes.

The Convener: I was anxious to clarify that.

Professor Maher: Let me make this absolutely clear. Section 1 rapes and section 2 assaults will carry a maximum penalty of life imprisonment. That will apply to all types of sexual assaults that are prosecuted on indictment.

The Convener: That was my understanding, but I was slightly vague about it. I think Nigel Don is similarly vague.

Nigel Don: Can you please clarify your point, Professor Maher? My understanding is that, under those circumstances, prosecution would proceed under section 2(2)(a), which concerns sexual penetration. You are suggesting that if that provision and all the words that are associated with it were removed to another section—which is what a lot of people have asked us to do—there would be a struggle to attach the same penalty to what remains in what is currently section 2. Is that your view?

Professor Maher: That is one consideration. There are conventions about maximum penalties for statutory offences. I am not saying that it would be impossible to argue for life imprisonment as a maximum penalty for the residual category of assault, but it seems to us that it would be easier, instead of making such distinctions, to have a general section 2 type assault that is constituted by four types of behaviour.

Nigel Don: Would it necessarily be a bad thing if that were to be the consequence? If we removed all the offences of penetration with objects or body parts to another section, would it be a bad thing if the residual sexual assault did not carry the same penalty? It is not clear to me that it should.

Professor Maher: That would give rise to the problem that was mentioned earlier of trying to avoid hierarchies—saying that one thing is always worse than another. From the victim's perspective, a sexual assault that is not penetrative can still have a terrible impact. To be told that it is okay because they have not been raped or sexually penetrated does not bring comfort to the victims in that scenario.

The Convener: Okay. We turn now to the issue of consent.

Robert Brown: Let us return to the general point about free agreement. The clarification in the bill has been broadly welcomed. Is it possible for that definition to stand on its own without reference to the categories in section 10, which have been at issue?

Professor Maher: When you say "stand on its own", are you asking whether we could do away with section 10?

Robert Brown: Yes.

Professor Maher: That is possible. However, we feel that an important role of the definitions in section 10 is to spell out to people who are contemplating sexual activity that certain forms of such activity in and of themselves count as rape or sexual assault. We feel that the law would not give a strong enough message if we left consent as defined in the general definition of free agreement.

Robert Brown: I am concerned that the whole issue looks very complicated, in terms of

directions to juries and that sort of thing. At the end of the day, we want something that is transferable into judicial language and comprehensible to a jury so that juries can make clear-cut decisions. Do you think that, in broad terms, part 2 allows for that?

Professor Maher: I think it does. The problem that arose in the state of Victoria, which a witness mentioned earlier, was that judges and prosecutors tended to treat the list of definitions as a checklist. They went through the checklist to see whether an offence fitted in with it. However, the definitions are meant to apply simply when the facts bring one of the definitions four-square within a case; they are not a checklist. A judge would not direct a jury by going through each of the definitions. In many cases, no particular definition will be relevant and the direction on what constitutes free agreement will be the important factor.

Robert Brown: You make the interesting point that there has been an example, in another jurisdiction, of a section 10 equivalent being treated as a definitive list, with other situations being difficult to consider.

Professor Maher: The list is not definitive in the sense that it covers the field of what constitutes free agreement; it is a non-exhaustive list of cases of lack of free agreement. In our report, we said that we looked at the experience in the state of Victoria when the new law first came into effect. We found that after some initial problems and misunderstandings there was, among the wide range of legal practitioners and judges, general acceptance that the new law was working. Our concern was that that would not be the case. You say that the provision seems to be complicated, but no problem was found in putting it into practice in Victoria.

Robert Brown: In that context, I assume that the key phrase is:

"without prejudice to the generality of that section".

Professor Maher: Yes—that is right.

Robert Brown: Significant concern has been expressed on the concept of prior consent. We are getting a sense that people view the provision as being somewhat theoretical and therefore difficult to apply to actual cases. In addition, we are hearing that it may, if it is applied, have adverse implications for the sexual autonomy point on which you place such emphasis. Having listened to and read the evidence, do you now consider that the view that is being expressed is reasonable or do you stand by the idea that prior consent continues to be relevant to the bill?

Professor Maher: We have to be careful about what we say in this regard. Most of the focus has been on section 10(2)(b), where I think the phrase "prior consent" is used. My worry is that the notion may get out that the law does not allow prior consent. I take the opposite view: there must always be prior consent. The focus of the commission's message is that if no consent is given prior to a sexual act, the sexual act is a criminal act.

I am worried about the language of not allowing prior consent. The absence of consent prior to an act is what makes the activity criminal. Unless prior consent is included in the bill, there is no point in talking about withdrawal of consent, because withdrawal of consent presupposes that consent has been given.

What should emerge from the discussion on the bill is that the law requires consent to have been given prior to any sexual act. That said, discussion thus far has focused on the scenario that is embodied in section 10(2)(b). My concern is that the chopping away of prior consent may serve to obscure that focus and lead people to think that prior consent is not something they need—indeed, it may lead them to think that the opposite is the case. As I said, prior consent is an essential part of the definition of sexual offences.

I also worry about what would happen if section 10(2)(b) were to be removed. If parliamentarians want to impose time limits on the giving of consent, you should spell that out in statute. That said, I suggest that that would not be a wise road to take, because it could lead to questions on whether the consent that was given one hour prior to sexual activity had expired or whether that which was given five minutes beforehand remains. It would serve only to miscapture the social dynamics of sexual activity. I see nothing wrong in the concept or principle of people giving consent prior to the sexual act taking place—even some time prior to it.

Robert Brown: From the evidence that we have heard, I sense that people view the provision as an artificial concept. One difficulty is the distinction between consent and prior consent. Also, people are not signing up to a document or saying hours in advance of the act taking place exactly what will happen later on, after they have fallen asleep or whatever. Do you accept the artificiality of the concept?

Professor Maher: I do not see what is artificial about the scenario. By way of illustration, I will set out a scenario and ask the committee to reflect on whether it is so statistically freakish that the law can ignore it. A couple go to bed and one says to the other, "If you are first awake, can you wake me in a nice way?" We could say that their having said so does not matter and we should make that activity illegal, but for me that would be an infringement of sexual autonomy. Removal of

section 10(2)(b) would not solve the problem, but would simply move the focus to section 9. If the bill were to be passed with section 10(2)(b) absent, this question would arise: is it an offence of rape in Scots law for a man to have intercourse with a woman while she is asleep? The answer should depend on whether she has consented to having sex in that state. In my view, the problem will not go away if we remove the provision in section 10(2)(b).

12:00

Robert Brown: Rightly, you say that it goes back to the general definition of consent. Is that not a more flexible and satisfactory way of tackling the issue than the slightly artificial provision in section 10(2)(b), which seems to imply signed documents and so on?

Professor Maher: The implication that signed documents are required is a criticism that can be levelled at the whole consent model, not simply at this definition. My point is that going back to section 9 will not give us an answer. If the question were asked whether it is rape in Scots law for a man to have sexual intercourse with a woman while she is asleep, what would the answer be? In my view, it is better for the definition to be spelled out.

There is another reason why the commission wanted the definition to be included in the bill. Historically, Scots law has had problems dealing with the sleeping person; other legal systems have had the same problem. In some senses, the issue is slightly illogical, but there is a superficial logic. It is true to say that a person who is asleep cannot give consent, but it is a fallacy to say that a person who is asleep cannot not give consent, and that they are therefore either consenting or not consenting. Scots law should spell out that having sex with a person who is unconscious or asleep is rape or sexual assault, except in one defined circumstance—when they have consented to having sex in that state.

Robert Brown: Would spelling out the issue in that way assist juries that are faced by the practical and varied circumstances in which such situations arise?

Professor Maher: For section 10 to be brought into effect, the victim would have had to be asleep or unconscious. The answer is that sex with such a person would be assault or rape unless the exception applied; in most cases, it would not. We are talking primarily about cases in which men find women asleep in the street because they are drunk. In such situations, there has been no previous contact between those persons, so the law should spell out that that is rape.

Robert Brown: You have made your position clear.

My final question relates to section 10(2)(c), which deals with threats of violence. The provision applies to situations in which the issue of historic abuse has been raised. Does the current wording deal adequately with that? Some witnesses have expressed concerns about that point.

Professor Maher: It was the commission's intention that historic abuse should come into play in such circumstances. The key point about section 10(2)(c) is that it relates to situations in which there is a causal link between violence and consenting or submitting to sexual activity. If the violence took place far back in time, it may be more difficult for the Crown to show that there is such a causal link, but our intention was that the definition would apply to historic violence or abuse.

Robert Brown: We are dealing with a serious criminal offence, so it is important to establish the existence of a causal link between violence and agreeing to sexual activity. We need to do more than establish background circumstances.

Professor Maher: Establishment of a causal link is important because if the Crown proves a case under the definition, that is the end of it—there is no defence in relation to consent, because it has been proved that there was no consent.

The Convener: Are you aware of any cases under the old clandestine injury charge in which the defence was that consent was granted before sleep or intoxication took over?

Professor Maher: That is a peculiar rule. Case law provides no guidance on the scope of clandestine injury. The offence still exists, but it will be removed.

The Convener: It is historical to the extent that it is no longer used by the Crown.

Professor Maher: Yes.

Bill Butler: Section 12 of the bill provides that, in determining whether a person's belief about consent was reasonable,

"regard is to be had to whether the person took any steps to ascertain whether there was consent".

How do you envisage that section working if the accused declines to give evidence?

Professor Maher: I will outline the scenario that we had in mind. If the bill became law and the law spelled out that there would be an inquiry about what steps, if any, the accused took to ascertain consent, we hope that the proper police procedure would always be to ask about that when the accused was being questioned. In interviewing the suspect, the police could say to him that so-and-so had said that the accused had raped her. He may deny the whole thing and say, "Yeah, I had sex, but she agreed." We would hope that, as part of

their standard questioning, the police would then say, "Okay. What steps did you take to make sure that she consented?" The suspect would either answer that question or he would not answer it, but the interview would be part of the Crown evidence.

Bill Butler: I accept that, but what if the suspect still declined to give evidence, despite that? Would it be possible, as was suggested earlier, to draw an inference if he refused to take the stand?

Professor Maher: The response could be, "Well, what would you think?"

You are perhaps asking two questions. One is whether a factual inference could be made, having heard all the evidence—including evidence to the effect that the accused refused to answer the police and refused to go into the box—that no reasonable steps were taken to ascertain consent and that no attempt was made to do anything. That is one thing, and I dare say that juries might consider that in appropriate cases. However, if you are asking whether the law should try to spell that out, which is a separate question, I agree with what James Chalmers said earlier about possible difficulties with the right to be silent under the current law in respect of the European convention on human rights.

Bill Butler: Do you agree with Mr Chalmers that the ECHR could be contravened?

Professor Maher: Yes—I think there are potential problems with the ECHR.

Bill Butler: Okay. That is clear.

May I move on to ask about part 4 of the bill, which is on children, convener?

The Convener: I would like to clarify something with Professor Maher. Perhaps I am being characteristically obtuse this morning, but is it intended that the provisions in part 2 of the bill should apply to attempts to commit rape or general sexual assaults? Section 9 refers only to parts 1 and 3 of the bill, section 10 refers to section 9, and section 12 refers only to part 1. You can understand my confusion.

Professor Maher: That is an important point—it is not confusion. There is a view that there is a problem with how the English legislation was drafted, in that the consent provisions do not apply to attempts. We had that specifically in mind in instructing our draftsmen about the draft that the committee has. In the light of the provisions of the Criminal Procedure (Scotland) Act 1995, on attempting to commit crimes, we are quite satisfied that for our purposes we need only define consent in relation to committing the crime, and the provisions on attempts will kick in. In trying to get the drafting right, we had it in mind that those provisions would apply to attempted rape and attempted assault.

The Convener: That is fine. I appreciate that drafting difficulties are involved, but we may have to reconsider that issue.

Professor Maher: Yes. It is essentially a drafting issue. The policy was certainly to apply the consent provisions to attempts.

The Convener: That is fine.

We now turn to children and young persons.

Bill Butler: The bill draws a distinction between young children and older children, but it has been suggested that that distinction undermines the bill's protective dimension. Children are, after all, children—that is Professor Temkin's contention in her written submission. Does that aspect of the bill undermine what would otherwise be a clear message that it is not right to engage in sexual activity with or towards a person under 16?

Professor Maher: There is a danger of making things worse by simply treating all people under 16 as children. The law should mark out a distinction between, on the one hand, an older man having sex with a seven-year-old girl and, on the other, an older man having sex with a seemingly consenting 15-and-a-half-year-old girl. Those are not the same scenarios, and the law should draw a distinction to reflect that difference.

We draw such distinctions in other areas of law, including in relation to sexual offences against children. I accept that there has to be a cut-off point, and the message must be that sex with young children is wrong—end of story, full stop. There is an age below which children are not appropriate for sexual activity, and the law must make that clear. However, the scenario is more complicated when children are maturing—not yet fully mature but developing—so the law has to recognise that. That is why, under the current law, we have different rules for under-13s and over-13s. There are important social and moral distinctions that the law should reflect.

Stuart McMillan: The Law Commission's original proposals were to decriminalise all consensual sexual conduct between young persons aged over 13 and under 16. First, why did the commission support decriminalisation? Secondly, what are your views on the bill's position on sexual relations between older children? Thirdly, would the move proposed by the commission not have reduced the legal age of consent by the back door?

Professor Maher: I will try to take those questions in the right order; you can prompt me if I forget one.

I was asked earlier about our guiding principles. One that I failed to mention was that the criminal law is not the only or always the most appropriate means for social intervention. As other witnesses

have said, criminal law sends out a particular message to society, but the law provides for other ways of dealing with social problems.

When we consulted on the question of what to do with teenagers in the 13-to-16 category who have consenting sex with each other—teenagers is not the correct technical term, but I will call them that—it struck us that there was a social problem, which other witnesses have explained to the committee. We asked ourselves whether the criminal law was the most appropriate method for social intervention. That problem has plagued legal system after legal system, but we think that we have the answer in Scotland—the children's hearings system.

To us, there does not seem to be a problem on which we need to send the legal message that such behaviour should attract the stigma of the criminal law. Rather, it is a problem of the social and moral development of children, and the appropriate intervention for that is through the hearings system.

Your other question was about lowering the age of consent. We must make it absolutely clear that the decriminalisation provisions would apply only when both parties were under 16. The age of 16 would still be the age of consent for having sex with someone over the age of 16. The age of consent would not be abolished or lowered.

Stuart McMillan: Some of the evidence that we have received has suggested that such a move could be construed as lowering the age of consent.

Professor Maher: It would lower the age of consent only for sex between teenagers. The message would have to be put out that it was still an offence for somebody over 16 to have sex with somebody under 16. The age of 16 as the age of consent would still exist in general law. The question is how to deal with sex between children under 16, who are by definition the parties to be protected—the age of consent is a protective provision. How do we deal with a scenario in which the two parties fall within the category of those who must be protected because they are both under the age of 16?

12:15

Stuart McMillan: What are your views on the bill's position? Are you happy with it?

Professor Maher: In relation to sex between teenagers?

Stuart McMillan: Yes.

Professor Maher: I adhere to what the commission said in its report, which is that such matters are best dealt with through a welfare intervention by the children's hearings system. I think that the bill represents the worst of all worlds, because it will extend decriminalisation by listing a wide variety of what would otherwise be offences, but will keep criminal liability for certain acts, which I will not say have been randomly picked, but it is difficult to see where the line has been drawn. Moreover, it does nothing to establish a new ground of referral to the hearings system—that children are engaging in sexual behaviour. To me, that is the worst of all worlds, from the perspective of the position that we in the commission arrived at.

The Convener: Does Cathie Craigie want to pursue that? We have been given a fairly clear answer.

Cathie Craigie: That is fine. I would love it if we had more time to debate the issue with Professor Maher, who has made his position pretty clear, but there is one point that I would like to ask about. We have heard evidence that it is not good legislative policy to enact criminal law provisions that it is broadly agreed will be enforced only in exceptional cases. Another consideration is that the European Court of Human Rights has held that a state cannot claim that the retention of criminal sanctions is necessary while indicating that, ordinarily, there is no intention that the criminal law will be applied. How can we square that with what the bill proposes?

Professor Maher: As a law reform body, it seemed to us that we would not be fulfilling our role if we recommended that the law should change but asked for it not to be enforced. That did not seem to be a good way of making new law.

We should think through the impact of the bill, especially on children, if it goes through in its present form. We will have to explain to teenagers what the law is, which will be complicated. We will have to tell them not to worry, because the bit of the bill that criminalises their activity with their boyfriend or girlfriend will not be applied to them—although it might in some cases. What message will children take from that? There is a serious danger that children will think that there is no point in listening to the law because although they are told that it is the law, they can ignore it. It would be unwelcome for anyone, especially children, to gather that they can ignore the law because somehow it will not be applied to them.

It would be far better if the law said that children who engage in sexual behaviour could find themselves subject to consideration by a reporter to the children's hearings system. That would send a message to children that they should stop and think, because the hearings system, rather than the criminal law system, could intervene in what they were doing.

The Convener: Let us continue to examine the issue of responsibility through a question from Stuart McMillan.

Stuart McMillan: In the context of the criminal responsibility of older children, will the extension of the criminal law to girls who are under 16 present any practical difficulties as regards enforcement? Are there any circumstances in which the law should treat young men and young women differently in that regard?

Professor Maher: I want to ensure that I understand your question. Are you asking whether the bill's provisions on teenage sex would be difficult to enforce?

Stuart McMillan: Yes.

Professor Maher: I think that they would. I have enough problems trying to explain the law to law students. In difficult situations, there comes a time when people just have to make their minds up. The commission made its mind up that the law would be in a very unsatisfactory state if you brought in such phantom quasi-offences, which give the appearance of criminal offences but are not really criminal because they are being decriminalised by another route: Crown Office discretion. That makes things messy. If it is decriminalisation that you want, decriminalise; but if you want to punish children through the criminal justice system and give them convictions for rape and sexual assault, put the law in place and give the Crown Office the understanding that those cases must be prosecuted: the police must investigate all such cases and the criminal courts must listen to them all. Decriminalisation by the side door is inappropriate. If decriminalisation is what is wanted, the law should state that.

That is not a direct answer, but it would cause practical problems if there were a law on the books in respect of which the police did not quite know what they were to investigate and the Crown Office was not told how it should exercise discretion.

Robert Brown: You indicated that the bill does not allow referral to the children's hearings system. Is that correct? Section 27 creates an offence and a child can be referred on offence grounds. Most offences committed by people under 16 would not go to the courts—they would go to the children's hearings system. Leaving to one side the broader matter, does the bill not continue that pattern?

Professor Maher: I meant to say that the bill does not add a new ground for referral, which would be that children have been engaging in sexual activity. Other witnesses have mentioned that there are problems about the use of the criminal ground of referral anyway, as there is a higher standard of proof and the need for corroboration. If the concern that leads to any teenage child being put before a hearing is that they are engaging in sexual activity, a much more straightforward way of achieving their appearance at a hearing is to have that as a ground rather than relying on the peripheral cases caught by section 27, which must then be processed through another ground of referral. Those are the very children that we want to go through a hearing, but they have to go through a different ground of referral, which might not be as easy to establish on the facts.

The Convener: I will bring us back to an important point, on which we want to be clear. In so far as the law is concerned, rather than in respect of a referral to the reporter or by the reporter, can you see any circumstances in which two people under the age of 16 have sex and one is charged but the other is not? If the provision is retained, would there have to be consistency in that both of them would be charged?

Professor Maher: That highlights one of the practical problems. If both children are in need of protection, but the law says that both are committing an offence, why should we distinguish between them? That is a good example of the practical difficulties to which section 27, in its current form, would give rise.

The Convener: We will now turn to what appears to be a sentencing anomaly.

Paul Martin: Schedule 1 to the bill sets out the penalties for offences introduced by the bill. Can you advise me of any circumstances in which it would be appropriate to impose a fine for rape or for the rape of a child?

Professor Maher: No.

Paul Martin: I understood that such fines were one of the Law Commission's recommendations.

Professor Maher: We were trying to clarify a technical anomaly, which is that there are certain offences for which there is no option of a fine. It is difficult to think of circumstances in which rape would attract a fine as a sole penalty, but we understood the law to be that if there were a very wealthy rapist, the law could put that person in prison for a very long time but could not fine him. We did not envisage that a fine would be the sole disposal for rape or rape of a child. It would be an additional penalty.

Paul Martin: You have more experience in these areas than I have, Professor Maher, but schedule 1 says that, for rape, the "Maximum penalty" should be

"Life imprisonment or a fine (or both)".

Are you advising me that it is not the case that, for the rape of a young child, the penalty could be a fine?

Professor Maher: We did not envisage that the rape of a child would lead only to a fine as a form of disposal. We were more concerned about ensuring that, in addition to imposing a period of imprisonment, the court fined the accused, if it was so minded.

Paul Martin: So the paragraph that I quoted is wrong.

Professor Maher: This may be a drafting point.

Paul Martin: The phrase

"Life imprisonment or a fine"

is repeated throughout schedule 1. You will appreciate that, if there is a drafting error, it is repeated.

Professor Maher: It may be a technical drafting error. Our instructions were to ensure that the courts had the power to fine, in addition to the power to imprison. The bill's draftsman drafted that in the way that members can see. There may be technical drafting reasons for that that I do not know about.

The Convener: We will have to pursue that point.

Nigel Don: What circumstances was section 3, which has to do with sexual coercion, intended to cover? I do not think that we have heard anything from anybody about that. Does the section refer to something involving a third party or is it intended to cover two people?

Professor Maher: It could apply to a range of circumstances. An example was given to us in the consultation. We were asked what offence would be committed under current law if a man forced a woman to have sexual intercourse with an animal for pornographic purposes or even just for purposes of sexual gratification. The law at present is not entirely clear on that. If a man forced a woman to masturbate herself for his pleasure, what offence would be committed? It seemed to us that there is an important gap in the law in that regard, which the bill's sexual coercion provisions are meant to cover. An accused can get sexual pleasure, for a variety of reasons, from forcing someone else to engage in a sexual act. We thought that the law should make it absolutely clear that that is a crime.

Nigel Don: So section 3 is really a catch-all section that is not intended to cover any particular circumstance.

Professor Maher: It is not a catch-all in the sense that we thought that we would cover everything else just in case we had not. We were addressing specific scenarios where someone is forced, under any circumstance, to have sex other than with the accused.

Nigel Don: That is my point. You visualise, therefore, section 3 covering a situation in which there is a third party or, in the case of masturbation, possibly not a third party. However, section 3 is not intended to be an addition to sections 1 and 2, which essentially have to do with two parties.

Professor Maher: That depends on whether your question is about the drafting, or the intent of the provisions.

Nigel Don: It is about the intent.

Professor Maher: The intent of the provisions is to cover circumstances to which sections 1 and 2 will not apply. Sections 1 and 2 will apply only where a person is forced to have sex with the accused. However, there can be plenty of scenarios where A, the accused, forces B, the victim, to have sex with somebody else or to engage in sex that does not involve the accused.

Nigel Don: I am with you. Thank you.

The Convener: Professor Maher, thank you for giving your evidence in what was, if I may say so, a stimulating manner.

Professor Maher: Thank you.

The Convener: There will be a five-minute suspension.

12:28

Meeting suspended.

12:35

On resuming—

The Convener: I welcome the final panel of witnesses. Bill McVicar is the convener and Alan McCreadie is the secretary of the criminal law committee of the Law Society of Scotland, and Ian Duguid QC and Ronnie Renucci QC are from the Faculty of Advocates. I welcome you all and thank you for your attendance. I am sorry to have kept you waiting but, as you will appreciate, we are under considerable pressure this morning. We will move straight to questions specifically for the Faculty of Advocates.

You do not appear to agree with the extension of the crime of rape to include oral penetration. That form of sexual assault is widely recognised as rape in other jurisdictions, and the proposed extension of the crime has been welcomed by witnesses from whom we have heard previously. What is your objection to the treatment of that activity as a form of rape?

Ian Duguid QC (Faculty of Advocates): The point of the legislation is to address the underlying issue that there are very few convictions for rape

in cases that are brought before the High Court. We do not feel that the provision to which you refer will change that situation in any way. Judging from our experience, we think that juries will be reluctant to consider oral penetration as a form of rape, which is why we are against it. Anal penetration and vaginal penetration are quite understandable to the layperson as forms of intercourse that can be afforded the description of rape, but we think that oral penetration is in a different category.

Our experience so far has been that there have been perfectly proper prosecutions and convictions for indecent assault, which includes the libel of oral penetration and is dealt with appropriately by the courts. Therefore, we see no need to change the law in the way that is suggested.

The Convener: Do you adopt those arguments, Mr Renucci?

Ronnie Renucci (Faculty of Advocates): Juries are reluctant enough to convict defendants of rape; to give them another option, and to call something rape that has not previously been called rape, will mean that there will be fewer convictions, as juries might be more reluctant to convict.

The difficulty with rape—no doubt this has been said in evidence before—is that it is unique in Scottish law. A jury is usually given a circumstance that is clearly a criminal activity, such as an assault, and asked to decide whether the person in the dock is the person who committed the offence. In rape cases, juries are given a set of circumstances that would not in the normal course of events be criminal, and they are asked to decide whether the person who engaged in that activity committed a criminal act. It is difficult for juries—rape cases usually boil down to one person's word against another, and rape is regarded, in many ways, as one of the most serious offences below murder. I think that juries will be reluctant to convict people of that offence if it is called rape.

The Convener: We did not receive a submission from the Law Society of Scotland. Mr McVicar, do you have anything to say on the issue?

Cathie Craigie: We received a submission.

The Convener: I am corrected.

Bill McVicar (Law Society of Scotland): We replied—we sent in written evidence, but we did not take issue with that point. We agree that there should be a standalone crime that deals with penile penetration, for the reasons that have already been given in evidence today. We disagree with the Faculty of Advocates' standpoint on that.

The Convener: Thank you. The submission from the Faculty of Advocates states:

"It is not easy to envisage a situation in which the actus reus of the offence could be committed 'recklessly'."

Is it not possible to envisage circumstances in which the accused was reckless with regard to whether or not the victim consented?

Ian Duguid: The issue of recklessness is currently a consideration in all rape cases. It arises in the assessment of the mens rea—the intention of the accused—and the law as it presently stands suggests that whether a man is reckless as to whether the party is consenting becomes an issue in a trial, so recklessness has a place in the ordinary consideration of such cases. Our concern, however, was that the extension of an offence that is substantially an offence of assault to include recklessness is a fundamental change in the law.

One of the alternative verdicts that are open to a jury in the event that the members do not hold that a rape has been committed is common-law assault, which requires that there was an evil intention to commit the offence. If a rape could be committed intentionally or recklessly but under an alternative verdict the offence could be committed only intentionally, we envisage that that would raise a huge difficulty for a court.

The situation that is arising is unfortunate, and will make it difficult for the courts to administer the law in that form.

Recklessness features throughout the proposals in the bill, in relation not only to rape but to sexual assault, sexual coercion and so on. However, we do not see any immediate need to change the law in the way that the bill intends to do.

I have been practising law for the best part of 20 years—prosecuting, defending and sitting as a part-time sheriff to decide on indecent assault and lewd and libidinous cases, although not rape—and, although I accept that, if something is broken, it should be fixed, my experience suggests that the law of rape is not broken in such a fundamental way that it requires a change in the way that is proposed. We think that, broadly speaking, the bill will make the process much more complicated for the public, juries and courts. If you are making the process more complicated for juries, you are simply not addressing the issue of why juries tend to acquit more often than they convict.

The Convener: But juries would have to identify whether the conduct of the accused in, for example, a road traffic case was reckless. The word "recklessness" is well defined in Scots law. Is there a fundamental problem in extending that word to define sexual behaviour that could be viewed, in effect, as rape?

Ian Duguid: I am not sure whether you have in mind the criteria that used to apply around the offence of reckless driving, which, of course, was changed to dangerous driving. However, recklessness was a creation of statute in that instance.

You are talking about changing the common law. In theory, you can change the common law to bring in a consideration such as recklessness, as was done in road traffic legislation before amendment. However, the question is, does that make things clearer or does it blur the images around the cases? As Mr Renucci said, many court cases amount to one person's word against another's. Would introducing a question of recklessness make the situation clearer for anyone?

The Convener: Mr Renucci, have you anything to add?

Ronnie Renucci: Only that my reading of section 1 led me to think that the bill itself was reckless. That caused me some concern. The bill is meant to clarify matters, but it certainly did not clarify matters for me.

The Convener: But recklessness is a well-established, common-law concept.

Ronnie Renucci: But the bill appears to suggest that there would be recklessness in the physical act. I cannot envisage a situation in which that would apply. Is it suggested that someone is going to say, "I slipped and fell and somehow penetrated the person"? That does not make sense. Section 1 does not make clear to me that the notion of recklessness applies to the intention as opposed to the physical act. It is difficult to see how someone could be so reckless in the physical act that it would cause penetration. The notion seems unnecessary.

Bill McVicar: Our view was that the recklessness that is specified related to mens rea, and we did not have a difficulty with it being placed in the section. I hear what the Faculty of Advocates has said, and I understand its concerns, but if one considers the idea of recklessness as part of mens rea, there is no particular difficulty.

The Convener: Cathie Craigie will ask questions around rape and sexual assault.

Cathie Craigie: First, I would like to continue the current line of questioning.

The Law Society's submission says, more or less, that it is not satisfied with the bill because it is intended to consolidate existing law rather than to address or resolve any problems, perceived or otherwise, with the conviction rates. What could be done differently?

12:45

Bill McVicar: As our submission says, further research should be done into what exactly the problems are. We do not know why juries do not convict in rape cases. We can speculate and guess, but we do not know. Our view was that, until some proper research is done into that specific difficulty—if there is, indeed, a difficulty—it is difficult to know how it can be fixed. We welcome the bill in the sense that it consolidates existing law and clarifies various factors and definitions. We just wanted to make it clear to the public that the bill is not the answer to the low conviction rate in rape cases.

Cathie Craigie: Do you know what the answer is?

Bill McVicar: I think that further research needs to be done before anyone comes up with an answer. I have been defending people in the High Court and various other courts for the past 25 years and I could give you all sorts of speculative answers, but I would not know whether they were correct.

Cathie Craigie: Is there any research in any other parts of the world that we could turn to?

Bill McVicar: We understand that research has been done elsewhere, particularly in the United States of America. However, we have not embarked on a review of that research as yet. When, in due course, proposals are introduced to amend procedural law and the law of evidence, as I assume will happen, that might be the time for us to consider those comparisons directly.

The Convener: One of our previous witnesses has produced a paper on that matter that might be of interest to you. We will direct you to that later.

Cathie Craigie: Does the Faculty of Advocates have anything to say about the Law Society's submission?

Ian Duguid: I wholly subscribe to what Mr McVicar said on behalf of the Law Society.

The low conviction rate can be addressed only by asking jurors about it, although at present that would be precluded by the Contempt of Court Act 1981. I am not sure whether some arrangement could be found to suspend the workings of that act for the purposes of conducting a survey, but that would be the way forward, rather than changing the law in the way that is proposed.

Earlier, someone asked what it was about the word "consent" that the public do not understand and why it was thought necessary to replace that word with the words "free agreement". I note what Professor Maher said, but nobody has yet given an answer to that question.

The way forward is to conduct some proper research. The problem is not exclusive to Scotland; it affects jurisdictions across the world. People have addressed it in various ways, and the suggestion in Scotland is to do that by codifying the law in some way. However, that does not really address the issue that most people—including us—identify as the unacceptable one.

I have been a prosecutor and I have been a defence counsel, so I have seen the issue from both sides, but I can only speculate on the reasons. There is no obvious reason why the situation should be as it is. I read an article by Helen Mirren in *The Sunday Times* that suggested a reason for the problem, but it was as speculative as the reasons that anyone could suggest. Proper research is the way forward.

Cathie Craigie: The submission by the Faculty of Advocates suggests that there is an overlap between sections 1 and 2, because conduct that might be charged as rape could be charged as sexual assault. Do you think that such an overlap is acceptable?

Ian Duguid: As you may have seen, neither I nor Mr Renucci was a member of the committee that prepared the faculty's submission. I am the chairman of the Faculty of Advocates criminal bar association; it is not clear that the bar that I represent subscribes to all the views that are set out in the submission. However, I will try to answer your question.

Section 1 seems to create an offence of rape. It seems to be the view that section 2 may also provide for an offence of rape, under the description of sexual assault, which includes penetration. Section 2(6) suggests that

"the reference in the paragraph to penetration by any means is to be construed as including a reference to penetration with A's penis."

There is a similar provision in section 2(2). Those who read and examined the provisions thought that it was open to the Crown to prosecute a person under section 1, for rape, and under section 2(2) and 2(6), for rape as we would understand it, but under the description of sexual assault. We were mystified by that piece of drafting. That is the best explanation of how the faculty approached the issue that I can offer to the committee.

Cathie Craigie: You have left me equally mystified. Given that the issue has been raised in writing, the committee will want to take it into account. If you think that further clarity is needed, I am sure that the committee will accept—

Ian Duguid: The concern was that the legislation would make the same situation eligible for prosecution in two different ways and that there was no obvious reason for choosing to prosecute a case under section 1 rather than section 2. We thought that you might try to suggest that section 2 relates to lesser offences—in other words, that you might distinguish such offences from rape, as we all understand it. We were not sure what was the intention or purpose of the provisions in section 2.

Bill McVicar: I understood from earlier evidence that it is not intended that the provisions should be seen as creating a hierarchy of offences—both rape and sexual assault can be punishable by life imprisonment. It occurred to me that section 2(6) might cover the bizarre situation in which the victim did not know what penetration was with. If the accused person were tried under section 2 rather than section 1 and gave evidence that penetration was with his penis, it would be open to the Crown to seek a conviction under section 2(6), even if it libelled something else to begin with. The situation that I describe is bizarre and unusual, but it provides a theoretical justification for the provision. Does that help?

The Convener: Yes, but there seems to be a degree of redundancy in the bill. We may need to look at that.

Cathie Craigie: It has been suggested to the committee in oral and written evidence that the bill should create a further offence of rape with an object. What are your views on that suggestion?

Ronnie Renucci: I thought that the issue was covered in section 2. I agree with Professor Maher, who explained why such a provision is unnecessary. The activity that you describe is an offence under the bill. It may not be the specific offence of rape, but it is clearly a serious offence. If we took up the suggestion that has been made, we would be adding another layer to the offence of rape. That is wholly unnecessary.

Bill McVicar: In my view, it would be redundant under the bill to create an offence of rape with an object. We should get away from the notion that the bill creates a hierarchical structure of offences—offences should be considered in the round, rather than on the basis that one offence is more serious than another. There is no need for a separate offence relating specifically to penetration with an object.

Cathie Craigie: Okay.

Nigel Don: The Faculty of Advocates raised the issue of sexual coercion, and you will have heard my previous conversation with Professor Maher. Would you like to comment further on what section 3 does or does not cover?

Ian Duguid: Yes. You addressed that in your questions to Professor Maher. I have nothing to add to what has been said thus far or to what is contained in the bill.

Nigel Don: Thank you. The faculty made the only reference to that section. I wanted to ensure that we do not miss something.

Ian Duguid: No, not from my point of view. I have nothing to add.

Angela Constance (Livingston) (SNP): Witnesses have broadly welcomed the definition of consent as "free agreement". Is that an improvement on the current law?

Bill McVicar: Yes. I agree that it is an improvement on the current law. It is difficult to express or draft in an elegant way the concepts that are involved in consent. When taken together, sections 9 to 12 set out clearly what a jury must consider in dealing with the question of consent.

That said, I have two matters to raise on section 10. First, in section 10(2)(b), the bill addresses what used to be described as clandestine injury. Many concerns have been expressed about prior consent. Perhaps a better way of putting it is set out at paragraph 2.59 of the Scottish Law Commission report:

"where the person was unconscious or asleep and had not earlier given consent to sexual activity in these circumstances".

That is a little clearer than the drafting of section 10(2)(b) is.

We addressed the matter in our submission in relation to threats. We suggested that consideration be given to whether a ground might be included under section 10(2)

"where a threat is made that results in consent being given where consent would otherwise not have been given".

It might be useful to list threat as a separate category under section 10(2). Beyond that, we have no adverse comment to make. We broadly welcome anything that makes it easier to understand the concept that is at the root of this.

Angela Constance: I am not sure whether you heard Professor Ferguson's evidence, but she suggested that use of the word "consent" is unhelpful to jurors' understanding of and their preconceptions about the concept. What is your view?

Bill McVicar: I do not agree with the proposition. The definition that is advanced in the bill is as clear as any that I could come up with. In the evidence that I heard today, no one made an improvement on the formulation.

Angela Constance: Does Mr Duguid or Mr Renucci have a comment?

Ian Duguid: I probably answered that in response to an earlier question. I said that no one who practises the law understands what it is in the word "consent" that people do not understand. If one word were to be replaced with two, the cause would not be advanced in any substantial way.

We all understand that the seven examples under section 10(2) are the sort of circumstance that would be placed before a jury as indicative of the absence of consent. No example that is given substantially changes the law; they simply codify what those of us who practise the law understand is already the law.

That said, a couple of the examples make things much more uncertain. Under section 10(2)(a), who is to judge whether someone is "incapable, because of … alcohol"? What happens if the victim's two friends come along and say, "She was drunk" and the accused's two friends say, "She was not drunk"? The drafting gives no indication of how incapability will be measured.

The issue caused me to look again at the statute. Since 1847, it has been the law that, if a person is intoxicated, they are incapable of giving consent. It is not as if the change that is proposed in the bill will make things better or more certain; it will do nothing in that regard. All the examples that are set out under section 10(2) can be covered perfectly easily by the common law as it stands.

The other concern that is identified in the faculty's submission is deception. The example that is given in the submission is a promise to marry, but I will bring it down to a more basic promise. Suppose that a man meets a woman and he says that he is 25 when he is, in fact, 35 and the two engage in sexual intercourse. The woman then contends that as he is not that age she has been deceived. Does that mean that it would be rape? I think that the answer to that question is "Yes, it does." I am not sure what Crown Office policy to date is. In theory, that would be a common-law fraud and the Crown might choose to prosecute it in that way, but it may choose not to do so. The bill gives no discretion to anyone. It would expose to criminal sanction people who might otherwise never have been exposed to it.

13:00

The Convener: May I interrupt? Looking at section 10(2), I am having a wee bit difficulty in ascertaining precisely where you are coming from with that analogy.

Ian Duguid: Section 10(2)(e) states:

"where B agrees or submits to the conduct because B is mistaken, as a result of deception by A, as to the nature or purpose of the conduct".

The faculty's submission gave the example of a promise to marry or something of that nature, but I presume that any form of deception would render someone liable to prosecution.

The Convener: At that stage, we enter into a legal debate as to what is a material fact and what is not.

Ian Duguid: You are, of course, right about that, but we are talking about rendering people liable to prosecution. Mr Renucci may have something else to say about it.

Ronnie Renucci: No; I agree with those comments. In addition to the example that Mr Duguid gave, I would include the example of someone saying that they were not married when they were. In theory, at least, a female could say that she would never have had sex with the man had she known that he was married and that that is deception.

I have concerns that a bill that is meant to clarify the situation refers, at section 10(2)(a), to when B is "incapable", but we are given no further help or assistance with the definition of that word. I can see that causing all sorts of problems in the course of a trial.

Angela Constance: Since we are on the subject of section 10(2)(e), I wonder whether anyone can help me. What sort of deception was envisaged when it was drafted?

Bill McVicar: I had the advantage, along with Mr McCreadie, of speaking to the bill team about the draft bill. We raised the same issues as the faculty, because at first blush section 10(2)(e) might cause difficulties with regard, for example, to those who pretend that they are not married. I was told that

"the nature or purpose of the conduct,"

was the most important feature of the section and that what the bill team had in mind was the carrying out of a spurious medical examination or something of that sort. If someone pretended that they were examining someone for medical purposes when they were, in fact, doing so for their own gratification, that would be the deception. That is the explanation that was given to me and it appeared to deal with the issue.

Ronnie Renucci: Unfortunately, people who read the bill or members of the public will not have the benefit of the draftsmen telling them exactly what was in their mind in drafting it. That is the problem with quite a lot of sections in the bill.

The Convener: I hear what you say, Mr Renucci.

Angela Constance: Section 10(2)(e) provides that there is no consent when the complainer agrees to or submits to the conduct because he or she is

"mistaken, as a result of deception"

by the accused. Is liability always with the accused? Is there never any scope for it to be turned round and for the issue to be with the complainer? I am not being very clear. I am asking whether the issue of deception should always be restricted to the accused.

Ian Duguid: Presumably, the accused is the person facing prosecution, so it would always be an issue of whether the accused had deceived the individual himself or been a party to deception by another. I am not sure whether the complainer's or victim's state of mind is important. It is important to the extent that she has gone through an act or acted as a result of a deception. The common-law offence of fraud turns on a pretence followed by a practical result. Presumably in this case, there is a pretence followed by a practical result, but we are talking not about fraud but about rape, because the practical result would be intercourse by deception, on which the victim has proceeded by mistake. I am not sure whether that answers your question, but I think that all the deception lies with the accused person, rather than the victim, in any situation.

Angela Constance: Okay. Thank you.

The Convener: To some extent, you might have anticipated Stuart McMillan's question, but he also has another issue to explore.

Stuart McMillan: I just want to explore one other aspect. Previous witnesses have suggested that section 10(2)(c) should be reworded to take account of the historical context of relationships where violence and abuse have been present. Would that be a positive step, or is it not necessary?

Ian Duguid: I would think that that was a positive advance. I am not quite sure what sort of drafting amendment was proposed, but I take it that you are talking about the situation of battered wives or partners or persons who are subjected continually to violence over a long period.

Stuart McMillan: Yes.

Ian Duguid: Well, the answer is undoubtedly yes. It would be advantageous at least to address that matter in the bill in some shape or form. I am not sure what form of amendment has been proposed, but I would not be averse to that matter being addressed.

The Convener: Does the Law Society have a view on that?

Bill McVicar: We agree that there is room for reconsidering the way in which that section is drafted. However, I return to the suggestion in our paper that a reference to threats in general could replace what is in section 10(2)(c). That would be a broader brush with which to address the various issues of violence over time, as well as more immediate violence or threats of violence.

The Convener: Ms Constance is satisfied that the issue of deception has been examined fully.

Bill Butler: The bill provides at various points that conduct that was initially consensual ceases to be so if consent is withdrawn and that if conduct takes place or continues to take place after consent has been withdrawn, it is non-consensual. Do you agree with that general principle, or do you think that it has practical difficulties?

Ian Duguid: Yes, it has huge practical difficulties, as I am sure that everyone in the room can envisage. On the issue of consent, there are plenty of instances—certainly in my experience in the courts—when parties have started off in what, on the face of it, seems to be a consensual situation, but consent has been subsequently withdrawn, for any number of reasons. You can think of any number of instances when the potential victim or complainer in a sense changes her mind. Should that be addressed by the law? Absolutely, because there is no longer consent—or free agreement, if you are going to call it that. However, by putting it in a bill in the suggested form, you are placing entirely in the hands of the complainer or victim the point at which they withdraw their consent. There is no indication whether the state of mind of the accused is going to be addressed. How is the accused going to know that consent is withdrawn? What happens if, after the event, the person comes along and says that they decided that they were not agreeable to the conduct, which would technically render the other individual liable to prosecution for rape?

It is an area that is fraught with difficulty. I am sorry to be negative again but, to come back to the original point, if it were an issue that required to be addressed by being put down in black and white, it would have been identified as such before now. The situation occurs regularly in the courts and is addressed by them in a perfectly straightforward fashion that, I hope, juries can understand. If they do not understand something about it, then, as I said in answer to another question, that should be addressed. Are juries proceeding on a misunderstanding of the law? That would be an important consideration for deciding to change the law.

To answer Bill Butler's question, the provision is fraught with difficulty through interpretation by the courts. As you will appreciate, if the common law is abolished, there will be no precedent to follow and the appeal court will be inundated with challenges to the interpretation of a statute. Therefore, the whole area of law will have to be revisited and matters will have to be discussed and argued at length. The provision will create a substantial difficulty in a situation in which, as far as I can see, the issue is currently addressed adequately and properly by the courts. I am sorry if that was a longer answer than you expected.

Bill Butler: No. What you said was clear. Do the witnesses from the Law Society agree with what Mr Duguid said, or do they have a different emphasis?

Bill McVicar: The difficulty is that, if we legislate to define what rape is, we must legislate on consent, on the circumstances in which it can be withdrawn and on when a criminal offence occurs in that respect. When we read sections 9 to 12 as a whole, there can be no real doubt as to what the law is intended to be. There is no great innovation in section 11, because that is what the current law is, as Mr Duguid said. I suppose the question is whether we need the legislation at all rather than whether there is anything wrong with section 11.

Bill Butler: Do you think that the intention is correct but that the provision would be fraught with difficulties in practice, as the Faculty of Advocates said?

Bill McVicar: I do not share the faculty's view or believe that there will as many difficulties as Mr Duguid apprehends. The court, in interpreting the statute, will have access to the various cases that existed beforehand on consent and withdrawal of consent because the provision is simply a codification of the existing law, as I understand it.

Bill Butler: So the Law Society's view is that the provision is workable.

Bill McVicar: Yes.

Bill Butler: In the panel's view, are the provisions on reasonable belief in section 12 workable, given that the accused cannot be compelled to give evidence at his trial?

Ian Duguid: I think that you raised the issue with Professor Maher, and it is a well-made point. The accused cannot be forced to give evidence. Professor Maher talked about police interviews, but of course the accused is entitled to say nothing at a police interview and may not do so. We considered how the matter could be addressed in the way that Professor Maher suggested. There is a process of judicial examination. Could the question on belief be put to an accused person before a sheriff in judicial examination? However, outside of murder cases, a judicial examination is currently conducted in only a few cases because of pressure of business in the sheriff courts. If the issue of reasonable belief was to be addressed in the way that Professor Maher identified, there would almost certainly have to be a judicial examination in each rape case and the judge at the trial would have to be allowed to comment on any failure by the accused to respond. That is how the law stands according to, I think, the Criminal Justice (Scotland) Act 1980. A judge is entitled to

comment on an accused's answer to, or refusal to answer, a question.

Bill Butler asked a good question about how the provisions in section 12 are to be addressed. However, aside from these observations, I am not sure that there is an answer.

Bill Butler: You said that there is a possibility of a judge commenting after judicial examination, but would that not raise the possible ECHR problem that I discussed with Professor Maher? Although it would be a judge's comment, it would channel juries along the way of inferring something from the accused's silence.

13:15

Ian Duguid: Professor Maher recognised that there was a problem with compliance with the ECHR, and I agree. I was trying to envisage the situation that he suggested might offer an out.

Bill Butler: But would it offer an out as far as the ECHR is concerned?

Ian Duguid: The provision that allows a judge to comment on the failure of an accused to answer a question during judicial examination is in a statute from 1980. It has not been challenged as not complying with European human rights jurisprudence.

Bill Butler: Would it be open to such a challenge?

Ian Duguid: I suspect that it might not be. Each of the member state signatories to the convention has what is called a margin of appreciation, which allows it to legislate in a way that, on the face of it, might appear to be non-compliant with the ECHR but for which there is justification. One would assume that if the 1980 act has not yet been challenged in that way, it must be compliant.

One must understand that Professor Maher suggested that an accused might answer questions from a police officer—I think that that was the first possibility that he mentioned—but, of course, the accused might never say anything. He is entitled not to say anything. He is entitled not to give evidence or answer any questions from police officers. The only way round the situation that I could think of was the process that I suggested but, as I said, account would have to be taken of the fact that every rape allegation would have to be the subject of judicial examination in the sheriff court. That just does not happen at the moment. One can only assume that that is because of pressure of business in the sheriff court. That would place a huge onus on the sheriff court, but it might be possible.

Bill Butler: Do you want to add anything, Mr Renucci?

Ronnie Renucci: I agree with Mr Duguid, although I think that use of the relevant provision would be challenged. It has not been challenged up until now because it is never used. I have not been involved in a single trial in which the judge has used the 1980 act to comment on the silence of the accused. That might be why the provision has not been challenged. I am fairly confident that the first time that that happens, there will be a challenge.

Bill Butler: I hear what you say; I am obliged to you.

What does the Law Society think?

Bill McVicar: It occurs to me that in the trial process, the jury has to consider the evidence that is led. That evidence might come from an accused person being interviewed by the police or his being judicially examined and saying that his position was that he believed that there was consent because of X, Y and Z. On the other hand, there might be no evidence of that sort at all, in which case the jury would be left with the complainer's account of events. She would, no doubt, be cross-examined about whether she had given consent, but if the accused does not give evidence, says nothing to the police and there is no judicial examination, what evidence is there from which the jury can infer that there was reasonable belief in consent? It is a point to do with the rules of evidence. We are in danger of crossing over into what happens in the trial process instead of considering a point of principle.

It seems to me that if an accused person were unwise enough not to give evidence in those circumstances, the jury might very well just bring in a verdict of guilty anyway because there would be no basis for holding that there was reasonable belief in consent. The judge must direct the jury on the basis of the evidence that is led during the trial. He or she cannot say that in some cases people give information about consent to the police but, in this case, that has not happened. They must focus on the evidence that has been led in the case.

Bill Butler: In such an example, do you see there being a problem with regard to the ECHR?

Bill McVicar: It would depend on what the judge said. If the judge said to the jury, "You can take it from the absence of evidence that there is no reasonable belief in consent," that would cause a problem, but if the judge simply said, "This is the evidence. You have to be satisfied that evidence exists from which you can hold that consent was given," there would be no problem.

Bill Butler: Do you think that judges would be liable to phrase their direction to the jury in the latter rather than the former form?

Bill McVicar: I do not know—that would be a matter for the judges. We would have to wait and see what they did. We are embarking on a new definition of reasonable belief, which is subtly different from the present definition, so it is difficult to know what a court or an individual judge would make of it. I do not see how Parliament can offer any guidance to the judge in that context.

Bill Butler: Would you like to add anything to that, Mr McCreadie?

Alan McCreadie (Law Society of Scotland): I have nothing to add, other than that I think that it is a matter of evidence and for the judge's direction to the jury.

The Convener: Paul Martin will ask questions on the abuse of the position of trust.

Paul Martin: The correspondence that we received from the Law Society highlighted a number of concerns in relation to the detail and practical application of the abuse of trust offence relating to mentally disordered persons, which is dealt with in section 35. Could you expand on that?

Bill McVicar: Since we prepared that submission, we have had an opportunity to consider the submission from Enable Scotland, which raises concerns about whether sections 35 and 36 should be reconsidered. I would defer to that organisation's greater knowledge of the area. If its view is that those matters should be revisited, I would agree.

Paul Martin: So you agree with Enable that we should not criminalise those who abuse trust but, instead, deal with the matter through regulatory means.

Bill McVicar: I am saying that the situation is not as straightforward as that. The matter should perhaps be debated further.

Alan McCreadie: With the committee's indulgence, I could seek further comments from the Law Society's mental health and disability subcommittee.

The Convener: Can that submission be made in writing?

Alan McCreadie: It can.

Paul Martin: Could you confirm that you do not think that criminal action should be pursued against those who abuse trust, and that you consider Enable's alternative course of action to be better?

Bill McVicar: We have not as yet reached a final view on that. The Law Society would want to consider what Enable has submitted before doing so.

I am not trying to avoid the question; I am simply saying that I do not have an answer to that question at this stage. However, we will formulate an answer in writing, with the assistance of those who have more experience of these matters than we personally do.

Paul Martin: I appreciate what you are saying with regard to those who have more experience than you, but there is an issue concerning the opportunities that are given to pursue legal action through criminal proceedings rather than through the regulatory processes, which is what Enable is proposing.

Bill McVicar: I appreciate that, but I do not have an answer to your question at this stage.

The Convener: The committee is actively seeking further information under that heading.

Nigel Don: I would like to pursue a subject that has been raised by members of the panel but which we have not considered at any stage, which is the question whether the statute is codifying the law or changing it to such an extent that it is not just codifying it. I appreciate that those are technical—and, perhaps, jurisprudential—issues, but I think that Mr Duguid suggested that people would be unable to refer to precedent if they had this kind of statute in front of them and that Mr McVicar is suggesting otherwise. Could you explain—in terms that are appropriate to those of us who are not lawyers—what you think the consequences of passing this kind of bill might be?

Ian Duguid: I can answer that quite quickly. We met the committee that was responsible for drafting the bill, and pointed out that, perhaps, changing the law in such a fundamental way—and, as one section would do, abolishing the common-law offences of rape and so on—would be likely to create a new jurisprudence that would have to evolve out of interpreting the provisions of the statute. We suggested that it might be a good idea to include a provision to suggest that the common-law precedent remained insofar as it was compatible with the terms of the bill, which would, presumably, allow the courts to have regard to decisions on particular matters, which could then become subjects of discussion.

I see no reason to depart from that suggestion, as it would be in everyone's interests. However, it was not something that the bill committee picked up on, perhaps because it did not think that it was a good idea.

Nigel Don: I have the impression that there is a very fundamental question—if something can be very fundamental—about whether we are changing the law and starting again or are merely trying to nudge the law into a form of words that we think would put everything in one place. I think

that most criminal lawyers would approve of the latter. The bill is attempting to codify what has gone before, so precedents will apply so far as they are relevant.

Ian Duguid: I hope that I am not being misconstrued. In my view, the bill changes the law in an unnecessary fashion. That is not to say that it does not contain some good provisions on the abuse of positions of trust and the extension of jurisdiction to cover offences that are committed abroad. The bill undoubtedly contains some advantageous provisions that will advance the law in a perfectly proper way. However, you asked whether the bill codifies the law or changes it, and my impression is that it changes it. If it were changing the law for the better, I would be in favour of it, but I am not convinced that a case has been made that it will do so. We will lose a lot if a new body of precedent and jurisprudence is established on the back of the bill. That will be expensive because it will inevitably take up court time, legal aid budgets and goodness knows what else.

Nigel Don: If we argued about whether the bill is a good thing or a bad thing, we would be here beyond tea time.

I ask Mr McVicar to comment on the point about codification and precedent. Do you agree with Mr Duguid that it would be a good idea to remove the bit about abolishing the common law, or at least to add a bit about precedent being relevant?

Bill McVicar: I am not an academic lawyer, but I do not think that it necessarily follows that we need a provision in the bill stating that the pre-existing law still applies where appropriate. As you might have gathered from an earlier answer, I rather assumed that the existing law would still apply if the circumstances, offences and themes of the bill were the same as the common law. However, as I mentioned in my response to the question about belief, there is likely to be some debate about that because of what I described as a subtle change in the definition of belief.

Nigel Don: Am I correct to take it that the panel agrees that holding on to previous decisions and precedents, where they are appropriate, is the right thing to do?

Bill McVicar: Absolutely.

Ronnie Renucci: Yes.

Bill Butler: For the avoidance of doubt, is it not the case that, as Mr McVicar said, it is always permissible to consider legislative history? Mr Duguid, do you agree that we do not need to do what you suggested and write into the bill a statement that common-law precedent is admissible? It is always admissible, is it not?

Ian Duguid: It would depend on whether the court decided that there was a sufficient coincidence, not so much in the facts but in the legal argument. If the court was satisfied that there was a coincidental argument, the answer to your question would be yes. However, let us say that you redefine consent with the words "free agreement". Would any issue that arose about the interpretation of consent in previous cases and what was or was not consent be applicable?

Bill Butler: Is it not always permissible and wise to look at legislative history because it informs the situation as it now is, or as it has been amended by a bill that has been enacted?

Ronnie Renucci: Yes, but acts are usually silent on the common law. Section 40 of the bill specifically makes it clear that the common law is abolished. That is the difference.

Bill Butler: So you could not refer back to the common law at all.

Ronnie Renucci: No doubt that will happen in practice in court, but I fear that, if the bill is passed with section 40 in its current form, the appeal court will become even busier than it already is with some of our more litigious colleagues.

Bill Butler: I am grateful for that answer.

The Convener: Thank you for your helpful contributions, gentlemen.

That brings the committee to the conclusion of today's consideration of the Sexual Offences (Scotland) Bill. We will finalise our consideration next week, when we will see the Lord Advocate and the Cabinet Secretary for Justice. The contributions from the Law Society of Scotland and the Faculty of Advocates have been helpful in informing what will happen next week.

13:29

Meeting suspended.

13:31

On resuming—

Subordinate Legislation

Justice of the Peace Court (Sheriffdom of Glasgow and Strathkelvin) Order 2008 (SSI 2008/328)

The Convener: The committee considered the order last week. At that stage, Robert Brown indicated that he intended to lodge a motion to annul the order. Today the committee will consider motion S3M-2869, in the name of Robert Brown, which states:

"That the Justice Committee recommends that nothing further be done under the Justice of the Peace Court (Sheriffdom of Glasgow and Strathkelvin) Order 2008 (SSI 2008/328)."

I welcome James Kelly MSP, who is the constituency member for Rutherglen, to the meeting. If he wishes, he may contribute to our discussions. I invite Robert Brown to speak to and move the motion.

Robert Brown: I have no difficulty with the general move from the district court to the justice of the peace court structure—that is not an issue. I also have no difficulty with what is happening in other parts of Glasgow, although that has thrown up other issues such as the future of the Glasgow police museum, which has recently received some publicity. My concern relates to the incidental effects of the order—that is how they are described—on Rutherglen court, in particular, and on Kirkintilloch court, about which I know less.

Our starting point should be the policy that is laid out in the consultation that the Scottish Court Service conducted on the circumstances in which local courts exist or should continue to exist. Unfortunately, there was nothing about that in the document that was out for consultation from May this year and to which James Kelly and I, as well as others, took objection. The document was all about issues such as administrative convenience and gave no real indication of the circumstances in which local courts are thought by the SCS to be appropriate or of the criteria that will be applied. In Rutherglen, which has a long history and is the oldest royal burgh in Scotland, there ought to be a presumption against discontinuing the court, unless such matters have been thrashed out.

I want to raise a number of issues. The first is the policy background to the instrument, which includes Lord Gill's review of sheriff court boundaries and changes to Government policy on short-term sentences. Those will have a considerable effect, considering the slightly anomalous position of Rutherglen. It is in the sheriffdom of Glasgow and Strathkelvin, but it comes under South Lanarkshire Council for the purpose of social work services. Health services are provided increasingly in the context of the local health partnership, which is also in such a middle position.

In that situation, issues of liaison and overlap become important, as does the question of what the eventual structures will be. My main proposition is that it is sensible to maintain the existing courts in Rutherglen and Kirkintilloch in broadly the same format until the issues have been thrashed out, the implications of Lord Gill's review and the consideration of short-term sentencing have been understood, and we have a clearer view of what the court structures will be required to provide.

Rutherglen and Cambuslang are in the interesting position of being geographically adjacent to Glasgow—indeed, for a time they were part of the City of Glasgow District Council—while also having a sense of themselves as Lanarkshire towns with similarities to East Kilbride, Hamilton and Lanark. Some account needs to be taken of that aspect.

I am not sure whether this is borne out by reality, but it was suggested to me that liaison problems between the sheriff court and the social work department, and a lack of direct e-mail connection in particular, are leading to a backlog. Whether or not that is the case—and there is no great consideration of such issues in any of the paperwork—it is important that we thrash out how the connections will operate between the court, which under the new arrangements will be in central Glasgow, and South Lanarkshire Council departments.

A number of other issues should also be considered further. Much play is made of the expense of altering the cell arrangements in Rutherglen, and no doubt that is an issue. However, the police station is next door to the court, and there must be advantages for police time in having witnesses immediately on hand, and in officers not having to travel to a court to deal with such matters. There must also be some potential for joint arrangements with the police in using cells in Rutherglen if the current arrangements are thought to be inadequate. We seem to be seeing a Scottish Court Service perspective on the situation, rather than a more holistic and corporate view that takes account of other issues. I referred earlier to the Glasgow police museum, which is another example of that.

There are also significant advantages in local justice. James Kelly noted in his submission to the consultation that there is a local newspaper in Rutherglen—as there is Kirkintilloch—that reports routinely on local cases in a way that does not happen in Glasgow.

There are also JPs with local knowledge, which would be subsumed in a larger context. It was interesting to read the summary of the evidence that was put forward in response to the consultation. Mrs Helen Ross, a Kirkintilloch justice of the peace, said that time was needed to assess the wider impact of summary justice reform on business volume and profile before closing courts—I made exactly that point earlier. Some of the other justices who objected to the order did so on the basis of loss of local knowledge. It is interesting that the objectors to the proposals are South Lanarkshire Council, members with a local interest in the Rutherglen area in particular, and justices of the peace, not least the East Dunbartonshire justice of the peace advisory committee and the JPs who operate in Rutherglen.

There is clearly a bigger issue—which I do not depart from—of how the new JP court arrangements are being brought into existence. It is important that we get things right. Glasgow is obviously more important in terms of the volume of business, and it will be necessary for us to return to that question if the motion to annul is agreed to. However, it would not be disastrous if the changes were postponed for a bit, because a rolling out is taking place across Scotland in any event.

My primary submission is the one that I began with. There is significant business in Rutherglen—the convener identified last week that about 600 cases a year go through the court—and there is a similar, if perhaps slightly smaller number, in Kirkintilloch. The Rutherglen court meets twice a month, which some may see as relatively infrequent, but it nevertheless holds regular trials. There is enough business to keep the court going, and it has been conceded that there is no major problem in how business is done.

The Scottish Court Service has not properly thought through the abandonment of the long-standing courts in Rutherglen and Kirkintilloch—there has been no consideration of the wider issues, and no regard has been paid to what the policy should be in terms of local court arrangements. Against that background, and subject to any comments that others may make, I move,

That the Justice Committee recommends that nothing further be done under the Justice of the Peace Court (Sheriffdom of Glasgow and Strathkelvin) Order 2008 (SSI 2008/328).

The Convener: Do any other members wish to comment?

James Kelly (Glasgow Rutherglen) (Lab): I thank the committee for allowing me to state my views on the motion to annul. On a lighter note, I congratulate the convener and the committee on its success at the politician of the year awards last week. Today's agenda was lengthy, and it is clear that the convener and the committee members have handled it competently in order to get through all the business.

I support Robert Brown's motion to annul the order. I declare an interest as the constituency MSP for Rutherglen and as someone who has publicly opposed the closure of Rutherglen district court and the transfer of that business to Glasgow. I support the motion for two reasons: transparency and boundaries. As MSPs, we all deal with justice issues in our constituencies and there is a strong feeling in Scotland's communities—including Rutherglen and Cambuslang—that it is important for people to be able to see the workings and the effects of the justice system.

While the district court is situated in Rutherglen, people are able to see justice being carried out. That manifests itself in reports in the *Rutherglen Reformer*, as the local media are able to report the business of the court. If that court business were transferred to Glasgow, the diet would be split up, and all the local cases would not be dealt with together. It would not, therefore, be possible for the local media to report the cases in the same way, so we would lose that transparency. It would also inconvenience local people, as they would have to travel into Glasgow.

I agree with much of what Robert Brown said about boundaries. Historically, Rutherglen and Cambuslang have existed as communities and councils on their own. They fell within Glasgow for a time, but recently there has, logically, been a move away from Glasgow: we joined South Lanarkshire Council in 1995. With regard to health board budgets, the local community health partnerships budget now comes under the Lanarkshire NHS Board. It is proposed as part of the reorganisation of Scottish parliamentary boundaries that the Glasgow Rutherglen seat will drop the existing Glasgow wards and move wholly into Lanarkshire, picking up some wards in Blantyre. There is a logical progression away from Glasgow, and the move of Rutherglen district court into Glasgow is therefore going against the tide.

There is also an anomaly in relation to the sheriffdom boundaries that needs to be examined. Rutherglen and Cambuslang sit within the Glasgow and Strathkelvin sheriffdom boundary, an arrangement that dates back to 1995, when all the Cambuslang and Rutherglen council wards were incorporated within that sheriffdom, while the other South Lanarkshire council wards were incorporated in the Strathclyde and Dumfries sheriffdom. The annulment of the order would allow more time to examine the boundaries and to engage in further discussion on that issue.

If committee members are not convinced by those arguments, they should remember that those are important matters for the people of

Rutherglen and Cambuslang. Such matters are worthy of being aired in the chamber, which I believe would be the process if the motion is agreed to, and I respectfully ask that members of the committee consider the arguments before voting on the motion.

13:45

The Cabinet Secretary for Justice (Kenny MacAskill): Good afternoon, convener, members of the committee and Mr Kelly. I oppose the motion to recommend annulment of the Justice of the Peace Court (Sheriffdom of Glasgow and Strathkelvin) Order 2008. At the committee's invitation, I explained last week the order's purpose in technical terms and answered some questions from Mr Brown and a question from the convener.

The JP court order is the latest step in a summary justice reform programme that attracted and continues to attract wide support. The process started in 2001. Everyone agreed that summary justice was in need of reform, and Jim Wallace MSP, the then Deputy First Minister and Minister for Justice, asked Sheriff Principal McInnes to carry out a review, which led to his report in 2004. That report was broadly welcomed across the political spectrum. It was not welcomed in every regard, of course, as there was little political support for the removal of lay justice, but the report was generally felt to take summary justice reform in the right direction, and unification of the courts was one of those steps in the right direction. Cathy Jamieson, as Minister for Justice, published a response to the report in 2005 and introduced the Criminal Proceedings etc (Reform) (Scotland) Bill in 2006. My party duly supported that bill. It was not alone, as the bill was passed unanimously, with unification of the courts as one of its major elements.

By encouraging the early resolution of cases, summary justice reforms spare victims and witnesses unnecessary court attendances. The overall package of reforms means that fewer people in communities such as Rutherglen have to attend court at all, and, if court attendance is necessary, victims and witnesses are not required to appear as frequently. It also means that officers are being freed up to police the streets, as they are no longer hanging around in court waiting rooms.

Mr Brown asked about the principles and rationale behind the establishment of JP courts, and I welcome the chance to set them out. One of the main aims of court unification was to place the administration of our courts in the best possible hands—the professional court administrators of the Scottish Court Service—therefore, not surprisingly, we asked the SCS to consider where courts should be located to ensure local justice that was fit for the 21st century.

The SCS sought to gain the benefits of unification: service integration; one provider, not 32 authorities; one information technology system; consistent delivery; greater simplicity and accountability; better estate use; and better facilities that are suitable for victims, witnesses and all other court users. It used a number of factors to guide it and drive its decisions: business levels, value for money, the standard of existing facilities, the mix of more serious business that was to be dealt with and, of course, local access—the proximity of other courts.

In Rutherglen and Kirkintilloch, we had to take account of the low volume of business and the cost of operating and maintaining the facilities. Rutherglen is within a short travelling distance of Glasgow and is served by frequent public transport. The SCS's position is that it is not sustainable to maintain courts that deal with such a low level of business as Rutherglen.

I value the expertise of and contribution made by local justices of the peace. However, because of Rutherglen's proximity to Glasgow, local access to justice is not significantly compromised by the order, and the issue of local knowledge can be addressed adequately by the training that was introduced under summary justice reform and by justices of the peace sharing knowledge and experience. JPs have greatly welcomed that training, and Rutherglen JPs will have far more day-to-day court opportunities for contact with fellow JPs.

The Government has had to make the difficult decision whether to accept the Scottish Court Service's recommendation. We have resolved to do so because it has been thought through carefully, balancing all the interests. It is not the first time that we have had to consider such a recommendation. We took difficult decisions to close courts in Grampian, Highlands and Islands and Lothian and Borders. For instance, the district courts in Kingussie, Nairn and Penicuik were closed in previous rounds of unification, with the subsequent transfer of business to Inverness and Edinburgh JP courts.

As I have stressed, the order is part of a much wider programme that delivers benefits to all and requires a degree of change to deliver those benefits. The programme has wide support, and I urge the committee to reject the motion.

Robert Brown: I am grateful to the cabinet secretary for laying out his position. However, he has increased rather than decreased my worries. Nobody—whether myself, James Kelly or other objectors—has taken issue with the process of moving towards JP courts, with training or with the

other aspects of summary justice reform about which the cabinet secretary spoke. The issue is the location of courts and, particularly, what is happening in the Rutherglen, Cambuslang and, perhaps, Kirkintilloch areas. Although it is true that a rationale was laid out in the consultation document for the administrative arrangements and the objectives for Scottish courts administration, I reiterate that the consultation did not consider the circumstances in which local courts would or would not be approved. That remains the central point.

The point that James Kelly and I have touched on involves the particular circumstances of the two non-Glasgow courts, which lie in other jurisdictions for the purposes of other services. All that we are asking is that those matters, the background arrangements around support, the rearrangements that might emerge as a result of Lord Gill's report, and the issue of short-term sentences be properly considered. The work should be done on a more satisfactory basis, not as the result of a by-blow, which is what seems to have occurred with the proposals.

The consultation process might have attracted wide support, as you said, minister, but the issue is whether these particular proposals received support. I suggest that there has been a degree of opposition from those local people who are concerned about what is, admittedly, a relatively esoteric issue. They are the ones who know how the system works in practice, and who would have to operate differently. I am thinking not least of the local councils, particularly South Lanarkshire Council.

In accordance with my views as outlined, I will press my motion.

The Convener: The question is, that motion S3M-2869 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)

AGAINST

Aitken, Bill (Glasgow) (Con)
Constance, Angela (Livingston) (SNP)
Don, Nigel (North East Scotland) (SNP)
McMillan, Stuart (West of Scotland) (SNP)

The Convener: The result of the division is: For 4, Against 4, Abstentions 0. I am therefore required to use my casting vote. Obviously, my casting vote shall be the same as my vote in the division.

Motion disagreed to.

The Convener: In accordance with usual practice, I will make clear why I arrived at my decision. The arguments that Robert Brown and James Kelly advanced had merit and their points were arguable, but they were not compelling.

I accept that there will be inconvenience to court users, but at least two bus services leave from Rutherglen's Main Street and arrive 10 minutes later at Glasgow cross, which is one minute away from Glasgow district court. There is also a regular train service from the Cambuslang area.

The inability of the local newspaper to report Rutherglen cases is an important point, as justice must be transparent, but I observe that the local newspaper seems to be able to cover sheriff court cases. I have no doubt that, as with the system that operates in the existing district court, whereby all of the cases from a particular divisional area tend to be reported together, some convenient arrangement can be made.

The deciding issue, however, is the numbers. As was said, there were 600 cases in Rutherglen court in the course of a year. It can be assumed that the alternative disposals that are now available to prosecutors will result in a 20 per cent reduction, which would bring that number down to around 500 cases, many of which would be dealt with by letter pleas. Further, the papers that we received today indicate that only two trials operate at a sitting of the district court. The numbers alone justify the proposed action.

That is the basis of my determination.

The committee will meet in private extremely briefly, simply to agree to defer consideration of an item.

13:54

Meeting continued in private until 13:55.

Members who would like a printed copy of the *Official Report* to be forwarded to them should give notice at the Document Supply Centre.

No proofs of the *Official Report* can be supplied. Members who want to suggest corrections for the archive edition should mark them clearly in the daily edition, and send it to the Official Report, Scottish Parliament, Edinburgh EH99 1SP. Suggested corrections in any other form cannot be accepted.

The deadline for corrections to this edition is:

Tuesday 25 November 2008

PRICES AND SUBSCRIPTION RATES

OFFICIAL REPORT daily editions

Single copies: £5.00
Meetings of the Parliament annual subscriptions: £350.00

The archive edition of the *Official Report* of meetings of the Parliament, written answers and public meetings of committees will be published on CD-ROM.

WRITTEN ANSWERS TO PARLIAMENTARY QUESTIONS weekly compilation

Single copies: £3.75
Annual subscriptions: £150.00

Standing orders will be accepted at Document Supply.

Published in Edinburgh by RR Donnelley and available from:

Blackwell's Bookshop

53 South Bridge
Edinburgh EH1 1YS
0131 622 8222

Blackwell's Bookshops:
243-244 High Holborn
London WC1 7DZ
Tel 020 7831 9501

All trade orders for Scottish Parliament documents should be placed through Blackwell's Edinburgh.

Blackwell's Scottish Parliament Documentation Helpline may be able to assist with additional information on publications of or about the Scottish Parliament, their availability and cost:

Telephone orders and inquiries
0131 622 8283 or
0131 622 8258

Fax orders
0131 557 8149

E-mail orders
business.edinburgh@blackwell.co.uk

Subscriptions & Standing Orders
business.edinburgh@blackwell.co.uk

Scottish Parliament

RNID Typetalk calls welcome on
18001 0131 348 5000
Textphone 0845 270 0152

sp.info@scottish.parliament.uk

All documents are available on the Scottish Parliament website at:

www.scottish.parliament.uk

Accredited Agents
(see Yellow Pages)

and through good booksellers

Printed in Scotland by RR Donnelley