JUSTICE COMMITTEE

Tuesday 25 November 2008

Session 3

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JUSTICE COMMITTEE
29th 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:

Johann Lamont (Glasgow Pollok) (Lab)

THE FOLLOWING GAVE EVIDENCE:

Elish Angiolini (Lord Advocate)
Kenny MacAskill (Cabinet Secretary for Justice)
Andrew McIntyre (Crown Office and Procurator Fiscal Service)

CLERK TO THE COMMITTEE

Douglas Wands

SENIOR ASSISTANT CLERK

Anne Peat

ASSISTANT CLERK

Andrew Proudfoot

LOCATION

Committee Room 2

Scottish Parliament

Justice Committee

Tuesday 25 November 2008

[THE CONVENER *opened the meeting at 10:19*]

Decision on Taking Business in Private

The Convener (Bill Aitken): Good morning, ladies and gentlemen. I begin with the usual request that all mobile phones be switched off. No apologies have been received so far. I welcome Johann Lamont, who is attending for the evidence session on the Sexual Offences (Scotland) Bill because of her interest in equal opportunities.

Agenda item 1 is for the committee to agree to take item 4, which is consideration of whether to accept into evidence late written submissions on the Sexual Offences (Scotland) Bill, in private. The committee is also asked to agree to take future consideration of draft reports on the Sexual Offences (Scotland) Bill in private. Finally, the committee is asked to agree to consider written evidence submitted in response to the call for evidence on the Offences (Aggravation By Prejudice) (Scotland) Bill and the committee's approach to oral evidence on that bill in private. Is that agreed?

Members *indicated agreement*.

Subordinate Legislation

Justice of the Peace Courts (Sheriffdom of Tayside, Central and Fife) Order 2008 (SSI 2008/363)

10:20

The Convener: Item 2 is one negative instrument. The Subordinate Legislation Committee raised no points on the order. Are we content to note the order?

Members *indicated agreement*.

Sexual Offences (Scotland) Bill: Stage 1

The Convener: Today is the final planned evidence session on the Sexual Offences (Scotland) Bill. I welcome the Lord Advocate, Elish Angiolini QC; Fiona Holligan, principal procurator fiscal depute; and Andrew McIntyre, head of victim policy in the Crown Office and Procurator Fiscal Service. We are grateful to you all for giving evidence. We will go straight to questions.

Bill Butler (Glasgow Anniesland) (Lab): Why do you believe that it is now necessary to put the law relating to rape, sexual assault and other matters that are covered by the bill on a statutory footing? What is wrong with the common law in this area of the criminal law?

The Lord Advocate (Elish Angiolini): You used the word "necessary"; what is proposed is probably not necessary, but the question is whether it is desirable and in the public interest. We could continue to prosecute with the common law as it is.

The Parliament must choose what sexual activity it wishes to criminalise. This is a very difficult area because it goes into the realms of privacy and morality. However, in setting the boundaries for criminality in the 21st century, it is appropriate for us to look to what the 21st century's law should be. Although much of our common law is useful, it originated in Hume's time, when the status of woman was different. The progress of the common law was such that it was not until 1989 that marriage stopped being considered to be the unequivocal and irrevocable giving of consent to sexual intercourse in whatever circumstances, irrespective of consent.

The common law has developed incrementally but in a startling way during a short time. As you are aware, there was a considerable development when the Lord Advocate's reference of 2001 removed the need for proof of force. That was a substantial leap for the common law, which has resulted in a significant batch of cases of a new type coming before the courts that would not have been prosecuted hitherto under the common law.

The proposed legislation is not absolutely necessary; the question for the Parliament is whether it wants to have laws that represent the social environment in which we live and which are fit for purpose for the next 20 to 30 years.

I have said publicly that it is a distortion to say that Scotland has the lowest conviction rate worldwide because, under Scotland's law, rape is a very narrowly defined crime that does not bear comparison with the definitions of this type of crime that are used elsewhere in the world—it is like comparing apples and pears; we are not talking about the same crime. Generally, and almost universally, the crime of rape has a wider definition that would embrace many of our convictions in Scotland that come under the umbrella of sexual assault. The conviction rate for sexual assault in the absence of consent in the cases that we prosecute is approximately 70 to 80 per cent. In relation to the sexual offences that we prosecute, it is a particular type of rape—in America it is called one-on-one rape, date rape or acquaintance rape—that presents a significant challenge, as the committee will be aware from its knowledge of the issue.

Bill Butler: That is very clear—thank you.

In last week's evidence session, Mr Duguid of the Faculty of Advocates raised the faculty's worry that,

"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."—[*Official Report*, *Justice Committee*, 18 November 2008; c 1386.]

Is the faculty right to have that concern, or will the courts be able to adapt and develop the new legislation to address matters that were not foreseen in it and to make use of existing common-law precedent in relation to matters that are covered in the legislation?

The Lord Advocate: I appreciate that section 41 suggests that the common law will be abolished at the time of commencement, in so far as the provisions relate to offences that take place post-commencement. I am not convinced that that is absolutely necessary. It is for the committee to consider whether to remove law, or simply to allow it to fall into desuetude as we begin to use the statutory offences. There are many instances in which codification or statutory alternatives have been developed by Westminster and the Scottish Parliament but in which we have retained the common law. For instance, the crime of vandalism is a statutory offence that goes back to the Criminal Justice (Scotland) Act 1980 but which has a common-law equivalent of malicious mischief. Although prosecutors use vandalism, malicious mischief is available at common law should they wish to use that. The extent to which we want to have that facility is a matter of choice.

The jurisprudence on the common law will not fall into desuetude for a long time, because we will be prosecuting the old law—if we can call it such—for many years to come. Historical sexual abuse is a large part of the menu of cases that we are prosecuting, with some crimes dating back 30 or 40 years. We will use the common law for such offences that predate the commencement of the new legislation. Therefore, the jurisprudence, case law and precedent that have been established will continue to develop through the cases that we will

prosecute under the current common law. There will be no bar to the courts applying the old jurisprudence to the new law in so far as it is relevant and coincides with that jurisprudence. If a distinction arises because of the use of words or if a different interpretation should be placed on the new provisions, the court will do that.

The bill will undoubtedly be a significant and dramatic change in the law, and with that comes an element of risk, because the provisions will have to be interpreted. I suspect that, if we were plagued by fear of the unknown, we would do very little in life. Every aspect of changing the law involves a degree of risk that something may or may not be left out. That is why I am delighted that the committee has had a comprehensive consultation with many interest groups. The Cabinet Secretary for Justice will take into account the comments and ensure that the bill, which in essence was created by the Scottish Law Commission, and which the Government supports, is as workable, practicable and foolproof as possible. However, it would be a brave Lord Advocate indeed who suggested that the development of a statutory law could not miss out a particular aspect of sexual criminality. As members know, sexual predators have an infinite capacity to be innovative in finding ways of committing crimes that even we as prosecutors could not have envisaged 20 to 30 years ago, such as the use of the internet and of fake images and distorted pictures of children.

We hope that the law that is created will be as flexible as possible. The beauty of the common law is its flexibility. There may be wisdom in retaining some of that, at least in the initial stages after the commencement of the new legislation.

Bill Butler: That was clear. Basically, you are not saying that there is no risk that, by placing the law on a statutory basis, we will lose the flexibility that is inherent in the common law; you are saying that there is little risk.

The Lord Advocate: The common law has been set out and we have a significant body of jurisprudence on it. In some respects, we have a fairly restrictive jurisprudence on rape. If the Parliament passes the bill, it will give a much wider definition of rape—in a sense, it will become a different crime. That has risks attached to it because of the other factors and variables. Many of the people who are selected for jury duty when the indictment is one of rape have a narrow notion of what rape amounts to—they have the classic notion of a woman being dragged off the street. However, at least 90 per cent of cases are not like that, as they involve acquaintance. Rape may occur in the context of a marriage, a partnership or an otherwise consensual sexual relationship. If we are widening the crime of rape, we have to hope that there will also be an education campaign to enable the public to understand that rape is no longer the narrow crime that it was prior to the commencement of the provisions.

10:30

Bill Butler: The term "sexual" appears throughout the bill and at various points the bill provides that conduct is sexual

"if a reasonable person would, in all the circumstances of the case, consider the activity to be sexual."

Does that provide sufficient guidance for juries and judges on the meaning of the term?

The Lord Advocate: The alternative would be to have a subjective approach to what is sexual. What might be sexual in one person's mind might be utterly innocuous in another's. It is a question of how we draw the boundaries. A reasonable, objective test is a sensible way forward.

In these cases, we rely on 15 members of the jury coming to a consensus on what they consider to be sexual. A definition that was too extreme would not work. We know that certain people may obtain sexual gratification from looking at pairs of shoes in a shop window. Unless there is some overt mechanism that demonstrates their arousal as a result of that, it is difficult to prosecute that. The question is whether we would want to prosecute, in the absence of a manifestation of sexual arousal. There are other somewhat bizarre activities that might cause sexual arousal, which means that something could be sexual for one individual and innocuous for another. We must have a reasoned, objective approach to what is sexual. I am sure that we can rely on the common sense of the courts to interpret the term.

Bill Butler: That is very clear. Thank you.

The Convener: We turn to part 1 of the bill.

Nigel Don (North East Scotland) (SNP): Good morning. In your experience, what are the main obstacles to conviction in rape and sexual offences cases?

The Lord Advocate: Using the current law?

Nigel Don: Yes.

The Lord Advocate: They vary, but there are universal obstacles throughout the world. Part of our problem in Scotland has been that some of the debate has been inward looking. In particular, the media sometimes imply that Scotland is a social backwater in relation to the crime of rape.

As I have said, the conviction rate for sexual offences in general is as good here as it is in any other jurisdiction; it is the restrictive aspect of our definition of rape that creates the difficulty. So far

as that is concerned, the problems arise from a number of complex variables.

First, we operate with a very narrow definition of rape; it is a very specific act of male rape against a woman. I do not need to rehearse that point for the committee, so I shall save you time. Secondly, corroboration is required. That is another feature that is unique to this jurisdiction. At least a third of the cases that are reported by the police cannot get off the starting blocks because of the absence of corroboration from a second source of evidence. In some of those cases, we have credible and reliable witnesses, but we cannot take the matter any further. Corroboration is an important part of our justice system and it is a protection against miscarriages of justice. It is for others, not for the prosecutor, to determine what should take place with regard to corroboration, but it is not a factor with which prosecutors elsewhere have to struggle. Some prosecutors elsewhere may look for corroboration if it is available but, in cases that are prosecuted in Carlisle and elsewhere south of the border, the absence of corroboration does not have to cause the prosecutor anxiety when they are considering whether they have enough evidence.

The other variables relate to the subject matter. The crime is, uniquely, made criminal by the absence of consent. In all other circumstances, we are talking about conduct that is enjoyable, consensual and part of normal life for most people. Unlike any other area of criminality, it becomes criminal only because of one ingredient: the absence of consent. It can be extremely challenging to gain proof of that, particularly in the types of case that I have mentioned, when there may be an on-going sexual relationship; there may be a considerable degree of affection between the partners, which would ordinarily be displayed; and there may have been considerable consumption of alcohol or drugs on the part of both the accused and the victim.

The accused in those cases are often very pleasant-looking young boys for whom the jury may build up a degree of empathy. They do not turn up in dirty raincoats with a belt and with balaclavas hidden in their pockets and so on; they are not strange-looking people. The image of a rapist that people have in their minds is of a creature with no remorse. Instead, they see someone who is very well presented and looks like everybody's very nice next-door neighbours' boy.

There are issues that are unique and which present a challenge but, ultimately, such cases often come down to the word of one person against the word of another. That is difficult when there is ambiguity about the circumstances.

Among the other variables is a significant one that has been identified by Amnesty International, Rape Crisis Scotland and Scottish Women's Aid: the attitude of all of us. It is about our social approach to the deserving victim and the notion that the victim who deserves to be protected by the law is one who has not contributed in any way by dressing provocatively or by their sexual activity. However, as the committee knows, the law does not restrict its protection to that type of individual. The law is available for the most vulnerable and weak among us, who are likely to be the persons who are preyed on by sexual predators. The law protects those who are, inconveniently, not a Doris Day-type of figure, who comes in utterly sober to give evidence in twinset and pearls, but a young girl who may have been dressed in a suede bikini-type outfit and who may have had five or more Bacardi Breezers and two Aftershocks. The typical member of the public passing by that girl will go, "Well, you know what's going to happen to her tonight." To an extent, that clichéd view represents in-built prejudices, which can be held by females as well as men; they are not confined to one gender. Some women would say "Well, I simply wouldn't get into that situation," and judge the victim according to their own standards, rather than looking objectively at the fact that these are the very people who are much more vulnerable and more likely to be sexually assaulted than those who are assertive and in control of their life.

Nigel Don: Thank you for that comprehensive answer. To what extent will the bill improve conviction rates?

The Lord Advocate: There is no panacea for the low conviction rates for these types of crime. It must be made clear that there is no magic bullet. I hope that a package of changes and reforms and consideration will adjust the situation. It is not about improving the conviction rate; it is about ensuring that sound cases are put before juries, that juries are placed in a position where they are able to test the evidence that is available and that the process has been expeditious and supportive for the victim as well as fair to the accused. That balance must be achieved because this is a very difficult area of criminality. It is not about looking at a barometer and saying that we want to achieve a certain quota of convictions next year. That would amount to a drive towards miscarriages of justice.

We do not coach witnesses in Scotland, although that is done in some jurisdictions, where witnesses are trained in how to give their evidence. We allow witnesses to give their evidence without any form of training in that respect because that would be considered unethical in this country and, indeed, under our current law, it might amount to an attempt to pervert the course of justice. Certain steps that could be taken are outwith our powers and not something that we would do.

I hope that, by modernising the law as it relates to the crime of rape, the bill will give us greater understanding. Equally—it is important that this message is conveyed across the Parliament—I hope that, by removing the hierarchy between sections 1 and 2, we will ensure that we do not have references just to conviction for rape. I hope that people will embrace the two sections. There is little distinction in terms of seriousness between some of the crimes in section 2 and those in section 1. Therefore, that change will assist with providing greater clarity. The change from the criterion of subjective honest belief to the bill's criterion of reasonable belief will be of some assistance to that, too, as will the statutory exclusions of certain circumstances that might currently be inferred as a basis for consent—for instance, intoxication and incapacity.

There are ingredients in the bill that will assist with the clarity of the law but not assist universally in curing the low conviction rate. The other variables are also important. The law of evidence in particular is crucial in relation to the conviction rate in Scotland. That law must be examined and a decision must be made as to whether it remains as it is or whether consideration should be given to variation—for example, in relation to the Moorov doctrine and its operation. Equally, our attitudes are important. There must be education about autonomy and the right of individuals not to have sexual intrusion without their consent, and a consistency of belief across the community about that because, undoubtedly, significant numbers of people simply do not believe that such victims deserve the protection of the law.

Nigel Don: On that point, would it be appropriate to do what I think was suggested by a witness at last week's committee meeting, which is to undertake research into why jurors come to the conclusions that they do in rape cases?

The Lord Advocate: Research on jurors' decisions is currently prohibited by law. That is partly in order to protect jurors from intrusive, invasive questions that may render them more vulnerable and perhaps less willing to do jury service. Again, that is an issue for the Parliament to consider because we would need an amendment to the law to allow such research.

Jurors are generally not very different from the public. Well, they are not different—they come from among the public; in essence, they are 15 people taken off the pavement and put into a courtroom. From surveys carried out by Amnesty International, Rape Crisis Scotland and Scottish Women's Aid, it is clear that there is a preponderance of one view. The view permeates society, and you do not need to do a great deal of research to find that out. When people come to try a rape case, they still start off with a rebuttable presumption that some woman has been dragged down an alley and forcibly engaged in intercourse, rather than a presumption that it will be the type of situation that I described earlier. There is a significant psychological obstacle to overcome when a jury suddenly realises that the two people were boyfriend and girlfriend, had been partners for 20 years, and were in their bed when the rape occurred, after having engaged in some form of consensual sexual conduct. That is a significant challenge for us all. The Parliament, the media, education services and prosecutors can all help to change attitudes, if society wants to provide protection.

Before we can begin to change, there has to be an honest dialogue about what it is that we seek to protect. Of course, research of any description would help, but that would be for the Parliament to determine.

Nigel Don: Witnesses to the committee have been exercised about the use of the word "rape", and have endorsed your view that the current use of the word is far too restrictive. What are the distinctive characteristics of rape?

The Lord Advocate: They are about to change. Are you asking about the current law, or—

Nigel Don: What should the definition be? We acknowledge that the current definition is restrictive—and any new definition ought to include it—but what criminal offences should the word "rape" cover?

The Lord Advocate: Section 1 of the bill relates to penetrative abuse with a penis—and it relates to abuse committed by both men and women. I think that there has been a suggestion in the committee that such abuse could be committed only by a man, but it could be committed by a woman with an artificial penis or by a woman who has a surgical prosthetic. Equally, it can be committed by a woman art and part, or in concert, with a man. There is no intention to abbreviate or adjust the common law or the statutory provisions on art and part as they appear in the Criminal Procedure (Scotland) Act 1995. Such provisions will still apply.

The characteristic that section 1 embraces at the moment is penetrative abuse that is penile in nature and relates to any orifice of the body. We have to give this issue balanced consideration, and my perspective is based on my experience as a prosecutor. As I have said before, penetration with an object can be one of the most horrific forms of sexual violation. It is just as serious as penile penetration. There have been cases, in Scotland and abroad, where knives, guns, batons and other objects have been used to cause huge sexual humiliation and desperate physical damage, with horrendous consequences for the

victim. It will be for the Government, and the Parliament collectively, to consider whether such abuse should be embraced in section 1. It is currently dealt with in section 2. However, I want to make an important proviso: there should not be any discrimination or hierarchy between section 1 and section 2.

You could replace the word "rape"; you could call the offence "penetrative sexual assault" if you wished. The crime is very old. It was a most serious plea of the Crown; it was a capital crime along with murder, restrictively. For a woman in the 17th and 18th centuries, the consequences of being raped were cataclysmic in terms of her reputation and social value. The emphasis on penile penetration at that time was clearly part of the social environment.

The consequences for a victim of penile penetration can be extremely serious because of HIV and hepatitis as well as pregnancy. An aggravation can come from that. However, other forms of penetration can also cause massive psychological destruction and physical injury. I would say that that also characterises the crime of rape.

Nigel Don: Can I therefore take it that you would support the idea that there might be a further statutory crime of rape with an object, or possibly another body part?

The Lord Advocate: The penis of an animal is another object that can be used. We have had to deal with such a case.

10:45

Nigel Don: So you would be supportive of such a further statutory crime.

The Lord Advocate: It is a matter for the Parliament. Sections 1 and 2 do include such crimes—there is no question about that. It is a matter for the Parliament to determine whether it wishes to identify such a crime as something separate and distinct from what is covered by sections 1 and 2, or whether it is content that the fact that the two crimes rank equally means that it would be of no particular consequence to cover such offences in either of those two sections.

Nigel Don: Quite a number of witnesses were exercised by the fact that section 2 does not include the word "rape" under circumstances where they felt that it would be appropriate. Many people have told us that they would like there to be some mention of rape with an object, in addition to the provisions in section 2 as they stand.

The Lord Advocate: It is important to listen to such requests, and I hope that the committee will give consideration to such matters.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): I have a point about the overlap between section 1 and section 2—section 2(6) in particular. Some people who have given us evidence believe that an overlap is created between sexual assault and rape. Are there any cases where it might be appropriate for the Crown to charge penetration with the penis as a sexual assault, rather than as rape?

The Lord Advocate: Not if it could be proved. The difficulty would be in cases where it might not be possible to corroborate the fact that it was a penis that made the penetration. Victims might be blindfolded in some cases, and they might have no idea with what they have been penetrated. That is why I mentioned the somewhat grotesque descriptions of what is possible.

The victim has the opportunity to give her evidence, in the context of section 2(6). She will be able to articulate that it might have been a penis but that she is not absolutely sure, or evidence could emerge in the context. Our policy would be that if there is a crime that supports the offence of rape, we will prosecute it as rape.

The Convener: I turn now to the coercive aspect that is dealt with under sections 3 to 5. With your experience as a prosecutor, can you describe some of the situations that those sections are intended to cover?

The Lord Advocate: There is an infinite selection of scenarios. My colleagues might be able to provide more examples than I can. The classic situation would be where an individual is detained and obliged to watch other people engaging in sexual activity in front of them, or they are forced to watch hardcore pornography, with the clear inference that it is being done for the sexual gratification of the individual or for the purposes of humiliating or distressing the individual.

In relation to that aspect of sexual coercion, I note that it is unusual to have the purpose or motive defined in a section. That could present a further challenge to prosecutors to corroborate the matter. The mens rea, or the mental element of a crime, is usually intention or recklessness in such situations. The actual motivation, or the reason why something has been done, is not something that we ordinarily have to prove. The only exception would be assault with intent to ravish or assault with intent to rape, when we consider the objective of the individual—their purpose in dragging someone to the ground, for instance. If someone intervened, the individual might never have got to rape the other person. In such cases, we might try to show what the individual's motivation was.

It is fine that the purpose is there, as it expresses the nature of the offence, and anchors it, but I am not sure that it is absolutely necessary to have it—I wonder whether it is implied in the nature of sexual coercion and whether it is therefore not necessary specifically to address the purpose that the accused had in committing the offence. Some of the worst sexual offenders are utterly inanimate, according to how the victim describes their conduct during the res gestae—the event itself. The victim might be suffering terribly but not expressing a great deal, with no florid crying or distress being expressed, although she will be in a state of fear and anxiety. The accused might not be expressing anything; he might not be telling his victim what he is thinking or doing.

We have to provide evidence from the circumstances that will infer what the purpose of the accused was in doing what he did to the other individual. To be able to prove that it was sexual coercion is one thing, from the actus reus, or physical acts, that have taken place. Inferring that he intended to do it is fairly straightforward, but showing what his purpose was can be a bit more of a challenge. We might want to consider that particular qualification before stage 2.

The Convener: We always have to look for the unintended consequences of certain situations. For example, what would happen with a situation in which a couple have consensual sex in the bedroom where their infant child is? The child might be aware that some activity is going on and clearly has not consented to sex taking place. Technically, that would stand as an offence under the bill.

The Lord Advocate: Let us consider people's economic circumstances. Many people in Glasgow lived in single ends, and if they were ever going to have a family, they had no choice but to have sex in the presence of their children because they all slept in the same bedroom. To an extent, one has to consider the prosecutor's common sense. When conduct takes place in a flagrant, reckless way—with wilful blindness—and people who are out of their minds with drink strop about naked having intercourse in an obvious way in front of children who are conscious and running about, those facts and circumstances clearly demonstrate if not intention, then recklessness.

If the couple happened to be poor—living in a tent, for example—and were in bed, one would consider whether those facts and circumstances inferred a recklessness about their conduct, and they would be asked whether the children were sleeping at the time. Although current common law offers possibilities to bring the law to bear in ways that would seem disproportionate and unreasonable, we do not use it in those ways; we attempt to use the law in a way that is fair and in the public interest. We would take into account circumstances such as those that I described.

The Convener: I am relaxed about the idea that the prosecutor would use their powers with discretion, but I wonder whether we might still have to look at the drafting of the bill.

The Lord Advocate: Andrew McIntyre has a comment.

Andrew McIntyre (Crown Office and Procurator Fiscal Service): Under the bill as currently framed, I hope that we will not run into such situations, because the bill includes the purposes behind such conduct. We would have to show not just that the child was present during the act but that the intention of the parties was to obtain sexual gratification or to humiliate or distress the child. We have expressed concern that that approach sets a standard that is too high for the prosecutor. Our concern might be addressed by having a reasonable inference test, which would allow us reasonably to infer that, in all the circumstances, the purpose of the conduct was to obtain sexual gratification or to humiliate or distress. That would solve our problem of the standard in the bill being too high—we did something similar with the Prostitution (Public Places) (Scotland) Act 2007. In cases involving circumstances such as those that the Lord Advocate described, in which there was anxiety that the act was perfectly reasonable, it would not be reasonable to infer that the conduct met that test.

The Convener: Do both the conditions that are outlined in paragraphs (a) and (b) of section 4(2) have to apply, or does one in isolation suffice?

Andrew McIntyre: As I read it, only one condition has to apply. My reading of section 4(1) is that we would have to prove that one of those conditions, rather than both, applied.

The Convener: We will have to look at the matter again.

The Lord Advocate: To further clarify the matter, we could simply insert an "or" between paragraphs (a) and (b) of section 4(2).

The Convener: It will not be beyond the wit of the Scottish Government to come up with a drafting amendment at stage 2. Thank you for that, Mr McIntyre.

We will now consider consent and reasonable belief with Robert Brown.

Robert Brown (Glasgow) (LD): Section 9 defines consent as "free agreement". Does that definition advance the law? Does it offer a scintilla of extra meaning? If that is what consent means, why is the phrase "free agreement" not used

throughout the bill? Using two words rather than one might make things simpler.

The Lord Advocate: The term "free agreement" is readily understood in that context because of its breathtaking simplicity and beauty. The term "consent" is in use, but we know from the authorities and case law that, in developing jurisprudence, people have struggled with the extent to which consent can be inferred.

I do not see any difficulty with the term "consent" as an overarching legal test that includes the specific definition of free agreement. Someone who is suffering from Alzheimer's can consent to go on holiday to Jamaica in June with another person, and whether that is free agreement depends on the state of their mental capacity and whether they understand the proposition and its consequences. That is the nature of the definition. I do not think that it is tautologous. It will be a useful tool for us in helping juries to understand what consent means, especially in the context of rapes that take place in a domestic violence environment or when someone has been abducted and detained. Although those circumstances are referred to in section 10—they are specifically listed in section 10(2)—it is still helpful to be able to explain the term to a jury.

Andrew McIntyre: I agree that there is something attractive about replacing "consent" with the term "free agreement" throughout the bill. I have said in the past that that would be better as it would remove one of the layers of definition. The only thing that makes me pause is the extent to which the common law will continue to apply, which we discussed earlier. There is a great deal of common-law interpretation of consent. I do not know authoritatively, but I wonder whether retaining the term "consent" in the bill will allow us to introduce more easily its interpretation in the circumstances of a case, which has assisted us in the past. That is one thing to bear in mind. If we decide that the term "consent" should no longer apply, we might be putting a pen through all the authorities that have considered what consent is—and what it is not.

Robert Brown: If I understand correctly, there are two issues. First, there is a language aspect, in that the words "free agreement" are more easily understood by the public—they are a clearer, more common expression in the English language. Secondly, as the Lord Advocate indicated, it goes a bit further, in that there are nuances of meaning in the expression. However, I challenge your last point. If we redefine consent, will we not, almost by definition, be throwing out previous definitions of consent?

Andrew McIntyre: That is one argument. However, the other argument would be that in redefining consent, we would be widening the definition, rather than restricting it. We would be adding a dimension to it—it has to be free agreement, not just agreement. There would still be a kernel of consent, which would be the same as it always was—simply, the agreement part of it. How we view it will change, depending on the circumstances of the case and the authorities that we rely on in future.

Robert Brown: The circumstances in which conduct takes place without free agreement have given the committee a bit of trouble in a variety of ways. Section 10 and all the different situations that it lists sound terribly complicated. In general, will section 10 make it easier for you, as prosecutors, to convince a jury that what took place was done without consent—without free agreement—or do you anticipate any practical problems?

The Lord Advocate: With all new law, particularly a radical change such as the bill, we anticipate challenges in court. Challenges are inevitable, and they are why, if one were risk-averse, one would never change the law: one would just take the safe course of action and stick with what one has. The nature of litigation is that if something is new, it may be worth testing in court. It is not a bad thing if, early on, we have interpretation from the courts of a statutory definition. As we all know, what legislators want and what they achieve can be quite different. The courts must interpret the law that they get, and not what the parliamentarians hoped they would get.

My understanding from the Scottish Law Commission was that the situations that are listed in section 10 are commonly used as examples of circumstances that do not amount to consent. Section 10 simply bolts that down—it codifies it and puts it into statute. However, the list in section 10 is not exhaustive. There is an infinite variety of circumstances that may elide free agreement, but section 10 gives examples of those that have been accepted by the courts previously. The situation is more complex because free agreement is not part of the existing definition, but it is part of the jurisprudence that supports that definition.

Rape might be defined in common law by a simple phrase but, behind that phrase, hundreds of cases explain and interpret each word in the phrase and the jurisprudence that supports it. If the notion is that the situation is simple, I am sorry, because it is far from simple for prosecutors. Even the recent jurisprudence that developed on consent in the cases of Cinci and McKearney meant that we had to rework to an extent the definition as we had understood it.

It is not the case that the common law provides certainty; the common law also develops and changes. I suspect that the provisions will require

some interpretation and might require adjustment with the passage of time.

11:00

Robert Brown: Should other circumstances be added to the list in section 10?

The Lord Advocate: Circumstances could be added—that is the nature of the issue.

Robert Brown: I appreciate that a general provision applies.

The Lord Advocate: Yes.

The bill says that consent is not present when a person

"submits to the conduct because of violence used against B or any other person, or because of threats of violence".

The extent to which that provision applies will be important. I hope that it could be used in the context of domestic abuse, when the threat of violence does not immediately precede the rape—when the perpetrator does not say, "Take off your clothes—I'll thump you if you don't have sex with me." The provision could apply to something that had taken place the night before, when the woman had been battered. It could apply when the woman knew, and the facts and circumstances—the evidence of their lifestyle—supported the conclusion, that if she refused to have intercourse, she would be assaulted.

A woman in such circumstances lives under a permanent threat of violence. We will have to prove that—it will not simply be asserted. We will have to establish the circumstances of the relationship to show the absence of free agreement. The court will interpret the extent to which the provision applies to the circumstances that prevailed at the time of the crime.

Robert Brown: Are you happy with the phraseology? As you know, some witnesses have expressed reservations about the extent to which situations of historic abuse will be covered. Would the words "threats of violence made then or at some previous occasion", or another elaboration, do the trick? As a prosecutor, are you happy that the phraseology is adequate to cover such situations?

The Lord Advocate: The committee must look carefully at the drafting. Further consideration would be helpful. A causal nexus would have to exist between the previous incident and the event. Something might have happened 30 years ago, but everything might have been a honeymoon since then, so the problem might not have recurred. We would have to show in evidence how the previous incident affected consent on the relevant occasion, which would be extremely difficult to do. The wider the gap between the incident and the threats or violence, the more difficult it will be for the court to infer an absence of free agreement and the awareness of the accused. Part of the mens rea is that the accused was aware that the woman did not agree in the circumstances.

Robert Brown: The concept of prior consent in section 10(2)(b) has caused some difficulty. First, it sounds a bit odd—it suggests somebody signing a form to agree to sex later, after they have fallen asleep. Some people have suggested removing the phrase

"prior to becoming asleep or unconscious"

or removing the whole of paragraph (b) and leaving the question to be subsumed in the issue of consent. Do you have a view on that and on the difficulties of prior consent that some witnesses have described?

The Lord Advocate: The issue is difficult. At the moment, if a woman is sleeping or is unconscious from alcohol and someone has intercourse with her, the Crown proves its case on the basis of the circumstances and the absence of consent. However, we would still have to take into account any evidence that, 10 minutes before, she had said, "I'm very happy to have sex with you under any condition whatever. Just have your wicked way with me", giving the man carte-blanche.

That is an extreme example, but an issue is the right of individuals under article 8 of the European convention on human rights to enjoy a private, sexual and family life as they wish to without undue interference from the state. A danger lies in criminalising conduct that is currently lawful—if people who are in a long-term or even a short-term relationship agree explicitly or impliedly to such activity, it is not criminal.

The important thing is to protect people who find themselves in that situation, and it strikes me that the provision on reasonable belief for the defence assists in that respect. Is it absolutely necessary to have prior consent if reasonable belief exists? The consideration whether something was reasonable in the circumstances must be one of the ingredients. Indeed, I wonder whether the concept of prior consent needs to be defined or further refined to ensure that it does not cover a situation in which, for example, someone who makes a casual suggestion in a state of sobriety wishes, five hours later, to exercise some autonomy or even, in sobering up, takes a very different view of what happened when they were sleeping. A person should not be tied to a decision that they might have made earlier. If an accused was clearly aware that someone was unconscious or sleeping, they cannot cite as a bar to prosecution some distant recollection of consent given hours or days before in very different circumstances.

Andrew McIntyre: Making prior consent an explicit part of the defence would shift the burden of establishing such consent on to the accused and would have the same practical effect as the approach that exists in the current operation of prosecutions.

Robert Brown: I appreciate that a lot of this comes down to practical circumstances. What about circumstances involving, say, a husband and wife or long-term partners who routinely sleep together? A lot of alcohol might have been consumed and if one party fell asleep the other might touch them in a sexual way—as, indeed, they have done before with consent. If these matters are not tightly defined, there might be a lot of potential for all sorts of criminal difficulties to arise from intrusion into personal circumstances. If, as you have indicated, these are criminal offences of a capital nature—

The Lord Advocate: They are not of a capital nature.

Robert Brown: Well, they are serious offences that are prosecuted in the High Court. Does the bill do the trick in excluding more ambiguous situations—if I can describe them that way—from criminal liability?

The Lord Advocate: That is the aim that the bill seeks to achieve, and I believe that it achieves it. However, it might be beneficial and worth while to consider before stage 2 whether the notion of prior consent should be refined to ensure that it does not have some meaning that the legislation did not intend to convey. It would certainly not be the intention of the prosecution to prosecute, for example, a husband who might wake up his wife by kissing her on the stomach or by any other action that might be expected in a perfectly happy, consensual sexual relationship. The provision is intended to protect women and their autonomy from people who might take advantage of them when they are at their most vulnerable, such as when they are in a state of utter intoxication, are unconscious or are asleep. Many serious rapes of that nature have taken place and have been prosecuted.

Robert Brown: On a slightly different point, the Faculty of Advocates, in particular, has suggested that, under section 10, a man who induces a woman to have sexual intercourse by deceiving her about his age is committing rape. I have to say that I did not read the section in that way, but is that a possible interpretation of the provision?

The Lord Advocate: The intention behind section 10 is to address deception in relation to purpose. For example, doctors have been prosecuted for rape or sexual assault when the nature or purpose of a medical examination or other activity that they were undertaking turned out to be very different in quality. At a de minimis level, it would all depend on how important the factor of age was in the circumstances. The same might apply if, for example, a person pretended to be a man or unmarried to have sex with a woman, although technically some of those cases might be prosecuted as fraud rather than as rape. The prosecution would have to consider the material nature and purpose of the deception and whether, as a result, the victim did not give true free agreement to the activity.

Robert Brown: So in broad terms it is unlikely that section 10(2)(e) would cover the circumstances that the Faculty of Advocates highlighted.

Andrew McIntyre: The point is that the provision would cover all such situations. However, as the Lord Advocate says, it would become a matter of materiality and discretion as to whether the factor was sufficiently important to merit prosecution. Prosecutions on such grounds are the very cases on which we need the courts to make decisions and establish a line of authority. The aspect that you mention could conceivably be covered.

The Lord Advocate: As long as I am Lord Advocate, the prosecution of a person on the basis that they deceived someone about their age will not materialise. We prosecute serious sexual offences, rather than indicting someone for what may be a trivial deception or something that is not of particular significance. My own gender is often guilty of not telling the whole truth about age in social encounters.

Robert Brown: I have a question on the objective nature of the consent that is implied in section 12, and how it applies to the position that is set out in section 10. Is there any danger that we are creating an offence of strict liability in relation to any of the situations that are listed in section 10? We are talking about an allegation of a serious crime against a person.

The Lord Advocate: No, because there must be mens rea—intention or recklessness. Mens rea is part of the process—the offence involves not only the actus reus of a person having sex with a woman who is unconscious or asleep, but that person's knowledge that the woman is unconscious or asleep and their intention to have sex with them in circumstances in which they have no reasonable belief that the woman consents. That is not strict liability.

Robert Brown: In section 10(2)(a)—the alcohol provision—the issue is that consent is defined as being absent. However, the only indication of expression of consent is that the conduct occurred when the person was drunk. Does that not come very near to creating an offence of strict liability?

The Lord Advocate: No, because it must be shown that the individual intended to have sex with the woman and that they were aware, or had a reasonable belief, that the woman was incapable. It will be for the courts to determine incapacity in those circumstances. We know that there are degrees of sobriety and that people manifest insobriety in a variety of ways—some very floridly, by falling across the pavement, and others by sitting quietly in a semi-fugue state in the corner. Much will depend on the facts and the circumstances, and I think that the court will apply the law fairly in circumstances in which it was patent to all who were present that the individual was intoxicated and not in a state to make a free agreement.

In one case, a girl had consumed a huge amount of alcohol in the presence of the accused while they were at a party, so he had that knowledge. She had to be carried out of the room and placed in bed, where she subsequently vomited on to the bed sheets. She was in a state of semiconsciousness; the accused went into the room and she was raped. We are talking about that type of circumstance—not someone who was a bit tipsy on two martinis. We are talking about circumstances that are clear and in which the case can be safely prosecuted on the basis of objective facts.

Robert Brown: So in short, the phrase "incapable" is a substantial challenge to the prosecution?

The Lord Advocate: Yes—the court will interpret that subsequently.

Johann Lamont (Glasgow Pollok) (Lab): I appreciate the opportunity to ask a question—I will be brief, so as not to take away time from committee members who have a significant number of questions.

With regard to the list of circumstances in section 10, has the inclusion of prostituted, trafficked or bonded women been considered, on the basis that they do not have free control? I know that the Equal Opportunities Committee has heard evidence on that. There is a concern that although the list is not exhaustive, there is an implied hierarchy. Will you examine that further? I would welcome your comments.

Secondly, given that we accept that emotional abuse and controlling behaviour are part of the spectrum of violence against women, does unlawful detention include situations in which a woman has been so controlled by her partner over a period of time that she has no control over her own life and therefore submits to his wishes, as she does not know how to get out of those circumstances?

The third issue that I want to raise is that of reasonable belief. As we are all aware, in 2002, changes were made to the way in which sexual history evidence is treated under the law. How has that worked out in practice in the courts? Does not the danger remain that the person complained against could use the reasonable belief provision in the bill to say, "I am aware of the victim's sexual history. She has been like this in the past. Other people have told me that—she has told me that herself." What protection does the victim have in court?

Finally, when asking whether the circumstances of prostitutes or trafficked women should be included in the list, I should also have asked you to consider the circumstances of women who are groomed and become victims of sexual assault and abuse.

11:15

The Convener: Before the Lord Advocate answers, I confirm that we have received correspondence from the Equal Opportunities Committee that, to an extent, deals with the circumstances that Johann Lamont has raised.

The Lord Advocate: Obviously, the Cabinet Secretary for Justice is also considering those matters in relation to stage 2.

The list is intended to be neither exhaustive nor a hierarchy, as I have said. People are extremely innovative and circumstances that we may not be able to conceive of at the moment may arise. The intention is not to say, "This is it." I hope that the Parliament will make that clear when the bill is passed.

Whether someone who is trafficked can be said to be "unlawfully detained" will depend on the available evidence. For example, someone may come to this country under false pretences—they think that they have come to work but are then detained and in a trafficked situation. Any case would depend on mens rea or on knowledge of that individual's circumstances. If it was patent that they had been detained in a room against their will in circumstances that meant that there was no reasonable belief other than that they had been unlawfully detained, we would be able to prosecute on that basis.

Whether those who have been trafficked can be added to the list will depend on construing detention in circumstances where that might not be obvious. Those who are trafficked are not always detained at the same premises; they may have some freedom—for example, to visit friends. The ability of the Crown to prove knowledge on the part of an individual who had sex for financial exchange with such a person—or with a prostitute—will therefore depend on the facts and

circumstances. Certainly, we would not rule out such prosecutions because, in some circumstances, they would come under the general detention provision.

I turn to the second issue of those who have suffered over time severe emotional and controlling abuse that has affected their self-esteem, their will to live and so forth. Again, whether such abuse amounts to unlawful detention depends on the circumstances. If an individual had been subjected to mental torture, including threats and isolation, over a number of years by a partner such that they were effectively detained, we would have to prove that detention and the extent to which the partner's threats, implied threats and controlling behaviour had overcome the individual's will. An individual is taken to have free will. We would have to prove, in evidence, that the individual had been detained. Obviously, there are extreme examples; some cases will be more difficult and challenging. In terms of domestic violence, in arguing the case, we would bring to bear the "threats of violence" provision in section 10(2)(c).

I turn to the third issue of sexual history and reasonable belief. I hope that the point that the member raised will not be the case. Reasonable belief relates to the res gestae, and the sexual history shield is available to us. Two weeks ago, I said in the chamber that protection under the legislation on sexual history evidence is not universally successful. When a rape victim gives her precognition to a procurator fiscal, we cannot give her a guarantee that her character will not be attacked. Undoubtedly, the victim's sexual history is one of first routes of attack for the accused in cases in which that can be explored.

It is important to ensure that legislation is made to work. The jurisprudence that has developed has limits. We cannot guarantee with absolute certainty that evidence about character, and previous character, will be excluded. Indeed, there is an inherent risk in excluding it. Some months ago, we lost a conviction in the appeal court—I think it was the case of Macinteer. The exclusion of the fact that the complainer had previously worked as a prostitute—both judge and prosecutor objected to the evidence being led—was held to have amounted to a miscarriage of justice and the conviction was quashed on that basis.

There are difficult judgments to be made, but I do not think that they will be affected by the reasonable belief provision. That said, there is undoubtedly a need to continue to examine how the legislation on sexual history evidence is working in practice and what the Parliament wants to do with it.

Andrew McIntyre: It will be difficult for the Crown to establish that a history of domestic abuse, without immediate threats of violence, is sufficient to come under one of the circumstances listed in section 10. If we are ever able to do that, it will be through section 10(2)(c). It is important to recognise that section 10(2)(c) is not restricted by time. It relates to threats that were made at any time—not just threats of violence, but threats in the wider sense. In situations of domestic abuse, threats are not restricted to violence. The accused can threaten to kill himself, to make disclosures about his intimate relationship with the victim or to humiliate them in some other way. If we accept that the provision has wide latitude in time and is not restricted to threats of violence, it could be used to establish lack of consent in cases of domestic abuse.

The Convener: We move on to the question of reasonable belief. You will have noted that last week we heard evidence that section 12 is not as effective as it might be because it does not provide for the accused to be compelled to give evidence. Do you see that as a problem?

The Lord Advocate: There is no difference from the current situation. The only alteration that the bill will make is that we will move from an entirely subjective test—the accused's honestly held belief, however unreasonable it may be—to a test based on reasonable belief, which is more objective. That should make matters easier because what is reasonable in the circumstances will be inferred from the facts and circumstances that are put before the court in proof. Individuals may speak to the conduct of the accused and the victim at the time of the alleged offence. They may describe how the accused and the victim were behaving—at a party, for example—and how the victim appeared to them. Was she happy? Did she look safe and content in the accused's company? Those factors, as well as anything that the accused said to his friends, when he was being interviewed under caution by the police or—more rarely—during judicial examination, may be derived from the evidence.

The bill does not shift the current position in any way and places no obligation on the accused. If there is an irresistible case crying out for an explanation, under common law the judge may suggest that the accused needs to rebut it, but that mechanism is used very rarely and conservatively. The bill does not shift the position in a way that will make a practical difference for us.

The Convener: Has conservative use of the power that you describe been governed by the fact that more frequent use could cause difficulties under the European convention on human rights?

The Lord Advocate: There is no absolute right to silence under ECHR—there is a presumption of innocence, which does not require the accused to indicate his position in all circumstances.

However, European jurisprudence views some degree of proactivity on the part of the accused as acceptable in a criminal trial. In solemn proceedings, an accused cannot plead an alibi or self-defence without giving prior notice. The notice does not establish the defence—the accused must find a basis for the alibi or defence of self-defence in the Crown case, or must lead evidence that raises reasonable doubt about the Crown case and establishes the defence. There is no expectation of utter passivity from the accused in the trial process. Cases such as we are discussing will be no different.

The Convener: I accept that an accused cannot argue a special defence unless he gives evidence in support of it. However, we are talking about a slightly different situation, in which the accused stays completely quiet throughout proceedings. Would that put the Crown behind the 8-ball?

The Lord Advocate: At the moment, we must prove mens rea: we must show that the accused intended to do wrong, or acted recklessly, which, incidentally, shows that he had no reasonable belief as to consent or knowledge. When we investigate cases as prosecutors, we do not do so with a view to obtaining a conviction at all costs. Our role is to ensure that the evidence is fair and balanced to the victim and to the accused, not to skew the case or exclude evidence that may support our case but be inconvenient to the proposition that the prosecution is putting before the court. That is an important part of the prosecutor's function as an officer of the court.

The Convener: Last week it was stated to us in evidence that the Scottish Law Commission intended that the provisions relating to consent and reasonable belief should apply to attempts to commit rape and sexual assault. How that will be achieved?

The Lord Advocate: I do not see a distinction between the complete offence and an attempt to commit that offence. The latter is also a crime, and the same provisions would apply. However, evidence must be available to support that, therefore much depends on what prevented the crime from becoming complete. It is particularly challenging to provide such evidence in rape cases.

There can be circumstances in which people are engaging in consensual intercourse, but there is a change of behaviour on the part of the accused. There is something odd, or the individual just decides that they do not fancy the accused any longer and changes their mind. If the complainer indicates that she does not wish to continue, there is from that point onwards the potential to prosecute for rape. The act becomes rape when consent is withdrawn, provided that it is reasonable, in the circumstances, to infer that the accused had the mens rea to know that consent had been withdrawn, or was utterly reckless in respect of whether there was consent. As members can imagine, the challenge of proving such circumstances is immense.

There is no distinction between the complete offence and attempts or assaults with intent to rape.

The Convener: I cannot see, in the bill, any provisions that deal with attempts.

The Lord Advocate: If the offence is available for the completed crime, it has to be available for an attempt. It is the same with theft. A defence in the case of theft is that the person is the owner of the property or had no intention to steal—that applies equally to an attempt to steal. We can consider the matter further if the committee would feel more comfortable if it was specified in the bill. However, the difficulty is that there are also conspiracies to commit crimes. It might be necessary to list all the inchoate offences, not just the attempts. The offence would also need to be made available in cases of conspiracy to rape.

The Convener: We will consider that in due course.

Part 4 of the bill is on children. Our questions will be led by Angela Constance.

Angela Constance (Livingston) (SNP): The offences against young children that are set out in sections 14 to 19 are designed to protect young children, but can also be committed by young children. Is it correct, as a matter of principle, that offences that are designed to protect young children can also be committed by members of that protected group?

The Lord Advocate: Whether that is right is a matter for Parliament. I am the prosecutor and I implement the law that Parliament and the Executive determine. As for what is right, if you are asking for the personal view of the Lord Advocate, I suppose that it is a matter of indifference to the world what my view is. My job is to implement the law and to interpret the public interest when that law is in place.

The current position is that I do prosecute children for non-consensual offences against other children when my doing so is in the public interest. However, that is extremely rare because we have a strong system in which most cases of offences by children are reported to the children's panel.

As chief prosecutor, I have no wish to criminalise children unnecessarily, but when there is an absence of consent and someone under 16 commits an offence against a younger child, prosecution is considered. If a 15-year-old abducts a four-year-old and sexually assaults them, prosecution is considered, particularly where the

behaviour was aggressive and where there might be a propensity to reoffend. The individual could become a lifetime sex offender, so we have to consider the facts and circumstances of such cases carefully.

Cases vary considerably, from children simply experimenting with each other in an innocent, explorative way—which we would never dream of characterising as criminal by way of prosecution—to serious offences that can permanently damage children or cause serious psychological or physical damage.

Angela Constance: I ask you to consider examples in which both the alleged perpetrator and the victim are under 13. If a 12-year-old girl invites a 12-year-old boy to touch her in a sexual manner, will both be guilty of an offence?

11:30

The Lord Advocate: The provisions in the bill suggest that there should be equality in relation to gender. In contrast with the law that we had in the past, when we consider how to legislate, we now have to ensure that the law complies with article 14 of the European convention on human rights and is non-discriminatory. We can justify a departure from that only where there are good reasons to discriminate between the genders.

A case involving the scenario of a 12-year-old touching another 12-year-old would never see the light of day in the criminal courts. It would possibly not even be reported to the children's panel, because such a scenario probably takes place in numerous neighbourhoods during the summer holidays. There may be some form of exploratory touching by children within a normal childhood.

It would be very different if a 12-year-old was bullying another 12-year-old, aggressively coercing them, and showing conduct that might illustrate a propensity on the part of the aggressive 12-year-old—female or male—to commit sexually aggressive behaviour for the course of their life. In those circumstances, the reporter to the children's panel would consider whether care and protection were necessary under the Children (Scotland) Act 1995 or whether the conduct was so serious that prosecution was merited.

I must say that, as the prosecutor, I consider the age of criminal competence of eight in Scotland to be extremely low. Consideration needs to be given to that, although not in the context of a particular bill.

The Convener: Yes. That is for another day.

The Lord Advocate: It is a much wider issue that needs substantial consideration by Parliament, and not just in the context of one bill. However, my policy is clear: I do not prosecute children when it can be avoided, because the children's hearing system is more appropriate. I will take children into court only when I consider it necessary and in the public interest. That was the policy of my predecessors: I am continuing it.

Angela Constance: You have given us comprehensive answers. You spoke about the circumstances in which you would consider prosecution. Will you say more about the circumstances in which you would consider prosecution when both children—the alleged perpetrator and victim—were under the age of 13?

The Lord Advocate: It would be exceptionally difficult to give such hypothetical circumstances. The scenario would be extremely serious. I suppose one example would be the Jamie Bulger case, in which a young child was abducted and tortured. If the scenario involved two 12-year-olds, it would have to involve behaviour such as serious torture or a serious rape in order to bring the case to court. In such circumstances, the court would have to be modified considerably, for example to allow the court to instruct counsel. Ultimately, the court would refer the matter to the children's panel for advice. Knowing that, and that the consequences might not be dissimilar to what the children's panel could do, I would have considerable pause before taking such a case to court. However, that decision would be balanced in the light of the circumstances and information from, for example, psychologists and psychiatrists on the likely path of the individual's behaviour. Unfortunately, research tends to suggest that, if a person is behaving in an extreme manner at the age of 12, the prospects for their future conduct are not great. For sexual offending, past behaviour tends to inform intelligently what happens in the future.

Stuart McMillan (West of Scotland) (SNP): My first question is on section 19. Having read through the bill a few times and listened to what has been said today, I would like clarification on what would happen in a situation involving two children under 13, in which a boy sent to a girl a joke of a sexual nature via a text message or link in an e-mail. Could an unintended consequence be that the boy had committed an offence under the bill?

The Lord Advocate: Yes. If it is competent to prosecute people from the age of eight, in theory it would be competent to prosecute such a case in law. However, it would depend on whether the message satisfied the definitions and purposes as currently described, and whether mens rea was present. Whether or not such a case would be prosecuted is another matter altogether.

Stuart McMillan: The Scottish Law Commission proposed that consensual sexual relations between older children should not attract criminal

sanctions. The bill does not adopt that approach in relation to various penetrative sexual activities. However, Professor Gerry Maher stated in evidence 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".—[*Official Report*, *Justice Committee*, 18 November 2008; c 1370.]

How frequently are older children prosecuted for consensual sexual relations?

The Lord Advocate: They are prosecuted very rarely. From our research, I think that there have been eight prosecutions in the past three years.

Stuart McMillan: Under what circumstances are such prosecutions brought?

The Lord Advocate: That depends on the circumstances, which can be very varied. We would consider the circumstances of both the victim and the accused. Some cases will relate to aggressive conduct on the part of the boy in the relationship—in the past, only boys could commit the offence. There might often be allegations of non-consensual intercourse for which we do not have the corroboration that would allow us to prove that. That is an important factor. In many cases, we have insufficient evidence to prove rape.

We prosecute under section 5(3) of the Criminal Law (Consolidation) (Scotland) Act 1995 for consensual intercourse with a child where we believe that the case is sufficiently serious, such that it is in the public interest to prosecute. It is very unsatisfactory for a victim to go through that process when the assertion is that she consented and her position is that she did not. However, if consensual intercourse with a child is all we can prove, that still allows us to get a conviction and it allows for the individual to be placed on the sexual offenders register, when we have a clear account from the police report that there is a real danger that the individual's offending will continue and that his disposition is such that he is an aggressive sexual offender. The eight cases that have been brought probably represent such circumstances.

We would consider whether there was exploitation of vulnerability, for example if the other child has learning disabilities. There might be a Euston-station situation, whereby an adult has got another child to go out and fetch a vulnerable child and groom them to engage in relationships. Their vulnerability, which would cause them to consent, might have been exploited cynically by the other individual. That sort of situation would be rare, but we would examine such exploitative situations in which the power balance in the relationship was clear and where there was aggression or bullying in the background.

Parliament might give me, as the public prosecutor, a clear signal that you wish children in such situations to be prosecuted, irrespective of the circumstances. Where there is fresh legislation, and there is a clear message from Parliament that it is to be enforced rigorously, the exercise of prosecutorial discretion is very much more limited. However, there might simply be recognition of the need for the provision for public health purposes, to protect children from exploitation by others, or to give some children a point of reference.

I do not think that anyone in this country wishes to criminalise unnecessarily children who may be involved in exploratory sexual behaviour. Most people would be concerned about the public health issues that may arise and about the welfare of individuals who commence relationships in circumstances that might be dangerous to their health, welfare or morality—they might be thrown into situations in which they are way out of their depth. I have seen cases in which 13 or 14-year-olds attend an apparently innocuous party at which, in fact, group sex is going on. They are utterly bewildered by the circumstances and are sucked into that scenario without having the emotional maturity, communication skills or assertiveness to get themselves out of it.

There might be value in there being a signpost in law to say that certain behaviour is criminal. People could shelter under that. I am not saying that prohibiting something necessarily makes people stop doing it—we know that that is a wish too far. However, the provision could be used as a point of reference to allow some victims not to find themselves obliged to consent because of peer-group pressure or bullying in circumstances that are immensely outwith their capability to deal with.

The Convener: I do not want us to get ourselves into difficulty.

Let us consider a situation in which you prosecute on the valid ground that you have enunciated. If you think that you cannot sustain the idea that there was coercion and a charge is therefore made under section 5(3), do not both people have to be charged?

The Lord Advocate: Discretion is exercised in a full range of circumstances. We would have to treat both people equally. If a girl had behaved in such a way towards a boy, it should be remembered that women can be sexually aggressive sex offenders.

Andrew McIntyre: The important point is that we would not be able to prosecute the female in those circumstances, because section 5(3) protects only females. That is an anomalous

situation. However, on what is to be proposed, either could be prosecuted.

The Convener: Either or both?

Andrew McIntyre: Yes. Either or both.

The Lord Advocate: It is difficult to envisage circumstances in which there would be sufficient evidence relating to both, unless they had done something in the middle of the park with all their friends around them, for example—although that happens.

The Convener: Unfortunately, it does happen, as you say. Therefore, we are left with a welfare or protective offence, and the question has to arise whether it is legally competent to prosecute a member of the protected or defended class with the offence of having had sex with someone under the age of 16.

The Lord Advocate: Parliament must make that choice and determine where to draw the line. I think that the Cabinet Secretary for Justice's view is that there are circumstances in which what has been proposed can benefit public health. I accept that there are valid considerations to do with the fact that suggesting that such things have happened might subject a person to the possibility of prosecution, which might deter young girls from seeking medical support or psychological counselling, or from disclosing to an adult. That factor must be taken into account.

Simply to refer such circumstances to the children's panel, as the Scottish Law Commission has suggested, is one way forward, but the type of situation that I mentioned would be lost by doing so. In some circumstances, we would focus on prosecution and would not be able to prove the absence of consent. Statistically, eight prosecutions are not many, but eight children or teenagers who go on to become serious sexual offenders represent a significant threat to the community in which we live. Therefore, Parliament must strike a balance. I am content to leave it to Parliament to determine where the appropriate line should be drawn and how such conduct should be controlled.

Robert Brown: I entirely understand the motivation behind what you say, but do you have any concerns about prosecuting for a more general crime, for which other people are not prosecuted in circumstances in which you cannot prove the things that you are concerned about?

The Lord Advocate: Yes. However, I suppose that the answer would be to remove the requirement for corroboration, which is another test. I am not suggesting that, but that is the reality. In other circumstances in other jurisdictions, one would be able to prove such things. We can work only with the evidence that we are able to get; if evidence does not exist, we cannot make more of what we have. As the committee knows, people often accuse others of rape and all that we can prove in law in such circumstances is that assault with intent to rape had occurred or that there had been lewd and libidinous practices. That is unsatisfactory for the victim, but it is all that we can achieve within the law, which determines the parameters within which we behave. We use the law where doing so is appropriate and in the public interest. It is therefore timely that Parliament is able to consider whether it wishes to maintain in that way that aspect of criminality for people aged between 13 and 16.

Nigel Don: My question may pre-empt what Stuart McMillan wants to say. Is there a risk that we are generating trials by the Lord Advocate rather than trials by court? In other words, you and your colleagues will decide what should be prosecuted. Forgive me—as you will appreciate, my question is not intended to be personal in any way, and I do not intend to attack the office that you hold.

11:45

The Lord Advocate: That situation applies across the board in Scotland. Of course the prosecutor in Scotland determines what cases will go to court—we are the gateway to the court. We do not apply the principle of legality in Scotland. We imbue, and have imbued, the Lord Advocate and her representatives, the procurators fiscal and Crown counsel, with the discretion to interpret the public interest. That autonomy is not exercised in isolation from the community and the people who provide information to us. We base our decisions on information that is provided by the police about the level of crime in the environment. For example, in Scotland we have a problem with knife crime, and we can adjust policies to take account of the seriousness of the problem. Such flexibility is a core part of our justice system.

Nigel Don's question suggests that the situation might have somewhat sinister connotations. I hope that we are not exercising our discretion to make decisions about what is in the public interest in a patronising or isolated way. If one thing characterises the nature of prosecution during the past 10 years, it is that we are reaching out to the community and listening to Parliament, interest groups and expert groups. An expert advisory group on sexual offending has been established and we are listening to its advice; we are not working in glorious isolation. However, decisions must ultimately rest with the prosecution and must be made independently of any other person, in terms of our statutory obligation.

Nigel Don: Thank you for putting that on the record.

Stuart McMillan: Would a welfare intervention in relation to consensual sexual relations between older children give rise to issues under article 8 of the European convention on human rights?

The Convener: Article 8 is about the right to privacy.

The Lord Advocate: Article 8 protects privacy and the rights of the family, but Strasbourg gives a margin of appreciation to states. There might be different cultural phenomena in different societies in Europe. In some states, the age of consent for sexual intercourse is as low as 12—I think that it is 12 or 11 in Spain. The situation varies considerably in Europe from one jurisdiction to another. Strasbourg has not put in place a high threshold for interference; there is a low common denominator on the extent to which the state can interfere with private lives, family choices or individuals' sexual lives.

There is recognition that states are entitled to consider protection of their most vulnerable citizens. People who are young or emotionally immature can be at risk of all sorts of diseases, the consequences of which they might not be aware of when they are only 13, 14, 15 or 16. Therefore, a margin of appreciation is afforded. I have not looked at the matter in detail, but I think that the short answer to your question is that it is perfectly legitimate to take a welfare approach.

If, as a result of taking such an approach, action is taken that limits or restricts the rights of an individual in a way that would engage article 6 as well as article 8, there must be some form of article 6-compliant tribunal, to deal with the article 6 rights that are inherent in any action that is taken on the basis of article 8.

Paul Martin (Glasgow Springburn) (Lab): Schedule 1 to the bill sets out penalties. The maximum penalty for rape of a young child would be

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

and the same maximum penalty would apply to other, equally serious, offences. Do you understand that to mean that a person who raped a child could receive a fine?

The Lord Advocate: The bill replicates the current law, which is that a fine is available on conviction for rape. I am subject to correction on this, but I think that the last time that a fine was imposed for a rape was in 1999—I cannot remember the name of the case, but it is somewhere in the back cells of the brain. No fine has been imposed for rape in the past decade. I suspect that if there had been such a case I would have immediately considered it in the context of unduly lenient sentences. I find extraordinary the prospect of only a fine being imposed.

As I understand it, it is intended that the fine would be a cumulative and not an alternative penalty, so that if an accused were very rich they could be fined as well as imprisoned. That could be cleared up in the drafting of the bill, if the situation is not currently clear.

Paul Martin: Should the implications of the move from common law to statutory law—where different minimum and maximum sentences apply—have been considered in that context?

The Lord Advocate: I am not sure what the Scottish Law Commission recommended in that regard.

In the context of cumulative penalties, I would like consideration to be given not just to a prison sentence but to a compensation order—that is not a matter for me, but I make the suggestion.

In circumstances that involve a very wealthy accused with a big mansion, for example, who rapes four or five children, it is very nice to be able to sell it and to make a compensation order in favour of the victims. That could be considered, although certainly not as an alternative to imprisonment in those circumstances—

Paul Martin: Lord Advocate, I understand the current position, and I appreciate and thank you for that point, but does the bill not offer an opportunity to refresh the legislation to ensure that the opportunity to impose a fine—

The Lord Advocate: Yes. You might want to consider amending the wording at stage 2 if it is considered that it is ambiguous and would not achieve the intention of imposing a cumulative penalty. However, I do not believe for a second that it is intended that a fine would be an appropriate penalty on its own.

Paul Martin: But your reading of the wording is that there is a possibility of the sentence being a fine only.

The Lord Advocate: Yes. The wording at the moment says "or a fine". That would have to be changed.

The Convener: Perhaps you can satisfy my personal curiosity by letting us know in which case in 1999 it was felt appropriate to impose a monetary penalty for rape.

The Lord Advocate: I may be wrong. With the passage of time, my memory is not what it was. However, I think that 1999 was the last year in which a fine was imposed.

Non-custodial sentences are sometimes imposed by the court for rape. There have been instances of probation and community service

being used. In a number of those cases, I have taken appeals against the sentences as being unduly lenient, but I have been unsuccessful. The Parliament might want to consider that in its consideration of the penalties.

The Convener: Well, that comes within the discretion of the courts, and is subject to your appeal.

The Lord Advocate: Absolutely.

Cathie Craigie: At present, the criminal law does not extend to a girl who is aged under 16 who engages in consensual sex. However, the bill will extend the criminal law and the girl will be committing a criminal offence. Over recent weeks, we have heard evidence of concerns about that. We have also heard that a pregnant girl who is at risk of being prosecuted might suggest that she was raped. How might your office deal with such cases?

The Lord Advocate: As I have said, very few cases of that nature are prosecuted and the evidence is likely to show patently what took place. The current trend is to suggest that, when someone young suggests that intercourse has taken place, they do so only because they were late and their parents were going to give them a row. There are trends and fashions regarding the defence that is put to the victim, but it is likely that that suggestion might be put to victims in the future when cases are prosecuted. Nevertheless, I expect such cases to be relatively rare, and I hope that even if that suggestion is put, it will not be borne out by the evidence that is available to the court.

Cathie Craigie: Is there justification for extending the criminal law to girls who are under 16?

The Lord Advocate: It is not a question of justification; it is about compliance with the European convention on human rights. Article 14 of the convention states that, when a right or obligation is created on the part of citizens, it should be applied without discrimination to particular groups. However, application can be varied if there is objective justification for doing so. The issue is whether there is justification for not applying rights or obligations to a particular gender.

The psychologists will correct me if I am wrong, but I think that girls mature emotionally more rapidly than boys. I am not sure at what stage boys catch up, but at that stage there is no objective basis for taking a different approach. A girl pushing a 12-year-old boy about and forcing him to have sex is clearly a matter of concern to the public as well as to the boy. Justification is a matter for the Parliament to determine. Given that one of the attractive prospects of the bill is the fact that it makes rape a gender-neutral crime—it will apply to male victims as well as female victims and whether the accused is male or female—there is an issue of consistency in how far that is taken, which must be balanced on the basis of the evidence that the Parliament has heard and weighed.

Cathie Craigie: Sticking with the group of older children for the moment, will there be any practical difficulties in prosecuting or dealing with under-16 consensual sex, since both parties could be guilty of an offence?

The Lord Advocate: We will have to decide whether to use one of the parties as a witness, which currently happens in many cases where we have an insufficiency. For example, with some of our serious crimes, such as a murder where there are two people in a room with a dead person and there is absolutely no evidence other than uncorroborated forensic evidence, we know that two people were involved and we have to decide who was the principal actor and how we can prove that in the public interest. In those circumstances, we sometimes have to use accused persons as witnesses. So the decision that you are talking about is not different from the decisions that prosecutors have to make every day on the full spectrum of offending.

Cathie Craigie: You will be aware of the evidence that we have heard that there is a strong body of opinion that under-16 consensual sex should be treated as a welfare issue, not as a criminal offence. That leads us to looking at past decisions of the European Court of Human Rights, which has held that a state cannot claim that the retention of criminal sanctions is necessary while at the same time indicating that ordinarily there will be no intention of applying them. However, you said that you use your judgment about whether to apply the criminal law, and the Government's policy documents in support of the bill indicate that there is no real intention to use the particular provisions in the bill. How do we balance the situation?

The Lord Advocate: That does not quite state the position. The Strasbourg jurisprudence relates to a blanket disapplication of the law, but I am saying that we will look for facts and circumstances that are consistent with the criteria that I have pointed out where there is absence of corroboration.

Registration on the sex offenders register achieves something very different from what the welfare system achieves. Registration is not available to the children's hearings system, because under-16 consensual sex is treated not as an offence but as a ground for care and protection, so there are distinctions. There is no blanket non-application of the law; we do not

intend not to use the law. However, as long as I am Lord Advocate, guidance will be given to the police, whether or not in statute—I already have the power to issue guidance under section 17 of the Police (Scotland) Act 1967—that recognises that I have discretion and that the law will be applied with discrimination, not universally. If the Parliament signals otherwise and tells the prosecution in Scotland that it wishes there to be ubiquitous and widespread prosecution of children between the ages of 13 and 16, I will have to take that into account. However, if the Parliament supports a discriminating approach, I will be able to continue with our current approach to this aspect of criminality.

The Convener: That is the way out of that one.

Cathie Craigie: I will move on. Section 27(7) says:

"The Lord Advocate may issue instructions to chief constables in relation to the reporting"—

I will not read it all out. Section 12 of the Criminal Procedure (Scotland) Act 1995 has a similar provision. Why is it necessary to restate that?

The Lord Advocate: It is not necessary. It states what my powers are already. I think that it is in the bill to acknowledge explicitly the Lord Advocate's powers when Parliament passes provisions that create a new offence for girls between the ages of 13 and 16. On summary justice reform, for example, there has been some debate about the use of the discretionary power, and whether the power was intended to be used for such crimes.

If the Parliament gives a clear signal that it is not expected that the power will be used in the manner that I have described—in other words ubiquitously, whereby all cases will be reported by the police—the provision can be removed, but it may be that the Parliament wants to reinforce the message. I do not think that section 27(7) in any way compromises the Lord Advocate's independence; it simply restates what is in section 12 of the Criminal Procedure (Scotland) Act 1995 and section 17 of the Police (Scotland) Act 1967. The provision is harmless; it is simply a signpost to what the Parliament intends, but it is not necessary.

12:00

The Convener: Arguably, it is redundant.

The Lord Advocate: That is a matter for the Parliament to determine; the Parliament might not consider that that is the position. Whatever view—whether majority or unanimous—the Parliament comes to on that, I as Lord Advocate will take cognisance of it.

Cathie Craigie: Last week, I heard you talking on the radio about guidance that you had issued. I do not want you to go into details, but does that guidance include the older children age group?

The Lord Advocate: That guidance includes instructions on the investigation of crimes against children, but it does not relate to the prosecution of children. It is about how the police investigate serious sexual crimes that involve adults and children. It is not a determination of prosecution policy or an instruction to the police about how to report crimes; it is about how they set about their investigations. It is quite different from the guidance that I will issue to the police following the enactment of the bill.

The Convener: Finally, we turn to the abuse of a position of trust.

Paul Martin: You may have heard that on 11 November, Enable Scotland set out that, in the case of mentally disordered persons, criminalising sexual abuse of trust

"does not seem to work"—[*Official Report*, *Justice Committee*, 11 November 2008; c 1313.]

and that the application of the criminal law in such cases is counterproductive, as it acts as a disincentive to disclosure of possibly inappropriate sexual conduct. What are your views on that, from your experience of dealing with cases of sexual breach of trust in such circumstances?

The Lord Advocate: I have not seen Enable Scotland's written submission; I can speak only from my experience as a prosecutor over some 25 years. People in institutions or care homes who suffer from mental disorder or disability—I include children as well as the elderly—are among the most vulnerable individuals in our community. When I was a young prosecutor, there was a culture, even among the police, of wishing to deal with domestic abuse privately, outwith the courts. The exploitation of mentally disordered people's vulnerability must be dealt with in the most draconian way and should include a deterrence element. I consider the physical, sexual or mental abuse of any such person to be a matter of the most serious nature. When such conduct amounts to a crime, it can be dealt with properly only by the criminal courts.

Paul Martin: So you do not accept Enable Scotland's point that, given the low level of reporting of such cases and the low success rate of prosecutions, another approach should be considered.

The Lord Advocate: Over the years, there have been many reports of the abuse of people with mental disabilities, including the elderly and children, by people in positions of trust. I dispute that it is not possible to prosecute in such cases. It

is extremely challenging to do so, but we have been successful in a significant number of cases. The fact that the process is challenging should not dissuade us from treating the issue with the greatest seriousness.

I do not see the attraction of disclosure as opposed to prosecution—I am talking about cases involving criminal sexual conduct rather than some breach of regulations—other than that it would obviate criminal responsibility. I presume that the matter would be dealt with on a disciplinary basis or through counselling. Members of our community who are trusted to look after those who suffer from mental disability are in the greatest position of trust. A breach of that trust has to be responded to seriously and openly in our courts.

Angela Constance: I note what the Lord Advocate says about the seriousness of breach of trust by people who, because of their employment, have power over vulnerable people. Enable Scotland has asked about scenarios in which the client—for want of a better word—has a mental disorder but would normally have the capacity to consent to sexual activity. What are your views on the criminal law in such scenarios?

The Lord Advocate: I do not see a difference. In those circumstances, one person would be in a position of care, and exploiting that position in a sexual way or allowing a romance to develop would be a failure of duty. If the person in the position of care sees that a relationship may be about to occur, they must desist. There are means by which they can get themselves out of the situation, so that they are no longer in a position of care or trust, and so that they are able to pursue a lawful relationship. A relationship should not happen while the person is in a position of care or trust. If it did, it would be exploitative, irrespective of how we characterise it.

The Convener: Lord Advocate, that concludes this evidence session. I thank you, and I also thank Ms Holligan, who has sat quietly all morning—they also serve who only sit and wait—and Mr McIntyre. I am sorry that the session has taken so long, but you will appreciate the importance of these matters. We needed maximum input from you. Thank you very much.

12:06

Meeting suspended.

12:11

On resuming—

The Convener: Our second evidence session is with the Cabinet Secretary for Justice, Kenny MacAskill; Gery McLaughlin, the bill team leader with the Scottish Government; Patrick Down, who is from the bill team; and Caroline Lyon, from the Scottish Government's legal directorate.

We will go straight to questions. What are the main justifications for the changes to the current law that are proposed in the bill?

The Cabinet Secretary for Justice (Kenny MacAskill): Significant public concern has been expressed by politicians of all parties and beyond in civic Scotland. There is a problem with ensuring that those who commit such heinous offences are dealt with properly. Our law has been built up over many years, so the bill is not an all-singing, all-dancing solution that will sort everything, but it is meant to ease a particular problem with the definition of consent and to deal with legal matters that came up in legal challenges. It also seeks to continue our country on its journey in trying to deal with sexual offending in a better way. Some measures have been taken internally, such as the changes in Crown procedure. The bill's aim is to improve matters. On its own, it will not resolve everything, but it is part of a general strategy by Government, Crown and police to deal with the issues better and to seek to assist when there are interpretation difficulties in judicial matters.

The Convener: The policy memorandum that accompanies the bill draws attention to the "wider context" of the bill, particularly the need to address matters of evidence and procedure in relation to the criminal law more generally. Why does the Scottish Government think it appropriate to introduce this bill before the work on the wider context has been completed?

Kenny MacAskill: The bill is one aspect of our approach to addressing those significant issues. The Lord Advocate commented on how we deal with evidence and corroboration and the Moorov doctrine. Those are on-going issues. Rather than waiting until we get all the ducks in place, we are doing what we can, but at a reasonable rate to ensure that we get it right. We are pressing on with appropriate measures while other processes take place in parallel. Depending on what the Scottish Law Commission comes back with on, for example, the law of evidence, more measures may be taken at a future date.

The Convener: Will the bill result in an increased rate of conviction for rape and sexual assault?

Kenny MacAskill: We hope that it will help in a variety of ways. On its own, it simply tries to provide consolidation and clarification, as well as assistance for juries in reaching decisions—whatever the Faculty of Advocates may say—and indeed for the judiciary. That is the intention and we hope that it does so. We do not expect the bill to be the sole, simple solution. If there were such a solution, it would have been found a long time

ago. We must also change attitudes because of how individuals in Scotland, including, sometimes, those who sit on juries, perceive matters. The bill is meant to improve what we accept is a lamentable situation in Scotland. The bill will not be the only solution, but we hope that it will be part of a broader effort to tackle a dreadful situation.

12:15

Cathie Craigie: Many witnesses to the committee have broadly welcomed the extension of the definition of rape in section 1. However, can you explain why the crime of rape has been confined to penetration with the penis?

Kenny MacAskill: We accepted the Law Commission for Scotland's proposals in that regard, but made two particular changes. We made one because of representations on sadomasochism and the difficulties that that might imply. The other change was to address the problem of underage consensual sex. We acknowledge the view of the Crown and others on penetration with objects, and we accept that these matters are finely balanced.

Apart from the two aspects that I mentioned, the bill that is before the committee simply confirms what we said at the outset, which was that we regarded the matter as non-party political and would bring in the Law Commission's proposals. However, we are more than happy to consider comments on the bill, particularly those made by my learned friend the Lord Advocate. We will also consider the committee's reflections on the bill.

As I said, the bill's definition of rape comes from the Law Commission's proposals. However, the Crown has suggested in evidence, and it has been said privately to me, that the definition should include the horrendous incidents of penetration with an object as well as penile penetration. We will certainly be happy to consider those views.

Cathie Craigie: Are you confident, cabinet secretary, that the bill's definition of rape is consistent with current public understanding of the term? The Faculty of Advocates was concerned that juries might have difficulty with the bill's definition.

Kenny MacAskill: Debates about nomenclature are always difficult. However, the bill's criterion of free agreement is standard for such matters in many countries throughout the world, and certainly in Europe. There is no simple definition that will suit 100 per cent of the population. However, the bill's proposal gets us close to making it as clear as possible to a jury of our peers what is required. The criterion of free agreement is the best one that we can see at the moment. If there are other, whizz-bang suggestions, we will be more than happy to consider them. However, we have taken it on board that the current position is unacceptable, that there is a problem and that there must be change. Whatever my learned friends in the Faculty of Advocates may say, juries have had difficulty with the definition, so we must improve it. Is the bill's definition word perfect? Well, we hope so. Our view is that the bill gets it as clear as is possible. Our understanding of various groups' evidence to the committee is that they accept that we are on the right track.

The Convener: Perhaps we can explore that a little bit further. You have obviously appraised what the Faculty of Advocates said at last week's committee meeting. Have you any views on extending the definition of rape to include oral sex and so on?

Kenny MacAskill: We have taken the bill on board, but we are more than happy to look at the wise counsel that the committee and others will come back with. We accept that some changes need to be made, so we will propose amendments at stage 2. We will be more than happy to take the view of the committee and the wider public on the question of oral sex. However, it appears to us that there are problems around how it would be detected and how a law on it would be enforced, and whether it would be better dealt with through a sexual health and education strategy. As I said, we will be more than happy to take the question on board, but it seems to us that we are addressing most of the matters that we need to. We accept that certain proposals must be amended at stage 2, and we will deal with that. We will take on board others' views on the question of oral sex, but we think at the moment that the bill's definition of rape is satisfactory.

The Convener: We go to Stuart McMillan, although to some extent you have anticipated his questions, cabinet secretary.

Stuart McMillan: Yes, that was regarding rape with an object.

What is the distinctive wrong inherent in the crime of rape, and what is the value in maintaining a separate and distinct crime of rape?

Kenny MacAskill: From discussions, both private and with the Lord Advocate, you will know that in other jurisdictions rape is simply described as a sexual assault. However, rape is within the public understanding. There is a clear requirement to define it, which is what the bill is about, and the circumstances in which it occurs, which is why we require to clarify consent. I tend to think that the serious nature of the offence should be marked and differentiated from a wider offence of sexual assault.

The Convener: We now turn to questions on consent and reasonable belief, with Robert Brown.

Robert Brown: Cabinet secretary, you may have heard the evidence on free agreement and consent, whether there is a difference in meaning between the expressions, and whether "free agreement" should be used throughout the bill. Do you have anything to add to the Lord Advocate's helpful comments?

Kenny MacAskill: No. I did not listen to the whole of the committee's evidence session with the Lord Advocate, but I heard most of it, and we are more than happy to accept the wise counsel of my learned friend.

Robert Brown: There are some areas of difficulty in section 10. Section 10(2)(a) deals with people being under the influence of alcohol or other substances, and you might have heard the evidence about that. Do you think that the provision does the trick in giving sufficient guidance to the court and juries on when a person is incapable of consenting? We are dealing with a common human position.

Kenny MacAskill: The provision is supposed to provide a non-exhaustive list of factual circumstances. The details may change, although it might take the wisdom of Solomon to define them at any specific juncture, as society and matters change. Our view is that the current list in the bill is adequate, but we will happily take on board any additional circumstances that people feel it would be appropriate to specify. We have the flexibility to make changes if we discover that we have not addressed all the matters or if circumstances change.

Robert Brown: We are dealing with serious criminal cases in which there has to be a high standard of proof. Is there any risk that section 10(2) introduces a strict liability version that provides that there is nothing more to be said in certain circumstances when, in the real world, situations are perhaps more complicated?

Kenny MacAskill: No, I do not think that the provision could be perceived as introducing strict liability. The provisions are meant to be indicative, but ultimately the Crown must still prove its case and a jury must still be satisfied beyond reasonable doubt. As Robert Brown and I both know from practising in our adversarial system, there are checks and balances. There was a clear perception, which I agree with, that the scales of justice were not weighted appropriately. We are seeking in the bill to redress the situation, but we still maintain the presumption of innocence and require cases to be proven beyond reasonable doubt.

Robert Brown: We have received a lot of evidence about section 10(2)(b), which refers to prior consent. On the one hand, it has a slightly artificial look about it—with the idea of someone signing a form in advance of the situation—but on the other hand there is perhaps the risk of the defence making spurious claims of advance consent. Do you have any thoughts about that? For example, we have received representations about removing that reference and leaving courts to deal with the situation more generally.

Kenny MacAskill: You are correct: section 10 rules out consent but does not exclude a reasonable belief in consent. That may be difficult to establish in the circumstances as set out.

I am aware of the evidence. It is a matter of balancing where we can go under ECHR with whether we have not gone far enough. We would be more than happy to consider the views of both the committee and those who have made representations to the committee. If the scales are not tilted appropriately or are tilted too much in one direction, we are happy to address that. We must ensure that we do not interfere with what happens in the marital bedroom; hopefully, such issues will be dealt with through sensible policing and prosecution. At the same time, we wish to ensure that victims are protected and do not have to endure spurious assertions or defences.

Robert Brown: We are defining the criminal law, so it is important that we do not end up with positions that criminalise or place an artificial interpretation on ordinary, consensual conduct. Is there not a risk that section 10(2)(b) could create artificial situations, because of the issue of what constitutes prior consent? Would it not be better to leave out that provision?

Kenny MacAskill: If we leave it out, we will undermine the ability to prosecute in some instances. It is about striking a balance. We should not interfere with legitimate behaviour that is not criminal or that is intended to be perfectly innocent in a relationship between individuals—even if it is not behaviour in which some would indulge. We think that the bill strikes a reasonable balance but, if others, including the committee, think that that is not the case, we will be happy to review the position.

Robert Brown: Section 10(2)(c) relates to conduct that is agreed or submitted to because of violence or threats of violence. We received evidence—you may have seen it—that that provision may not deal adequately with situations involving past abuse or on-going relationships in which an implied threat is lurking in the background. Do you have any thought about the provision, in light of the evidence that we have heard?

Kenny MacAskill: That is a good question. The issue causes considerable concern to those who deal with domestic abuse issues. Domestic abuse has a history and leaves a legacy. We believe that

the current provision is adequate, because it covers instances of domestic abuse that have happened in the past. I accept that it is difficult for the Crown to prove such cases, but the law allows past abuse to be used as evidence that consent was given because of threats and coercion. The problem is more with persuading juries of that than with the law, which allows past instances of violence or threats—not simply those that have happened within 24 hours or a similarly short period of time—to be taken into account.

Robert Brown: In short, as the Cabinet Secretary for Justice, you are satisfied that the phraseology of section 10(2)(c) allows that to be done in a sensible and reasonable manner.

Kenny MacAskill: As I said at the outset, the Scottish Law Commission drafted the phraseology of the section. If the committee or others think that it is inadequate, we will be more than happy to consider that. At the moment, it appears to us that the problem is not that the law does not allow us to take into account past incidents but that we need to persuade juries to do that. If it is felt that the phraseology can be tightened in any way, I will be more than happy to do that.

Bill Butler: Section 1 makes it clear that a belief in consent will not exclude responsibility for rape or any other offence set out in parts 1 and 3 of the bill if it is not a reasonable belief. Does that mean that rape can now be committed negligently? For example, A may intentionally commit a sexual act against B in the belief that B is consenting, but where that belief has been carelessly formed.

Kenny MacAskill: No. At the end of the day, under mens rea and other principles that have always existed, for an act to be a crime, it must be committed with the intention to do wrong. I find it hard to think of circumstances in which someone could negligently commit the crime of rape. It comes back to the issues of how we deal with free agreement and reasonable belief. Some of it comes down to commonsense interpretation.

12:30

Bill Butler: That was a clear answer, cabinet secretary.

The committee has heard concerns that section 12 may not operate appropriately if the accused declines to give evidence. In such a case, it may be difficult or impossible to determine what steps the accused took to ascertain whether there was consent. Is there a potential difficulty there?

Kenny MacAskill: These are difficult issues—not only for those who draft the legislation but for those who interpret it and those who prosecute using it. I think that the balance in the bill is right, but we will be more than happy to make amendments if they will improve the bill.

A jury will be capable of inferring whether there was prior consent, based on matters that were not commented on, investigations that were not made, or refusals to answer or to say what investigations were required. There is a limit to what the law can specify in the nature of some defences. We therefore have to allow inferences to be made; we have to allow the jury to use common sense.

Bill Butler: You have answered the question that I was about to ask, which was on the idea of a jury drawing an inference.

Could an onus be imposed on the accused to show that he had taken steps to ascertain whether there was consent? Would you be open to such an amendment?

Kenny MacAskill: I would certainly be happy to consider it—but it would run contrary to the idea that, in Scotland, people are not required to state their defence and are entitled to hide behind a denial. We have to challenge such ideas, although society has usually been reluctant to change them. However, I think that the balance at the moment is correct. A case can be founded on a line of questioning by the police: during the prosecutors' line of questioning, they can ask why particular issues were not mentioned earlier. Then, if those issues are still not mentioned when the opportunity is given, prosecutors can ask the jury to draw the appropriate inference. That will doubtless be commented on by the judge.

I do not rule out an amendment along the lines that Mr Butler suggests. However, it would be a fairly major step, and some people might point out that such an onus was not required in other types of defence.

We would not rule out an amendment out of hand, but the police will assume, and the prosecution will certainly home in on, the jury's ability to draw an inference.

The Convener: Part 4 of the bill deals with children.

Paul Martin: On 4 November, the committee heard evidence from the Commissioner for Children and Young People. She said that children under the age of 13 should never be held criminally responsible. What are your views on that?

Kenny MacAskill: That is a separate and wider issue. There are specific and general issues. Some issues have been raised by the United Nations and other issues have been raised about the age of criminal responsibility in this country. The issue that Mr Martin raises has been considered in years past, and it is under review by the Government.

Earlier, the Lord Advocate spoke about the number of people who are prosecuted, and such issues will have to be considered in due course. At the present time, they should be left to the discretion of the Crown.

Paul Martin: Sections 14 to 19 have been designed for the protection of children. However, those crimes can also be committed by children.

Kenny MacAskill: As I have suggested, there are two separate issues, one of which is the age of criminal responsibility in this country. If you want to argue for a change in that, we could have a debate at an appropriate time. The issues are under consideration. There have been comments from the UN, but those are separate issues.

We are talking about the Sexual Offences (Scotland) Bill and about protecting our children. Therefore, the issue that Paul Martin raises is one for the discretion of the prosecution service.

Paul Martin: Is treating children who are under 13 as not being mature enough to make decisions about sexual conduct inconsistent with holding them criminally responsible for engaging in that conduct, especially when no evidence of coercion or exploitation exists?

Kenny MacAskill: I return to what I said. We are dealing with two issues, one of which is the age of criminal responsibility. If people want to revisit that, that can be done, but that is what applies at present. The bill is intended to make the law better and more fit for purpose and to protect our children.

Does a clear dichotomy exist between having the ability to prosecute a child and at the same time protecting that child? The answer is, of course, yes. However, the solution with regard to the age of criminal responsibility lies elsewhere. The bill's purpose is to protect children who are under 13, who we do not think are capable of consenting to sexual activity. The Crown will consider how to deal with any child who is under 13 who carries out such conduct.

Paul Martin: I appreciate that you have said that the issue is not a matter for the bill, but the children's commissioner said in her evidence that children who are under 13 should not be criminally responsible. All that I am asking is whether you support that suggestion—yes or no?

Kenny MacAskill: That is a matter for another day.

Paul Martin: I appreciate that, but we have received that evidence from the commissioner in response to the bill.

Kenny MacAskill: I as an individual and the Government are considering and reflecting on the matter.

Paul Martin: So you have no response to that evidence that we have received.

Kenny MacAskill: We are considering it. We have had representations from the United Nations. I am more than happy to take on board your view, if you are willing to give it.

Paul Martin: I am asking the questions.

Kenny MacAskill: I have given you the answer.

Paul Martin: You are not giving me an answer—

The Convener: We are not getting terribly far.

Robert Brown: I understand that a slightly more subtle aspect is that a legal doctrine links offences that relate to the protection of victims to situations in which it is not normally regarded as appropriate to prosecute people who are in that category of victim. If we forget about the underlying general ability to prosecute children who are over 8, does a major inconsistency remain not just in practice, but in legal principle, in the idea of prosecuting children who are under 13 for conduct from which they are supposed to be protected?

Kenny MacAskill: The short answer is yes. As I told Mr Martin, such matters must be examined. The Government, the Parliament and the country have received representations from the United Nations and others, which must be considered. If members have views, they should let us know them and the Government will reflect on them.

We must allow the Crown to act on the basis of whether a crime has been committed, whether it can be proved and whether prosecuting it is in the public interest. The Crown has always had to and will always have to answer those three questions. We always fall to the third question: is prosecution in the public interest? That judgment is exercised with great discretion and judiciousness by the Lord Advocate and the Crown. I have great faith in them.

Robert Brown: Would the issue be squared off by an understanding that, in the circumstances under the bill, perpetrators who were under 13 would not be prosecuted but would routinely be referred to a children's panel?

Kenny MacAskill: The intention is that such matters will routinely go to a panel. We must consider the facts and circumstances and trust the Lord Advocate and her successors to act in the public interest.

Stuart McMillan: The Scottish Government has departed from the Scottish Law Commission's approach to decriminalisation of sexual conduct between older children.

Professor Gerry Maher gave evidence to the committee 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".—[*Official Report*, *Justice Committee*, 18 November 2008; c 1370.]

Why did the Scottish Government follow the route that it took?

Kenny MacAskill: We understand the Scottish Law Commission's general intention, but a great deal of public concern was felt that the message that would be sent and the inference that the public at large—not necessarily legally qualified people—would draw would be that consensual sexual relations between 13 to 16-year-olds were being legalised. That would be a retrograde step. We have problems with sexually transmitted diseases, teenage pregnancies and all the difficulties in which children become involved. It would be inappropriate to allow the inference to be drawn that the bill legitimised and decriminalised underage sex for kids who were aged between 13 and 16.

We think that it is necessary to make that clear in the law, even if the intention is, in the main, not to prosecute but to refer to the children's panel for care and welfare. We felt that we struck the appropriate balance by making it clear that we do not condone underage sex between those aged 13 to 16, nor do we want it to be suggested in any way that we wish to legalise it. Equally, we recognise that prosecution is not necessarily the best way to go. We think that the correct balance will be struck by maintaining the law, so that nobody draws any false interpretation from our approach; at the same time, we will ensure that the care and welfare that are often what is needed are provided by a reference to the children's panel.

Stuart McMillan: I have a couple of examples of cases in which such issues could arise. First, why should it be a crime for a 15-year-old boy to have consensual sexual intercourse with his 15-year-old girlfriend, but not a crime if a 15-year-old boy has oral sex with a 13-year-old boy?

Secondly, in a case in which an adult who is 16 years and one day old had sex with a girl who is 14 years and one week old, could not section 29(3) be considered to be reducing the age of consent by the back door?

Kenny MacAskill: The short answer to your final question is no, it could not be.

As a society, we believe—and the Government is articulating this broad view—that 15-year-old boys and 15-year-old girls should not have sexual relations, because the nature of maturity with regard to health and other social problems makes it inappropriate. We want to ensure that we continue to drive that message home. Section 29(3) on age proximity does not apply to intercourse. On oral sex, as I say there are issues about how it is proven and how it is seen. Our view is that if the committee suggests that the matter should be dealt with in the bill, we would be more than happy to consider and reflect upon that option, but it seems to us that many such matters are best dealt with through education and health counselling. We must take into account the difficulties in locating such activity, proving it in court and progressing such cases. It is about striking the right balance.

Stuart McMillan: What is the justification for extending the criminal law to girls under 16, who currently do not risk prosecution for engaging in consensual sexual conduct?

Kenny MacAskill: That relates to the ECHR's requirement for gender neutrality. I do not want to be flippant, but it could be argued that perhaps many of those girls should be referred to the children's panel so that we can look after their care and welfare, because teenage pregnancy is a considerable problem for our society and it causes great difficulty and distress for the girls and their families.

Stuart McMillan: Paragraph 174 of the policy memorandum states:

"The Scottish Government is satisfied that the provisions of the Bill are compatible with the European Convention on Human Rights."

However, it makes no mention of the privacy rights of older children. Does the Scottish Government believe that older children have rights to sexual privacy under article 8(1) of the convention?

Kenny MacAskill: Our view is that they are children and that children are covered by the ECHR in the same way as adults. Those matters relate to how we interpret the convention and the broader views that we take as a society on children's rights. We think that we have struck the appropriate balance. That is why we differentiate between children who are aged under 13 and older children. It could be argued that those things relate to the maturity of individual children—a younger child may be very mature and an older child may be immature—but, as a society, we have to set down some provisions that trigger messages and lay down the rules and parameters within which we operate. We believe that we have got the correct age balance. We do not believe that under-13s are capable of providing appropriate consent.

We must protect the rights of children between 13 and 16, who we believe are not in a position properly to consider their own interests on such matters. It is a question of balance. Of course

children have rights under the ECHR, but, as the Lord Advocate said, there is a margin of appreciation. Society has a choice about where to set the parameters and we have decided to make provision for 13 to 16-year-olds. Other jurisdictions take a different approach, but I do not think that anyone is suggesting that we change our approach.

12:45

Stuart McMillan: If intervention can be made through the children's hearings system to deal with underage sex, why is it necessary to resort to the criminal law to deal with the issue?

Kenny MacAskill: There was a considerable view that if we did not do that and simply adopted the Scottish Law Commission's initial view, the Parliament and the Government would pass a law that would trigger the message that we were decriminalising consensual sex between 13 and 16-year-olds, which seemed to be a retrograde step. We want such matters to be dealt with sympathetically in most instances, given the clear need to consider a young person's care and welfare, but we must also trigger a message on the issue to the public, young and old, and there must be a caveat in relation to the—thankfully—few instances in which there might be doubt or a requirement to prosecute.

The Convener: Further to your response to Stuart McMillan, where do you place your reliance on the bill's compliance with article 8.2 of the ECHR?

Kenny MacAskill: We place our reliance on the advice of our legal team and consultation with the Lord Advocate. It would be incompetent of the Government to ask the Parliament to pass a bill that was not ECHR compliant. The best advice that we have is that it is ECHR compliant.

Cathie Craigie: I am sure that you have followed the evidence that the committee has received in recent weeks. There is overwhelming evidence from the majority of witnesses who work with young people that the age of consent should not be lower than 16. However, people are concerned that the bill will criminalise young people who might be better served by welfare intervention. People still think that to enshrine in legislation provision for referral to the children's reporter would be a better way of dealing with the problems that you described, such as STDs and teenage pregnancy. I think that we all agree that it is not good for young people under 16 to be sexually active. Would it be better to engage with the public and discuss using the children's hearings system to try to resolve something that has been a problem for a good number of years?

Kenny MacAskill: We are open to the committee's suggestions. Our view is that the approach that we are taking provides for what you describe. We are making it clear that we think that it is wrong for young people under 16 to engage in sexual intercourse; we are giving the Lord Advocate flexibility to ensure that children's care and welfare are considered; and we are making provision for the fiscal to address the issue in the odd instance in which there is good reason to do so. We are leaving it to the Lord Advocate to provide guidance and we are satisfied with that approach, but if the committee wants us to enshrine matters in the bill we will consider doing so.

The Convener: Let us see whether you can convince Mrs Craigie that your approach is sufficient.

Cathie Craigie: The approach that is proposed in the bill is already being taken. Cases are referred to the Lord Advocate for decisions. However, while we consider the bill the problem is growing and we are not able to deal with it. Sexual activity carries risks for the future wellbeing of the young person. For those reasons, do you not think that the bill provides the opportunity to consider something slightly different that would ensure that young people who are engaging in sexual activities would be referred on to the children's reporter and would be provided with the necessary welfare responses, education and support through a difficult time in their life?

Kenny MacAskill: I agree fully with your intention and share your sympathies. However, we are dealing with specific legislation on the criminal law on sexual offences. The matters to which you refer would be dealt with appropriately by other agencies, by colleagues in other Government departments, or by local government and voluntary organisations. As you correctly said, we believe that, to some extent, the bill simply seeks to maintain the status quo in the law as it pertains to sexual intercourse between people under the age of 16. There is merit in the maxim, "If it ain't broke, don't fix it." We do not need to change that law; we can tackle sexual acts between those who are under the age of 16, but there are other problems and we have to consolidate the legislation. Your points about how we deal with the other aspects of the issue are valid and I share your sympathies. However, they would be best dealt not with by legislation but by health and education.

Cathie Craigie: We would all agree that, "If it ain't broke, don't fix it"; however, it is broke. More and more young people are presenting with sexually transmitted diseases and we do not seem to be able to tackle the problems of teenage

pregnancy, which can have a huge effect on a young woman's future prospects.

If it comes to the attention of the authorities that a young person is engaging in underage sex, and the legislation provides that they will be reported to the children's reporter, they could be offered the support that they would otherwise miss. At the moment, not every young person who becomes pregnant under the age of 16 is reported to the authorities so there must be a large group of young people who do not get any help or support and have to rely on their families.

Kenny MacAskill: When I say, "If it ain't broke, don't fix it" I refer specifically to the law on underage consensual sex between children aged 13 to 16. If you wish to suggest further changes by referring to oral sex, for example, I am more than happy to look at them.

However, there is a wider problem. That is why we have the getting it right for every child programme, health strategies, advice, and working groups elsewhere. Some aspects of the problem have to be dealt with in a way that is not simply legislative or related to criminal justice; other departments and organisations have to deal with them, too.

Today, we are dealing specifically with the question of offending. The Government wants to ensure that we continue to make it clear that sexual relationships between people who are under the age of 16, consenting or otherwise, are not acceptable. Will a law on its own solve the problem? No, it will not. We have to educate our young people, warn them and provide them with health and education.

We are happy to consider any proposals for changes to the legislation, but many of the other issues that you have raised would be better dealt with by health and education, or other departments, rather than justice and legislation. That is why we have GIRFEC.

Cathie Craigie: One of my colleagues will probably raise this point later, but I am pleased that you are talking about the health and education departments being involved. We might be able to discuss that issue later, but I do not want to steal a colleague's thunder.

The Convener: It is an important issue.

Robert Brown: I want to approach the same issue from the other side. The Lord Advocate said that only a small number—between 10 and 12 a year—of section 27-type cases of sex between older children are prosecuted. She said that there were often situations in which coercive elements, for example, could not be proved. Is that a rather unsatisfactory, narrow base on which to build a more general law that applies to people across the board?

Kenny MacAskill: It is unsatisfactory, but I cannot think of anything else that can be done. Either we do not proceed against people when there is clearly a reason to believe that something untoward and illegal has happened, or we do the best that we can. The situation is not ideal, but we should try to ensure that something is done, with at least some caveat. That is the position that we find ourselves in. To some extent, the Crown deals with such matters reluctantly, on the basis that other options that are open to it would be incapable of being proven.

Robert Brown: The vast bulk of children under 16 will end up at a children's hearing anyway, even if the prosecution route is gone down. Would it not be more sensible to put things to a children's hearing in the first place?

Kenny MacAskill: No. In some instances, if the Crown has been unable to prove that a more serious sexual assault has taken place, we should, at the minimum, seek to record matters. There is good reason why that option should be available to authorities. Such matters would not be best dealt with simply by leaving them to a children's panel.

Nigel Don: Good afternoon, cabinet secretary. You will be aware of the substance of section 27(7), which states:

"The Lord Advocate may issue instructions to chief constables".

The Lord Advocate said that she regards that subsection as redundant in the light of section 12 of the Criminal Procedure (Scotland) Act 1995, and I think that you would share her view. I understand why we should restate the Lord Advocate's discretion and why we would want to put the provision next to the preceding subsections, but is there not a risk that, by including it, every subsequent statute will have to include such a provision, as leaving it out would mean that a different approach was being taken? That is a statutory issue. In addition, is there not a risk that, by including the provision, we will read its absence into previous Scottish Parliament statutes? Will we set a dangerous precedent by including a redundant provision?

Kenny MacAskill: I do not think so. I must accept the best advice of people who are professionally qualified in such matters. It seems to me appropriate to include the subsection, and I do not see why it should set a precedent. There is no clear evidence that it will undermine previous legislation in any way. If it is appropriate for the bill, we should do what is right.

The proposal is part of a journey, not all of which is about what we do in legislation. The issue is how we tackle a particular problem. I am satisfied that the provision will not undermine the criminal law as it applies across the broader sweep of Scottish society.

Nigel Don: On a completely separate issue, Scotland's Commissioner for Children and Young People, among others, suggested to the committee that we should have consulted the young people who will be affected by section 27. Not many 15-year-olds have been consulted about a law that will affect them. What is your perspective on that, please?

Kenny MacAskill: We have spoken to various organisations and people, including Scotland's Commissioner for Children and Young People, Barnardo's and Children 1st. We went out of our way to ensure that we consulted 13 and 14-year-olds, if not specifically and directly. We consulted organisations that articulate and advocate for them and represent them.

Nigel Don: But is it fair that they represented those young people? I am not disparaging the organisations and person you referred to, but if you want to talk to 14 and 15-year-olds, should you not do so?

Kenny MacAskill: Obviously, Governments seek discussions with stakeholders and interest groups as a matter of course, and we have done that. We will get into difficulties if we ensure that in considering any legislation we must speak to X or Y percentage of people or people who are this, that or the next thing. We took a broad range of views. As I have said from the outset, we are still listening, and we are happy to discuss matters, but we have acted appropriately and obtained the appropriate information. The caveat is that we are still happy to listen and make changes if need be.

13:00

Cathie Craigie: You say that you are happy to listen and make changes. In the evidence that we have heard, children's organisations and church organisations strongly expressed the view that we should be consulting young people. This is perhaps the last chance we will get for a good number of years to consider and legislate in the area, so it is right that young people should be consulted. If the committee's report suggests that the Government should extend the period between stage 1 and stage 3 to allow a consultation exercise to be undertaken, will it consider doing so?

Kenny MacAskill: That would cause a great deal of difficulty. I would have to speak to parliamentary business managers. If the committee wishes to extend its evidence-gathering sessions, I am more than happy for the Government to facilitate that. If you want to ensure that groups of children are brought in to give evidence, that is fine. The Government will help you with that. I cannot commit the Parliamentary Bureau or the business managers beyond that, but if that is what you want to do, because you feel that we have not done it appropriately, we will happily help you to do it.

Cathie Craigie: Convener, I do not want to do that; it is the responsibility of the promoter of a bill—in this case the Government—to consult properly on the legislation that they propose. It is not the committee or the Parliament that should do the consultation. Witnesses have identified a serious flaw in the process that the Government undertook to produce the bill. If we want to take seriously the people who come along to engage with the Parliament—and, through the Parliament, the Government—by giving evidence to committees, surely we should listen to them.

Kenny MacAskill: Absolutely. Legislation is about checks and balances, though. That is why we have a committee structure in the Parliament.

I do not believe that the Government has got the bill wrong. I believe that we have appropriately checked with stakeholders and representative bodies, but if you think we have not, the opportunity lies with you to seek to do so. I am not prepared to undertake to extend the consultation process, but I am prepared to facilitate things for you as an individual or the committee as a whole if you wish to carry out an investigation and discussion with others to whom you think we have not spoken.

Cathie Craigie: That is a disappointing answer and I am sure that other members of the committee will be equally disappointed by it.

Before Nigel Don came in, we were discussing the involvement of the Government's education and health departments. Do they agree with the way forward that the Government proposes in the bill? Is there agreement between the justice department and the health and education departments?

Kenny MacAskill: Yes.

Cathie Craigie: Okay.

Robert Brown: The minister will be aware of the broad thrust of the UN Convention on the Rights of the Child, the Children (Scotland) Act 1995 and the like, under which previous Governments have taken the view that proper consultation with children and young people on matters that affect them is part of the process. Such consultation is an obligation that falls on a Government, is it not? Has the cabinet secretary taken guidance from the Cabinet Secretary for Education and Lifelong

Learning about the process that she would advise should be gone through?

Kenny MacAskill: I think I have already answered that, convener. We are more than satisfied that we have gone through matters. If we have been remiss, Parliament has been set up with checks and balances. The same offer applies to Mr Brown as applies to Ms Craigie. The Government will support them in whatever ways we can if they wish to investigate matters, but having spoken to a broad variety of organisations we are satisfied that we have done what is appropriate.

Robert Brown: Does the cabinet secretary accept that there is an obligation on the Government to take on board the spirit of the UN convention—in respect of which, incidentally, a report was made recently about certain deficiencies in UK and Scots practice? Does the cabinet secretary realise that that is an obligation on the Government?

Kenny MacAskill: Well, these obligations fall upon our Government just as they fell upon previous Governments. Our position is that we believe we have consulted appropriately. If individuals or the committee believe we have not, they have the opportunity to sweep that up as part of the checks and balances that we have in a democratic society.

The Convener: We will move on to questions about the abuse of a position of trust.

Angela Constance: A few weeks ago, the committee heard evidence from Enable Scotland, which claimed that criminalising sexual breach of trust in the case of mentally disordered persons

"does not seem to work".—[*Official Report*, *Justice Committee*, 11 November 2008; c 1313.]

According to Enable, the potential application of the criminal law in such cases is counterproductive because it acts as a disincentive to the disclosure of possible inappropriate sexual relations.

Kenny MacAskill: We heard that, but we are not persuaded. Enable gave evidence that was contrary to its initial position. The legislation that we are introducing has been discussed with organisations including Enable and the Mental Welfare Commission for Scotland. We feel that some protection is necessary. These issues are a matter of balance. We have to ensure that we do not cast the net too widely and interfere with organisations and individuals who are acting legitimately and thereby jeopardise a variety of aspects of the care and wellbeing of individuals, but we have to protect those who have mental disabilities. We believe that we have struck the correct balance. That said, we will reflect on what the committee concludes at the end of its evidence-gathering sessions on whether provisions should be extended to youngsters.

The Convener: Finally, we have a question on penalties from Paul Martin.

Paul Martin: I would like you to clarify whether I am misreading schedule 1, which relates to penalties. I understand that, for the rape of a young child, the maximum penalty on conviction is life imprisonment, or a fine, or both. Is it possible that a court's disposal for the rape of a young child could be a fine?

Kenny MacAskill: I think I heard the Lord Advocate answer that question earlier. I can only repeat that we view rape as a heinous offence, which is why we are taking action in the bill. There have been problems in Scottish society that we are seeking to address. We expect those who perpetrate rape to be dealt with severely. Gerry Maher and the Lord Advocate indicated that the general intention was that the fine should be an add-on rather than an alternative. Having checked, I can confirm that in the past 10 years nobody has been given a fine for rape. I assure you that we will check the drafting to ensure that if there is a drafting error, it will be addressed.

You have my assurance that the situation you fear has not happened and that we will not allow it to happen. However, there was merit in what the Lord Advocate said. A fine would not benefit the victim, but I could be persuaded that a compensation order should be added on to the sentence of a rich man who committed such a heinous offence and who could afford to pay. I hope that you accept the Government's assurances that the situation that we inherited does not seem to present a problem but, for the avoidance of doubt, we will ensure that it does not.

Paul Martin: I just want to clarify what you said. Are you disappointed with the current drafting of the bill, which results in the possibility of a fine being imposed?

Kenny MacAskill: No. I said that if there is a problem or ambiguity, we will address it. The current circumstances are the circumstances that have always existed. If what you are concerned about is that previous Administrations have not addressed matters appropriately, you can rest assured that we will seek to do so. I am giving you an assurance that nobody has been fined, instead of being imprisoned, for rape since 1999. It is our intention to ensure that people who commit that offence are dealt with severely. It is our understanding that the fine was to be cumulative; it was not meant to be an alternative. There was a great deal of merit in what the Lord Advocate had to say about that, particularly in relation to compensation orders. We will ensure that there is no ambiguity about these matters.

Paul Martin: You referred to previous Administrations, but the issue is too serious for us to try to score political points.

Kenny MacAskill: Perish the thought.

Paul Martin: The point I am making is that the current law is common law. We have an opportunity in the bill to introduce minimum standards in relation to sentencing options. What I am trying to extract from you is humility about the fact that the current position in the draft bill is unacceptable and an assurance that you will lodge an amendment to it.

Kenny MacAskill: I thank you for that selfless, non-partisan interpretation. I reiterate that the Government will ensure that our people are protected, that the victims of rape are treated with dignity and respect and that the perpetrators are appropriately punished. As I said, if there is a drafting flaw—I am not qualified to comment on drafting—it will be addressed, so you can sleep easy.

The Convener: I want to do a bit of sweeping up on sections 40 and 41. Is it the Government's intention to do away with only the common law offences that are defined in those sections?

Kenny MacAskill: Yes, that is the case as per those sections.

The Convener: Will the common law offences that are mentioned there as being taken off the statute book be used only in historical cases?

Kenny MacAskill: Yes, that is our intention.

The Convener: Can you enlighten us as to which situations are potentially envisaged under section 41?

Kenny MacAskill: I think that they will probably be matters of an historical nature—clearly, it is more for the Crown to comment on what circumstances are envisaged—that come to light once the bill has been enacted. We all know that many matters that are—thankfully—successfully prosecuted may be of an historical nature. The fact that matters occurred many years ago does not mean that the perpetrators should be able to avoid punishment.

The Convener: Basically, the bill takes a belt-and-braces approach?

Kenny MacAskill: Yes.

The Convener: I thank Mr MacAskill—

Robert Brown: Convener, if I may, I would like to catch up with the minister on a couple of equalities issues.

Section 1 uses phraseology that refers to "artificial penis" and "artificial vagina". As you may be aware, equalities groups made some criticism of that phraseology and suggested that the reference in the English legislation to "surgically constructed" parts was more in tune. Do you have any views about that? Are you sympathetic to looking at that again?

Kenny MacAskill: Mr Brown, both you and I are legally qualified, so we are very conscious that legal draftsmanship is a technical matter. I am more than happy to leave such matters to those who are better qualified, but I am also happy to seek the views of the Scottish Government's legal department. If the committee is persuaded that the nomenclature that is used south of the border is better, I will not have a difficulty with that unless those advising me say that there is some technical problem in Scots law.

Convener, perhaps I may advise the committee on what other matters we intend to lodge amendments at stage 2. I can confirm that they include extending the offence at section 5 to catch sexual images such as genital nudity as well as images of sexual activity; extending the offence at section 8 of administering a substance for a sexual purpose to cover circumstances in which the substance is administered by a third party albeit that the offence is committed by another; redrafting the offence at section 7 to ensure that the same approach is taken as in sections 4, 5 and 6; and amending the non-physical sexual offences at sections 4 to 7 to ensure that the purpose of such acts is subject to an objective, rather than a subjective, test. We intend to lodge amendments on those provisions as well as on other, minor, technical matters.

As I said at the outset, we view this as a non-partisan bill, so if, upon reflection, members think of other amendments—whether they relate to equal opportunities issues or to other matters—we will be more than happy to consider them. We seek to improve the law. The bill will not take us into a perfect world of how to deal with rape—that requires other things—but we believe that it will make it easier for justice to be done.

Robert Brown: That is very helpful.

Another, more general, point concerns the references to outdated phraseology in section 13—"Homosexual offences"—of the Criminal Law (Consolidation) (Scotland) Act 1995. It may or may not be appropriate to deal with that in this bill. Does the cabinet secretary have any thoughts on how the inappropriate language in that section can be got rid of? Is there any intention to consider that in a subsequent bill or to revisit it in this one? The equalities organisations made some valid points about that.

Kenny MacAskill: I am happy to consider that. I tend to think that the purpose of the bill is to build on the views of the Scottish Law Commission,

which addressed the specific problem of sexual offences in relation to ensuring that we improve on current circumstances, in which far too many people who perpetrate rape are not brought to justice.

There are other issues relating to how we deal with homosexual offences and the perception thereof in Scottish society, but I think that this is not the appropriate juncture at which to bring those in. I am not aware of any current proposals to change the legislation as Robert Brown suggests, but that is something we can discuss. Our priority in the bill is to improve the plight of the victims of rape by ensuring that those who have to go through the ordeal of court cases are treated with dignity and respect. It is hoped that some of the people who have managed to fall from the clutches of the system when justice has not been served will be brought to book.

13:15

The Convener: Have you finished, Mr Brown?

Robert Brown: Yes. I am sorry about that.

Cathie Craigie: I have a final question about consultation in general. The Government launched its consultation on the bill following the publication of the Scottish Law Commission's report on rape and other sexual offences. It is not clear from the documents that accompany the bill who was consulted on the bill. Can you advise the committee on that? It appears that there was consultation on the Scottish Law Commission's report, but I am unsure who was consulted on the bill.

Kenny MacAskill: I do not have a list of the consultees, but I am more than happy to write to the committee with a full list of everybody we consulted.

The Convener: That is covered in paragraphs 26 and 27 of the policy memorandum.

Kenny MacAskill: Thank you.

The Convener: I am doing your work for you, Mr MacAskill—not for the first time, I may say. I thank you and your officials for your attendance and for the prior notification of some of your intentions at stage 2. That is particularly helpful.

The committee will now move into private session for the remaining agenda items.

13:17

Meeting continued in private until 13:49.

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