JUSTICE COMMITTEE

Tuesday 17 March 2009

Session 3

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JUSTICE COMMITTEE
9th Meeting 2009, 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)
*Stewart Maxwell (West of Scotland) (SNP)

COMMITTEE SUBSTITUTES

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

*attended

THE FOLLOWING GAVE EVIDENCE:

Fergus Ewing (Minister for Community Safety)
Gordon McNicoll (Scottish Government Legal Directorate)

CLERK TO THE COMMITTEE

Douglas Wands

SENIOR ASSISTANT CLERK

Anne Peat

ASSISTANT CLERK

Andrew Proudfoot

LOCATION

Committee Room 1

Scottish Parliament

Justice Committee

Tuesday 17 March 2009

[THE CONVENER *opened the meeting at 10:17*]

Subordinate Legislation

Victim Statements (Prescribed Offences) (Scotland) Order 2009 (SSI 2009/31)

Victim Statements (Prescribed Offences) (No 2) (Scotland) Order 2009 (SSI 2009/71)

The Convener (Bill Aitken): Agenda item 1 concerns subordinate legislation. First up, we have two negative instruments. The Subordinate Legislation Committee drew the first of the instruments, SSI 2009/31, to the attention of the Government on the ground that it was defectively drafted. The second instrument, SSI 2009/71, revokes and replaces the first, but not until 1 April.

Scottish Government officials have been invited to attend this meeting to answer any questions that members might have. I welcome Bill Hepburn, the head of the Scottish Government's victims of crime branch, Gordon McNicoll, the division head of the solicitors criminal justice, police and fire division of the Scottish Government, and Andrew Ruxton, a solicitor in that same division.

Thank you for attending today, gentlemen. Who is going to offer the explanation?

Gordon McNicoll (Scottish Government Legal Directorate): I am going to do it today.

We acknowledge that an error appears in SSI 2009/31 in that no coming-into-force date is specified. The error was drawn to our attention by the Parliament's solicitors, who examined the instrument after it had been signed by the minister and laid. Obviously, we apologise unreservedly for the fact that the error occurred.

Once the matter was drawn to our attention, we decided that the appropriate way to correct the mistake would be to revoke the defective instrument and replace it with a correct version that includes the coming-into-force date. That is what SSI 2009/71 does. It is important to note that it has been possible to make and lay the second instrument and bring it into force on 1 April 2009 without breaching the 21-day rule. The first instrument will be revoked as soon as it comes into force, which is the same time as the second instrument comes into force.

We considered a range of options when the matter was drawn to our attention. The first was to do nothing in the hope that the coming-into-force date would be obvious, but we concluded that that would be inappropriate. As the Subordinate Legislation Committee noted, there would be a strong argument that the order came into force on the day on which it was made—3 February—and that, because it came into force at the start of that day, it had done so before the minister signed it. In any event, that approach would give rise to uncertainty, which seemed to us to be highly undesirable. The policy is that the order should come into force on 1 April, so we took the view that the best way forward would simply be to revoke the first order and replace it with the second.

We have taken the problem that has arisen very seriously and investigated how it happened. It seems that it arose during the drafting process. We adjusted what appears now as article 1 fairly late on and, during that process, we omitted to include the commencement date in what was article 1(1). We apologise unreservedly for that. Obviously, it is a matter of concern because the order, like every other instrument, will have been checked in the legal directorate before the final version was sent to the minister for signing. It will have been checked by the branch head and the division head—which was me in this case—and by Scottish statutory instrument advisers, who look at all instruments. To be honest, I cannot explain how none of us managed to pick up the error; we can only speculate about that.

I suppose that the one positive thing that we can say is that all drafting solicitors will now be more aware that such problems might arise than perhaps they were before, although it is clearly common knowledge that instruments need a commencement date.

As I said, it is fortunate that we have been able to rectify the problem before the first order comes into force, and we apologise unreservedly for the error.

The Convener: You have been very up front, Mr McNicoll. You will appreciate that this is the second successive week that we have had to deal with similar issues. Is a pattern emerging?

Gordon McNicoll: No. I accept that I am at the committee for the second week running, but I have no plans to be here again. As Michael Carey explained last week, there was a version-control problem with an instrument, not a drafting problem as such. Perhaps that is no consolation to the committee, and the other error is also a matter of concern, but the problems are distinct so I do not think that there is a pattern as such.

Bill Butler (Glasgow Anniesland) (Lab): If the proper order will not be in force until 1 April, will there be any detrimental consequence in the interim?

Gordon McNicoll: No. The first order was due to come into force on 1 April because the new scheme will start from that date. As I have said, it is fortunate that the problem was identified early enough for us to be able to revoke the first order, make the second order and lay it without breaching the 21-day rule. There should be no detriment to anyone.

Nigel Don (North East Scotland) (SNP): It seems that no damage will be done in this case—apart from to reputations and pride perhaps—but there may be occasions when similar errors occur, because people make mistakes. The application of a statutory instrument could be much more significant, and its start date could be in dispute as a result of such an error. Will you reflect on whether there should be a statutory change to protect against such a problem? I understand the general principle that an instrument coming into force immediately after it is laid and signed could cause you a problem. Might there be value in introducing somewhere in legislation a presumption that, in the absence of a specified date, which instruments would normally include, an instrument will not come into force for a week or two after it is laid and signed? That would give us a chance to catch such errors and ensure that the date when a provision comes into force is clear.

Gordon McNicoll: I assume that what you have in mind is a stipulation that no instrument should come into force until X days have elapsed—

Nigel Don: Or some form of saving provision, just in case we make a wreck of something at some stage.

Gordon McNicoll: That would be possible, but in some circumstances instruments have to come into force immediately. The 21-day rule is not absolute and can be breached if there are good reasons for doing so. If you were minded to go down the route that you described, you would need an opt-out to ensure that certain instruments could be brought into force early if required.

Nigel Don: I was thinking of something that would make it clear that, if an instrument did not specify a date for its coming into force, the default period would be a certain number of days after it was laid and signed. That would give us a chance to establish what the date really is, instead of running the risk of signing off something after it has come into force.

Gordon McNicoll: I suppose that that would be possible.

Nigel Don: Perhaps such an occurrence is so rare that we do not need to worry about it, but it might be worth putting precautions in place.

The Convener: As there are no further questions, I ask members whether they are content to note the orders.

Members *indicated agreement*.

The Convener: Mr McNicoll, thank you for attending the meeting. I certainly do not want to see you in committee on a similar exercise in the foreseeable future.

10:26

Meeting suspended.

10:27

On resuming—

Advice and Assistance and Civil Legal Aid (Priority of Debts) (Scotland) Regulations 2009 (SSI 2009/49)

The Convener: Item 2 is consideration of a negative instrument. Somewhat refreshingly, the Subordinate Legislation Committee raised no points on the regulations.

I see that members have no comments to make. Are we content to note the regulations?

Members *indicated agreement*.

The Convener: As we are still waiting for the Minister for Community Safety to arrive for the next item, I suspend the meeting briefly.

10:28

Meeting suspended.

10:29

On resuming—

Advice and Assistance and Civil Legal Aid (Financial Conditions and Contributions) (Scotland) Regulations 2009 (Draft)

The Convener: We proceed with agenda item 3. The Subordinate Legislation Committee did not draw any matter on the draft regulations to the attention of the committee.

Prior to the formal procedure on the motion that relates to the regulations, members have an opportunity to ask questions of the Minister for Community Safety, Fergus Ewing, or his officials, Chris Graham, from the access to justice team in the Scottish Government's constitution, law and courts directorate, and Fraser Gough, a solicitor

with the legal directorate. Mr Ewing, do you have an opening statement?

The Minister for Community Safety (Fergus Ewing): Yes. I will say a few words to give the committee some background on the regulations and what they mean.

The principal change that the regulations will bring about is a substantial increase to the upper disposable income threshold for civil legal aid from the present figure of £10,306 to £25,000. We intend to give formal guidance to the Scottish Legal Aid Board to set out the appropriate levels of contribution that will be payable by assisted persons. There will still be no contribution—zero—for those with disposable incomes of up to £3,355 and the current contribution rate of one third of the excess over £3,355 will still apply to disposable income of up to £10,995—a contribution of one third of the difference between the disposable income and the lower threshold of £3,355. A 50 per cent contribution will be payable on disposable income between £10,995 and £15,000, and 100 per cent will be payable on disposable income between £15,001 and £25,000. For example, someone with a disposable income of £25,000 would pay a contribution of up to £14,524 and someone with a disposable income of £12,000 would pay up to £3,024.

Disposable income is calculated by making deductions for maintenance payments and child care or travel costs that are associated with work, as well as an allowance for the costs of providing for dependents. About 42 per cent of people in Scotland are financially eligible for free or subsidised civil legal aid under the current limits. The higher limits will mean that three quarters of all Scots could be eligible for help in cases that involve, for example, maintaining families, ensuring financial security or adequate housing, or protecting employment rights. I hope that the committee agrees that the extension of eligibility for civil legal aid is welcome at a time when more and more people could require such assistance.

I move that the committee recommends that the—

The Convener: You are a bit premature, Mr Ewing.

Fergus Ewing: Ah—I do not want to be premature.

The Convener: Do members have any questions for the minister?

Robert Brown (Glasgow) (LD): I do not quite follow the effects of the higher levels. I think that the minister said that there was a 100 per cent contribution between the £15,000 and £25,000 levels of disposable income. What will that mean in practice? Will anyone with that level of disposable income get concessions?

Fergus Ewing: It will mean that people with a disposable income of £25,000 will have to make a sizeable contribution. In other words, the contribution is tapered, so that those who are on lower incomes have to pay as little as possible but those who are on higher incomes have to pay a fairly substantial amount—I mentioned a figure of more than £14,000 for someone with a disposable income of £25,000. However, such a person will be entitled to legal aid and, as Robert Brown will know, the costs of a serious contested litigation in the Court of Session, for example, can exceed that amount by a considerable distance.

We are doing what the Justice 1 Committee in 2001 asked the then Scottish Executive to consider. The aim is to deal with the trap whereby it is perceived that only those who have virtually no income get legal aid and those who are reasonably, but not hugely, well off are denied it. Under the regulations, legal aid will be available to such people, subject to a high contribution.

Like Robert Brown, I was concerned about the size of the contribution in that, to put in bluntly, £14,000 is one whopper of a contribution. I checked that it is possible to make payment of contributions by instalments over a period of up to 48 months. Even in that situation, someone at the higher level would be subject to a fairly hefty contribution—but not an unmanageable one, I would suggest.

The main thing is that people with slightly higher incomes are not denied legal aid and thereby denied access to the courts. The regulations also address situations in which there is an unequal contest—for instance, in some matrimonial litigation in which one party to the cause receives legal aid but the party with the higher income does not. As I am sure Robert Brown will recall from his previous work, that creates an unequal contest in some cases—and legal aid can almost be used as a negotiating tool on some occasions. We do not expect a huge proportion of cases to be at the upper level; we expect that most cases in which legal aid is granted will involve a relatively small income.

It is possible—it happens at present—that some solicitors will advise clients not to apply for legal aid, even though they might qualify under the new rules, on the basis that the contribution will be so high that the lawyer estimates that the cost of a minor litigation does not merit all the processing, paperwork and delay that a legal aid application can involve. The application is normally dealt with before litigation, by sisting an action or not proceeding with it.

I hope that that broadly answers Robert Brown's question.

Robert Brown: My question was getting at whether there is a maximum contribution of £14,000, notwithstanding the possibility that the costs might be higher, especially in the Court of Session.

Fergus Ewing: Yes: as I understand it, that is the maximum. A mathematical formula will be used, and it will be contained in the guidance to be applied.

The £25,000 figure relates to the disposable income, which is arrived at after making deductions for the items that I mentioned—child care and dependents. If someone has a family, they will have more commitments than a single person and their actual net income will probably be substantially higher than £25,000.

Nigel Don: Can the minister advise me whether the sums are before or after tax?

Fergus Ewing: I understand that the disposable income is net income. Deducted from that net income would be allowances for child care and dependents—the permitted allowances at the present time.

Nigel Don: So £25,000 of disposable income indicates quite a substantial gross income.

Fergus Ewing: Indeed. As I said, we feel that three quarters of all Scots will be eligible on financial grounds. People will still have to satisfy the tests of probable cause of litigation and reasonableness, but those are separate tests. On financial grounds, three quarters of all Scots will be eligible.

The Convener: Those tests have always governed the way in which legal aid matters have been proceeded with.

Fergus Ewing: Yes, and they are very important tests.

The Convener: Indeed.

There being no further questions, we go to item 4. I invite the minister to move motion S3M-3503.

Motion moved,

That the Justice Committee recommends that the draft Advice and Assistance and Civil Legal Aid (Financial Conditions and Contributions) (Scotland) Regulations 2009 be approved.—[*Fergus Ewing*.]

Motion agreed to.

10:38

Meeting suspended.

10:39

On resuming—

Bankruptcy and Diligence etc (Scotland) Act 2007 (Inhibition) Order 2009 (Draft)

The Convener: Item 5 is consideration of another item of subordinate legislation. The Subordinate Legislation Committee has not drawn any matter in relation to the draft order to this committee's attention. Prior to the formal procedure on the motion on the order at item 6, members may ask questions of the minister and his official, Linda Clark, senior policy development manager, Accountant in Bankruptcy. Do you feel the need to make any statement, Mr Ewing?

Fergus Ewing: I was planning to make a statement.

The Convener: Proceed.

Fergus Ewing: The Bankruptcy and Diligence etc (Scotland) Act 2007 allows ministers to make, by order, incidental and supplemental provisions that are considered necessary or expedient for the purposes of the act. The act introduces reforms to inhibition, which is a personal diligence that prevents the debtor from conveying or granting any new security over his interest in heritable property to the detriment of his creditor. The act provides that certain inhibitions on the dependence of an action that are limited to specified property at the instance of the court convert to inhibition in execution on granting of decree. Moreover, the act also specifies that those inhibitions are no longer limited and that their effect extends to all the debtor's property.

A fundamental aspect of property transactions has always been that third parties can rely on the integrity of the personal and land registers when deciding whether to proceed. Concerns have been raised that the act did not include any requirement to notify the keeper of the registers of Scotland of the granting of decree in cases in which inhibition on the dependence had been limited to specified property. As a consequence, the registers would not necessarily reflect the true position in respect of a debtor's ability to transact with his property.

To maintain the comprehensiveness of the registers and to protect both third parties and the inhibiting creditor, the draft Bankruptcy and Diligence etc (Scotland) Act 2007 (Inhibition) Order 2009 amends the act to provide that, once granted, a copy decree is registered in the personal register, and prescribes the form of the accompanying notice. The order clarifies that the removal of the limited extent of the inhibition does not take effect until the beginning of the day on which the decree and notice are registered. The order will ensure that the trust that is placed in the accuracy of the registers can be maintained and

that third parties are in no doubt of the true position when negotiating on property.

I was keen to read that out not because explanations to practising solicitors are always necessary but so that, if needed, it is on the record. In a practical sense, any house purchase transaction in Scotland can be thwarted and aborted at the last moment because of the appearance of inhibitions in the register. Therefore, the order corrects a loophole that could have jeopardised some purchase transactions, causing misery and mayhem to innocent third-party purchasers. I just wanted to place that on the record, although the circumstances to which the order applies will be relatively few in number.

The Convener: The issue is perfectly straightforward. If members have no questions, we will move to item 6, which is formal consideration of motion S3M-3544, to recommend that the order be approved.

Motion moved,

That the Justice Committee recommends that the draft Bankruptcy and Diligence etc. (Scotland) Act 2007 (Inhibition) Order 2009 be approved.—[*Fergus Ewing.*]

Motion agreed to.

The Convener: I thank Ms Clark for her attendance.

10:43

Meeting suspended.

10:46

On resuming—

Sexual Offences (Scotland) Bill: Stage 2

The Convener: Item 7 is the first day of stage 2 proceedings on the Sexual Offences (Scotland) Bill. The committee will consider amendments to sections 1 to 8 inclusive and section 13 but will not proceed beyond that point. Members should have their copies of the bill, the marshalled list and the groupings of amendments.

I welcome the Minister for Community Safety, Fergus Ewing, who is spending the entire morning with us, and his officials Gery McLaughlin, Patrick Down, Caroline Lyon and Diane Barbirou.

Section 1—Rape

The Convener: Amendment 1, in the name of the minister, is grouped with amendments 2 and 3.

Fergus Ewing: Before we start today's substantive business, I put on record my thanks and those of the Cabinet Secretary for Justice for the constructive approach that committee members have taken to the bill. That is greatly appreciated and it has helped us significantly with the complex and difficult issues in the bill. As you are aware, the Government has taken full account of the committee's views in lodging amendments at stage 2, and we are grateful to you for your advice and assistance on the best and most appropriate ways in which to strengthen the bill.

Amendments 1 to 3 relate to the recommendation in paragraph 66 of the committee's stage 1 report. The concern was that the use of the term "artificial" to describe genitalia created in the course of surgery such as gender reassignment surgery is inappropriate, as the term is more generally used to refer to prosthetic parts. The committee's report asked the Government to consider the issue and lodge appropriate amendments to the bill. Our response to the report confirmed that we would do that.

We agree that the terminology that is currently used in the bill is inappropriate. The intention of the amendments is to have the bill refer to "surgically constructed" genitalia rather than prosthetic parts. Amendments 1 to 3 therefore amend section 1 to replace the term "artificial" with the term "surgically constructed".

I move amendment 1.

Amendment 1 agreed to.

Amendments 2 and 3 moved—[Fergus Ewing]—and agreed to.

Section 1, as amended, agreed to.

After section 1

The Convener: Amendment 4, in the name of the minister, is in a group on its own.

Fergus Ewing: Amendment 4 provides for a new offence of sexual assault by penetration. It is a response to the committee's stage 1 report, which recommended that the bill be amended to create

"a separate offence of rape with an object or with another part of the body, limited to vaginal or anal penetration".

As the Government's response to the report made clear, we understand and sympathise with the reasons behind the committee's recommendation. In her evidence to the committee, the Lord Advocate stated that some of the most horrific and violent attacks involve the victim being penetrated with an object. Such attacks are not currently defined in law, despite being perceived by many victims to be as serious as rape. As the cabinet secretary said in response to the Justice Committee's report, the Government's view is that it would be inadvisable to provide for a separate offence of rape with an object without incorporating that offence within the definition of the offence of rape.

As the committee is aware, the Government considered amending the bill to incorporate such conduct within the offence of rape in section 1. However, there were concerns that such a definition of rape might not match the wider public's perception of what constitutes the crime of rape. Juries might be reluctant to convict an accused of rape if the assault does not match their understanding of the offence.

Having considered the matter at some length, the Government has concluded that the committee's recommendation is best addressed by the creation of a new offence of sexual assault by penetration, triable only on indictment and carrying the same maximum penalties as rape.

In closing, I thank the committee for its advice and assistance, which have been invaluable in helping us to reach our conclusion.

I move amendment 4.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): There is something that I would like the minister to clarify when he sums up. It concerns subsection (4) of the new section that is proposed by amendment 4, which says:

"Without prejudice to the generality of subsection (1), the reference in that subsection to penetration with any part of A's body is to be construed as including a reference to penetration with A's penis."

Section 2 also deals with that. Will the minister clarify the subsection and explain why repetition is required when section 1 already defines rape quite clearly?

Fergus Ewing: That seems a very reasonable question. Convener, do you wish me to answer it?

The Convener: Not at the moment, but you may deal with it when you sum up.

Fergus Ewing: I will.

Bill Butler: In that summing up, will the minister also say for the record what advantage the Government sees in taking the course of amendment 4 rather than including an offence of rape with an object? I take his point that the same penalties will apply, but does the Government feel that its chosen course will provide more flexibility and will assist juries?

Robert Brown: I have a question on the penalty and the method of prosecution. The minister said that the offence would be chargeable only on indictment—meaning, I think, only in the High Court. Will another amendment be required to make that clear?

The Convener: As there seem to be no further questions, I invite the minister to wind up.

Fergus Ewing: I will start with Cathie Craigie's point. Amendment 4 creates a new offence of sexual assault by penetration, and Cathie Craigie asked me to clarify how it will operate and why it is necessary. The new offence is committed when a person sexually penetrates with any part of his or her body, or with anything else, the vagina or anus of another person without their consent and without any reasonable belief that they consent. As Cathie Craigie rightly points out, there is an overlap with the offence of rape, as subsection (4) of the new section that is introduced by amendment 4 provides that penetration includes penetration with the accused's penis.

It is not intended that rape will be prosecuted under the new section that is introduced by amendment 4, but rather that, when the victim is not sure what he or she was penetrated with, for example because they were blindfolded in the course of the attack, a prosecution can be brought under the new section. The new section ensures that, in that specific fact situation, when a victim is uncertain what the object of penetration was, we would not fail to prove a very serious crime because of a fault of draftsmanship. That is an important fact situation in which the new section could be used and in which, were there only the offence of rape, someone might avoid conviction.

We agree with Bill Butler's suggestion that the Government's approach will allow more flexibility, particularly to prosecutors. I think that it will also assist juries; we certainly hope that it will do so.

On Robert Brown's point, amendment 51 deals with penalties. I do not think that I said that the trying of this offence on indictment means that it would necessarily be heard in the High Court; it could be heard in the sheriff court. I guess that it is up to the Lord Advocate to decide in which court a case will be brought, but plainly the nature of this offence is most serious.

The Convener: I am anxious that this very important matter should be canvassed as widely as possible and I can see that Cathie Craigie still has some concerns. In the circumstances, if she wants to raise another point, I am happy for her to do that, and I am sure that the minister will do his best to answer it.

Cathie Craigie: I understand the point that the minister makes about the victim not being sure about what they were penetrated with—the Lord Advocate also made that point when she gave evidence to the committee. My concern is that the accused's legal representatives might try to have a lesser charge brought, because I would see the new offence as a lesser charge than a charge of rape. They might try to have the charge considered as sexual assault by penetration. For the record, can you give the Government's view on that and perhaps rule it out?

Fergus Ewing: I certainly hope that we can rule it out and I feel that we should be able to rule it out. It is plainly for the Crown to decide which charge should be brought in any particular fact circumstances. However, as the Lord Advocate said in her evidence to the committee, some of the most horrific and violent instances have involved penetration by an object. It will be readily understood and appreciated by all juries that such a crime could, in some circumstances, be even more heinous and appalling than rape itself. Without going into too much graphic detail, one thinks of broken glass and some other horrendous scenarios, which no doubt the Lord Advocate has had to deal with in the courtroom.

I reassure Cathie Craigie that the new offence that is introduced by amendment 4 is a most serious one. Each case falls on its particular circumstances and facts. It will be up to the Crown to decide how to proceed and, indeed, whether to proceed with both charges, in an either/or or both scenario; it will depend on the facts of each case. Where, for example, there is some dubiety on the part of the victim about what object he or she was penetrated with, there might well be merit in proceeding with a charge of rape and a charge of sexual assault by penetration to see where the evidence falls. In many instances of rape, there are serious and difficult evidential challenges for the prosecution, because such incidents tend to take place in private circumstances such as in homes or other locations where there is no third-party evidence available.

I give Cathie Craigie the reassurance that she seeks. We are at one with the committee and we agree that the offence of sexual assault by penetration is most serious and ranks alongside rape.

Amendment 4 agreed to.

Section 2—Sexual assault

11:00

The Convener: Amendment 5, in the name of the minister, is in a group on its own.

Fergus Ewing: Amendment 5 extends the definition of sexual assault to include other offending behaviour, namely spitting and urination. The offence of sexual assault under section 2 currently covers a range of non-consensual conduct, including the ejaculation of semen on to the victim.

Discussions with the Crown Office have highlighted that the emission of urine and saliva can also be constituent elements of a sexual assault. If that conduct is not covered by the bill, it would have to be charged under common law as assault aggravated by indecency separately from the offence of sexual assault under the bill. The Government's view is that such conduct should be included in the definition of sexual assault. That will enable a single incident that features such conduct, as well as other elements of sexual assault, to be charged as an offence under the bill. That would avoid the need for it to be charged separately as common-law assault.

We therefore propose to extend the definition of sexual assault to cover circumstances in which the accused intentionally or recklessly emits urine or saliva on to the victim. Not all such conduct is necessarily sexual in nature. Where it is not, the intention is that it will continue to be dealt with under the common law of assault.

Amendment 5 includes a requirement that the emission of saliva or urine must be sexual. That will ensure that only conduct of a sexual nature is charged as sexual assault.

I move amendment 5.

The Convener: I think that we deal with the question of the nature of the conduct by referring to the assumption that would be made by a reasonable person.

Fergus Ewing: That is correct.

Amendment 5 agreed to.

The Convener: Amendment 6, in the name of the minister, is grouped with amendments 7, 8, 12, 13, 19, 24, 28 to 30, 34 to 38, 42 to 48 and 75.

Fergus Ewing: The amendments in the group are technical amendments, which replace the 22 separate definitions of "sexual" with a single definition, which defines the term wherever it is used in the bill.

Amendment 75 provides that, for the purposes of the bill, a communication, penetration, touching or any other activity, a manner of exposure, or a relationship is sexual if, in all the circumstances, a reasonable person would consider it to be sexual. The other amendments in the group are consequential to amendment 75 and delete the existing definitions of "sexual" from the bill.

I move amendment 6.

Amendment 6 agreed to.

Section 2, as amended, agreed to.

Section 3—Sexual coercion

Amendment 7 moved—[Fergus Ewing]—and agreed to.

Section 3, as amended, agreed to.

Section 4—Coercing a person into being present during a sexual activity

Amendment 8 moved—[Fergus Ewing]—and agreed to.

Section 4, as amended, agreed to.

Section 5—Coercing a person into looking at an image of a sexual activity

The Convener: Amendment 9, in the name of the minister, is grouped with amendments 10, 11, 31 to 33, 39 to 41, 53, 57, 58 and 60 to 74.

Fergus Ewing: Amendments 9 to 11, 31 to 33 and 39 to 41 amend the definition of

"an image of a sexual activity"

in the offences under sections 5, 18 and 25. As the bill is currently drafted, it is not clear that those offences would criminalise the sending of images of a person's genitals without consent, or a reasonable belief in consent, as the images would not constitute

"an image of a sexual activity".

Given that such images have just as much potential to be used to cause humiliation, alarm or distress, or to be sent by persons who seek sexual gratification, we propose to amend the offences so that they refer to "a sexual image", which we have defined as either an image of a person

"engaging in a sexual activity"

or an image of a person's genitals.

In view of the changed definition, we propose to change the names of the offences so that they refer to "a sexual image" instead of

"an image of a sexual activity".

The other amendments in the group are consequential amendments that reflect the changed names of the offences.

I move amendment 9.

Amendment 9 agreed to.

Amendments 10 to 12 moved—[Fergus Ewing]—and agreed to.

Section 5, as amended, agreed to.

Section 6—Communicating indecently etc

Amendment 13 moved—[Fergus Ewing]—and agreed to.

Section 6, as amended, agreed to.

Section 7—Sexual exposure

The Convener: Amendment 14, in the name of the minister, is grouped with amendments 15 to 18, 20 to 22, 25 to 27 and 54.

Fergus Ewing: Amendments 14 to 18 amend the offence of sexual exposure at section 7 to bring it into line with the offences at sections 4 to 6. The effect would be to require that, for an offence to be committed, the accused must expose his or her genitals in a sexual manner to another person without consent, and without any reasonable belief in consent, for the purpose of obtaining sexual gratification or for the purpose of causing humiliation, alarm or distress.

As drafted, the offence of sexual exposure in section 7 is framed differently from the offences at sections 4 to 6. No reference is made to consent; the offence is framed in terms of intent to cause alarm or distress. Given that the offence achieves much the same effect as the other offences in the bill, we believe that it should be drafted in the same terms. Amendments 14 to 18 will have that effect.

Amendment 20 amends the offence of sexual exposure in section 7 and removes the defence that the conduct

"was done in the course of a performance of a play".

That defence is no longer required, given that the amended offence provides that A is guilty of the offence only if it can be proved that B did not consent to the exposure and that A had no reasonable belief that B had consented. The fact that B is at the play could give rise to a reasonable assumption in A's mind that B knows what the play is about and that B is there through choice.

Amendment 21 provides for a new offence of voyeurism. The bill as drafted does not include provision for such an offence. At present, the offence would be prosecuted under the common law as a breach of the peace. However, given that it is clearly a sexual offence, and given that those who are convicted of it are routinely placed on the sex offenders register, our view is that the bill should provide for an offence of voyeurism.

Amendment 21 makes it an offence for a person to observe, for the purpose of obtaining sexual gratification or of humiliating, distressing or alarming the victim, another person without their consent or without any reasonable belief that they consent as they engage in a private act, as defined in amendment 22, in a place or in circumstances in which they could reasonably expect privacy. The provision is similar to the offence of voyeurism in England and Wales under the Sexual Offences Act 2003.

Amendment 21 also makes it an offence to operate equipment such as a webcam, enabling the accused or a third person to observe the victim engaging in a private act, for the purpose of obtaining sexual gratification either for the accused or for a third party or of humiliating, distressing or alarming the victim without the victim's consent and without any reasonable belief that the victim consents.

It will also be an offence for the accused to record the victim with the intention of enabling the accused or a third person to look at an image of the victim engaging in a private act without the victim's consent and without any reasonable belief that the victim consents for the purpose of obtaining sexual gratification for the accused or a third party or of humiliating, distressing or alarming the victim.

Finally, a person will commit an offence if he or she installs equipment such as a video camera or constructs or adapts—for example, by drilling a peephole—a structure or part of a structure with the intention of enabling him or herself or a third party to carry out any of the three actions described above for the purpose of sexual gratification for either the accused or a third party or of humiliating, distressing or alarming the victim.

Amendment 22 defines terms used in voyeurism offences. Under the amendment, a person is engaged in a private act if they are in a place in which the circumstances are such that there is a reasonable expectation of privacy and

"the person's genitals, buttocks or breasts are exposed or covered only with underwear, … the person is using a lavatory, or … the person is doing a sexual act that is not of a kind ordinarily done in public."

The proposed section also provides a definition of a structure for the purpose of the offence of modifying or constructing a structure to engage in voyeurism.

Amendments 25, 6 and 7 make consequential amendments to the bill as a result of the introduction of the new offence, and amendment 54 provides for the maximum penalties for the new offence.

I move amendment 14.

The Convener: The amendments raise three issues, the first of which relates to difficulties that might arise in stage performances. Having listened to the minister, I am persuaded that it would be highly unlikely that a person who had not consented to the act involved would then have been present while it was carried out. That should remove any problems for the performing arts community.

The second issue is the addition of the offence of voyeurism. It is indeed correct that for many years such matters have been dealt with under the catch-all charge of breach of the peace. However, in the vast majority of such cases, part of the disposal has been that the offender be put on the sex offenders register. Thirdly, I am interested to see that the offence now covers the art-and-part involvement of the person who drills a hole in the knowledge that photographic equipment will be installed.

Robert Brown: With regard to the new provisions relating to stage performances, has the minister, or his officials, had any contact with people in the theatrical community to ensure that any circumstances that we cannot immediately envisage do not give rise to problems?

Fergus Ewing: We have not had any such contact. I suppose that one reason for that is, as the convener indicated, actors willingly take part in performances. The offence involves a lack of consent but, prima facie, performances of plays involve the willing participation of actors. I suppose that there are relative degrees of willingness to take part in a play, which might depend on how much someone is paid to do so, but no one is forced to play roles such as Ophelia or Hamlet—they give their consent. Therefore, it had not occurred to us to seek third-party support for our position or corroboration of our argument, but it seems, prima facie, to be solid.

11:15

Robert Brown: My point was that the exposure would be not just to other stage actors—it would be to the play's audience, which is slightly wider than the minister suggested.

Fergus Ewing: We have proceeded on the basis that people who are in an audience wish to see the play, so they consent to be in the

audience. We did not envisage that that would be a problem within the confines of the bill. Audience members are free to leave, as I have sometimes done, although not necessarily for the reason that we are discussing.

The Convener: We are intrigued about the performances of Hamlet that the minister may have attended, but we will leave that hanging to the wall.

Stewart Maxwell (West of Scotland) (SNP): My question is on the same area that Robert Brown asked about. I am clear about the issue as it relates to members of the cast, and to the audience when a play is advertised as being of an adult nature and all the actors stick to the script, but what would happen if an actor did something that was unscripted? Would they still be able to use the defence that their action was part of the play? That question is about a situation in which there is a clear script and someone goes off script.

My other question is about more free-flowing or ad lib performances. At what point would certain action constitute an offence as opposed to being part of the performance?

Fergus Ewing: I understand that the concern that was expressed by those who are involved in thespian circles was not about the performance of a play but related to "reasonable belief". Stewart Maxwell postulates a situation in which an event takes place on a stage that is not part of the script. I find it difficult to see how someone who deliberately departed from the script to engage in a sexual offence could have any legitimate defence. Any defence would be exercised on the basis that there was a reasonable belief that consent was given, but there could be no such reasonable belief if the person in question departed from the script or the tenor of the performance to commit a sexual offence, because it would not be reasonable to assume that anyone else consented to such behaviour.

Stewart Maxwell: I assumed that that would be the case with a scripted performance, but my second question was about unscripted performances of a more free-flowing or ad lib nature. Has any thought been given to whether a defence would be available to actors in such performances?

Fergus Ewing: I guess that it would depend on the nature and extent of the behaviour that was committed, but I cannot see how anyone could avoid being convicted in circumstances in which they were taking part in an artistic performance that had no script, no plan, no nothing and they committed a sexual offence. In such circumstances, I really do not think that they would find it easy to establish that they had a reasonable belief that the other parties consented.

Robert Brown: I seem to recall that, some years ago, a great furore was caused when a nude person was wheeled across the stage in a wheelbarrow during a performance in the Edinburgh festival. Would something like that—which was clearly designed to shock in the circumstances of the time—be counted as a criminal offence? I am dubious whether people today would consider that such an event should constitute a criminal offence, regardless of whether a defence was available under the legislation.

Fergus Ewing: The issue is consent, and what amounts to a reasonable belief of consent. Some performances are advertised as being of an adult nature—although I think that the word "adult" is widely recognised as a euphemism for material of a particularly unpleasant, graphic or pornographic nature. Where performances are advertised in such a way, there might be a reasonable belief that those who take part in such performances—whether you would call them art is another matter—do so in the knowledge that they are taking part in a play or a supposed work of art that is of an explicit and adult nature. In such a case, one could infer that the people who were taking part had given their consent.

I am pleased to say that I did not see the play that involved some sort of wheelbarrow event. My comments might address Robert Brown's concerns or they might not; I do not know.

Nigel Don: Amendment 22 defines a private act. Is that definition derived from elsewhere in the legal canon, or has it been made up for the purposes of the bill?

Fergus Ewing: I am advised that it is similar to the definition that is employed in the 2003 act in England and Wales. It is similar, but not identical.

Nigel Don: The definition causes me no particular problems, but I wondered where it came from.

The Convener: The matter is important, as some new material had been injected on this subject, so we explored it in somewhat greater depth than I would have been relaxed about permitting in normal circumstances.

Do you have anything to say in conclusion, minister?

Fergus Ewing: No. I fully appreciate the questions that were put by members, even though they were, perhaps, way beyond the fringe.

The Convener: That remark is hardly worthy of comment.

Amendment 14 agreed to.

Amendments 15 to 20 moved—[Fergus Ewing]—and agreed to.

Section 7, as amended, agreed to.

After section 7

Amendments 21 and 22 moved—[Fergus Ewing]—and agreed to.

Section 8—Administering a substance for sexual purposes

The Convener: Amendment 23, in the name of the minister, is in a group on its own.

Fergus Ewing: Amendment 23 addresses a gap in the offence concerning administering a substance for the purpose of committing a sexual offence.

Section 8 applies where the accused administers a substance to a person for the purpose of stupefying or overpowering that person in order that the accused can engage in sexual activity with him or her. The gap arises from the fact that the offence does not currently apply where the accused administers a substance for the purpose of allowing a third party or parties to engage in sexual activity while the victim is incapacitated. Amendment 23 ensures that an offence will also be committed where the accused administers a substance to a person to enable someone other than the accused to engage in sexual activity with that person.

I move amendment 23.

The Convener: Do members have any questions about or comments on an amendment that appears to plug a fairly important gap? Do you have anything further to add, Mr Ewing?

Fergus Ewing: No.

Amendment 23 agreed to.

Amendment 24 moved—[Fergus Ewing]—and agreed to.

Section 8, as amended, agreed to.

Section 13—Capacity to consent

Amendment 25 moved—[Fergus Ewing]—and agreed to.

Section 13, as amended, agreed to.

The Convener: That concludes consideration of amendments to sections 1 to 8 and section 13. Next week, we will consider amendments to sections 9 to 12 and sections 14 to 30.

I thank Mr Ewing and his officials for their attendance.

11:26

Meeting continued in private until 11:45.

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