JUSTICE COMMITTEE

Tuesday 24 March 2009

Session 3

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JUSTICE COMMITTEE
10th 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 ALSO ATTENDED:

Kenny MacAskill (Cabinet Secretary for Justice)

THE FOLLOWING GAVE EVIDENCE:

Gordon Wales (Scottish Court 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 24 March 2009

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

Subordinate Legislation

High Court of Justiciary Fees Amendment Order 2009 (SSI 2009/87)

Court of Session etc Fees Amendment Order 2009 (SSI 2009/88)

Sheriff Court Fees Amendment Order 2009 (SSI 2009/89)

The Convener (Bill Aitken): Good morning, ladies and gentlemen. I remind everyone that mobile phones should be switched off. Unfortunately, one member of the committee has been held up, but there should be a full turnout.

Agenda item 1 is subordinate legislation. The committee will consider three negative instruments: SSI 2009/87, SSI 2009/88 and SSI 2009/89. The Subordinate Legislation Committee has drawn the committee's attention to the statement made in the Executive notes associated with each of the orders that steps have been taken to ensure that those in receipt of a new form of benefit—income-related employment and support allowance—that was brought into force on 27 October 2008 under the Welfare Reform Act 2007, would be entitled to the fee exemption concerned with effect from that date, although the fees legislation provides for such an entitlement only from April 2009.

I welcome Gordon Wales, who is director of operational support at the Scottish Court Service. He has been invited to answer any questions.

I will open the questioning. What was your authority in acting as you did?

Gordon Wales (Scottish Court Service): When the Minister for Community Safety and Scottish Court Service officials appeared before the committee in June last year, we alluded to the fact that the new benefit would be brought in later on that year, but the timing of the details around the allowance was such that it did not allow us to act then or in advance, in October. We knew at that stage that we would be late in bringing further orders to the committee.

There were two other main reasons why we wanted to make changes to the fees orders. The first was to make provision for the increase in the income level threshold for tax credits, which takes effect in April. The second relates to the introduction of European small claims legislation from January this year.

There were therefore three substantive reasons why we needed to change the orders. We thought that it would be expedient for the Parliament, and administratively expedient, to bring the orders together in one place while ensuring that we allowed the provisions on the new benefit to apply from October last year.

The Convener: Should not the matter have come before the committee earlier?

Gordon Wales: Indeed. Ideally, it would have come to the committee beforehand, but unfortunately the timing of the provisions relating to the allowance was such that it did not allow us to bring it before the committee in October last year. You are right. As I say, in an ideal world, we would have brought the matter to the committee beforehand.

The Convener: But nobody has lost anything; in fact, the reverse is true.

Gordon Wales: Indeed. We were mindful of the comments that the committee made in June last year about access to justice, and we wanted to make absolutely sure that no one would fail to get access to justice because of the administrative procedures that our organisation must go through. Therefore, we made provision in leaflets and guidance in the courts for all applicants in receipt of income-related employment and support allowance to be entitled to the fee exemption. Everyone who was entitled to an exemption has been provided with it.

The Convener: As there are no more questions, are members content to note the orders?

Members *indicated agreement*.

The Convener: I thank Mr Wales for his attendance.

Police Grant (Scotland) Order 2009 (SSI 2009/80)

The Convener: Agenda item 2 is consideration of two further negative instruments, the first of which is SSI 2009/80. The Subordinate Legislation Committee raised no points on the order. Are members content to note it?

Members *indicated agreement*.

Act of Sederunt (Fees of Solicitors in the Sheriff Court) (Amendment) 2009 (SSI 2009/81)

The Convener: The Subordinate Legislation Committee raised no points on the instrument. Are members content to note it?

Members *indicated agreement*.

The Convener: I suspend the meeting. We will resume shortly to consider the Sexual Offences (Scotland) Bill at stage 2.

10:25

Meeting suspended.

10:31

On resuming—

Sexual Offences (Scotland) Bill: Stage 2

The Convener: This is the second day of stage 2 proceedings on the Sexual Offences (Scotland) Bill. The committee will consider sections 9 to 12 inclusive and sections 14 to 30 inclusive. We will not proceed beyond section 30 today. I welcome the Cabinet Secretary for Justice, Kenny MacAskill, and the relevant officials.

Members should have before them a copy of the bill, the marshalled list and the groupings of amendments for today's consideration.

Section 9 agreed to.

Section 10—Circumstances in which conduct takes place without free agreement

The Convener: Amendment 76, in the name of the minister, is grouped with amendments 77 and 96.

The Cabinet Secretary for Justice (Kenny MacAskill): Amendments 76, 77 and 96 are a response to the concerns that were expressed at paragraph 146 of the committee's stage 1 report, regarding the reference to prior consent in section 10(2)(b). As the committee is aware, the Government agrees with the concerns that have been expressed about that.

In our response to the committee's report, we confirmed that we would consider how best to deal with the issue. The committee is also aware that we considered whether an amendment to section 10(2) was sufficient to address the committee's concerns on the matter. On further reflection, we have concluded that the matter is better dealt with by removing the provisions that relate to sleep and unconsciousness from section 10(2), and dealing with them in a separate section.

Amendment 76 deletes section 10(2)(b); amendment 77 inserts a new section to address the issue. Amendment 96 is a technical amendment to section 28, and is consequential to amendment 77.

The new section that amendment 77 introduces replicates our understanding of the current law by providing that someone who is asleep or unconscious cannot give consent while in that state. The new section provides that consent cannot be given in such circumstances, although it does not, in terms, exclude the possibility of a reasonable belief in consent, nor does it place any specific restrictions on how such a reasonable belief may arise.

In practice, it would be for the court to decide whether any claim of reasonable belief in consent on the part of the accused would be credible in a case in which such circumstances had arisen. It is highly unlikely that a court would regard a belief that the victim gave consent while he or she was incapable of giving such consent to be a reasonable belief. We believe that that will mean that cases in which an accused has engaged in sexual activity with the victim while he or she was asleep or unconscious can be dealt with by the courts, as at present, thereby addressing the concerns that were expressed about the drafting of section 10(2)(b).

In summary, the three amendments address the concerns that were expressed about the matter at stage 1, which were referred to in the committee's report. I commend the amendments to the committee, and I urge members to support them.

I move amendment 76.

The Convener: I confirm that the issue to which the amendments relate was raised in the committee's stage 1 report and caused us some concerns. I think that the problem has been remedied.

Amendment 76 agreed to.

The Convener: Amendment 132, in the name of Robert Brown, is in a group on its own.

Robert Brown (Glasgow) (LD): Amendment 132 relates to the recommendation in paragraph 155 of the committee's stage 1 report, which was made in response to representations by Enable Scotland and others. At issue is whether the phrasing of the bill in respect of threats of violence is sufficiently broad to take account of people whose situation is different from that of the average person—for example, people who have learning difficulties. Enable Scotland argues that such people

"might be much more suggestible to threats than others".

The underlying intention of the amendment is to ensure that section 10 covers not just threats of violence but behaviour such as credible coercion. I am aware that the Government has considered the issue, but I would like it to confirm its position on the record. Enable Scotland and others have raised a valid issue and, despite the Government's good intentions, I am not entirely satisfied that the current wording of the section addresses the fears that they have expressed.

I move amendment 132.

Kenny MacAskill: I am grateful to Mr Brown for his explanation and appreciate his intentions in lodging the amendment. Although I have every sympathy with those intentions, we have serious concerns about amendment 132. We consider that it will not be effective and that it risks undermining to some extent the operation of section 10(2).

The bill provides that, where any of the circumstances that are set out in section 10(2) apply, there is no free agreement and, therefore, no consent. Currently, section 10(2)(c) provides that there is no free agreement where a victim submits to sexual conduct because of violence or threats of violence made against them or "or any other person". Amendment 132 would extend section 10(2)(c) to include situations in which a victim submits to sexual conduct

"because a fear that violence or other harm may be inflicted upon"

them has been induced in them by other means.

The effect of the amendment would be substantial, principally due to the vague nature of the term "other harm", which conceivably includes very minor harm. It is also not clear how a fear of violence could be induced by a means other than violence or threats of violence. Currently, such circumstances are dealt with in the bill by means of the definition of consent as free agreement. For example, it would be open to the court to conclude that a person who agreed to sexual activity because of threats of blackmail had not freely agreed to the conduct. However, that conclusion would be reached only in the light of the full facts and circumstances of the case. Amending the bill to include such wider and vague circumstances in section 10(2)(c) would lead to the automatic conclusion that there was no free agreement, regardless of the facts and circumstances of the case. The Government's view is that that would be inappropriate.

Although it may still be open to the accused to argue that he or she had a reasonable belief in consent, even where one of the circumstances that are set out in section 10(2) has been proven to apply, the provision that there is no free agreement and, therefore, no consent in such circumstances is a strong one. The Government's view is that it would not be appropriate to apply the provision in such an undefined and potentially wide range of circumstances. Currently, where one of the circumstances that are set out in section 10(2) applies, it seems unlikely that a claim of reasonable belief in consent on behalf of the accused would be credible in anything other than exceptional cases. To widen the circumstances that are set out in section 10(2)(c) to include vague but potentially common circumstances would risk such an outcome being the rule, rather the exception, potentially weakening the provisions in relation to the other circumstances that are covered in section 10(2).

The Government's view is that amendment 132 extends the circumstances that are covered by

section 10(2) in a way that is inappropriate and risks undermining the intent behind the amendment. I have every sympathy with what Mr Brown is seeking to achieve, but I suggest that it would be better for us to trust the judgment of the courts and to stick with the provision as drafted.

Robert Brown: I am grateful for the cabinet secretary's explanation; it is helpful to have those remarks on the record. I will study his comments at greater length after the meeting, with a view to considering whether the issue should be addressed at stage 3, but I am inclined to think that I am satisfied with the explanation. For the moment, I do not intend to press the amendment.

The Convener: I think that we have consensus ad idem.

Amendment 132, by agreement, withdrawn.

Amendment 26 moved—[Kenny MacAskill]—and agreed to.

Section 10, as amended, agreed to.

After section 10

Amendment 77 moved—[Kenny MacAskill]—and agreed to.

Section 11—Consent: scope and withdrawal

Amendment 27 moved—[Kenny MacAskill]—and agreed to.

Section 11, as amended, agreed to.

Section 12 agreed to.

Section 14 agreed to.

After section 14

The Convener: Amendment 78, in the name of the minister, is grouped with amendments 82 and 115.

Kenny MacAskill: Amendments 78 and 82 create new offences of sexual assault on a young child by penetration and of engaging in penetrative sexual activity with or towards an older child. The amendments bring the provisions in part 4 of the bill, which deal with children, in line with the amended provisions in part 1, which the committee approved last week and which provide for separate offences concerning penetrative sexual activity. As with the other offences in part 4, there is no reference to consent, and therefore no requirement to prove that the child did not consent for an offence to be prosecuted under part 4.

I move amendment 78.

Amendment 78 agreed to.

Section 15—Sexual assault on a young child

The Convener: Amendment 79, in the name of the minister, is grouped with amendment 83.

Kenny MacAskill: Amendment 79 extends the definition of sexual assault on a young child to include other offending behaviour—spitting and urination—when such conduct is sexual. That will bring the definition of the offence of sexual assault on a young child into line with the offence of sexual assault in part 1.

Amendment 83 makes an equivalent change to the offence of engaging in sexual activity with an older child.

I move amendment 79.

Amendment 79 agreed to.

Amendment 28 moved—[Kenny MacAskill]—and agreed to.

Section 15, as amended, agreed to.

Section 16—Causing a young child to participate in a sexual activity

Amendment 29 moved—[Kenny MacAskill]—and agreed to.

Section 16, as amended, agreed to.

Section 17—Causing a young child to be present during a sexual activity

Amendment 30 moved—[Kenny MacAskill]—and agreed to.

Section 17, as amended, agreed to.

Section 18—Causing a young child to look at an image of a sexual activity

Amendments 31 to 34 moved—[Kenny MacAskill]—and agreed to.

Section 18, as amended, agreed to.

Section 19—Communicating indecently with a young child etc

Amendment 35 moved—[Kenny MacAskill]—and agreed to.

Section 19, as amended, agreed to.

After section 19

10:45

The Convener: Amendment 80, in the name of the minister, is grouped with amendments 81, 84, 85, 105, 113, 114, 116 and 117.

Kenny MacAskill: Amendment 80 provides for a new offence in part 4 of sexual exposure to a young child, and amendment 84 provides for an

equivalent offence of sexual exposure to an older child. The new offences are required because the offence of sexual exposure in section 7 has been amended so as to require that the person to whom the accused sexually exposed his or her genitals did not consent to the exposure.

The approach in the bill is that young children have no capacity to consent to sexual activity and older children have only a limited capacity to do so. As such, part 4 contains protective offences concerning sexual conduct involving children that are modelled on the offences in part 1 but with the consent element removed. The offence of sexual exposure to a young child can be committed by a person of any age; the offence of sexual exposure to an older child can be committed only by a person who has attained the age of 16 years. However, if such conduct takes place without consent, an offender who is under 16 could be prosecuted under the provision in part 1. It will therefore not be an offence for an older child to expose his or her genitals to another older child, provided that such exposure is consensual.

Amendment 81 provides for a new offence in part 4 concerning voyeurism towards a young child, and amendment 85 creates an equivalent offence concerning voyeurism towards an older child. Those offences are modelled on the offence of voyeurism in part 1 but with the consent element removed, for the same reasons as I explained in relation to sexual exposure. As with the offence of sexual exposure to an older child, the offence of voyeurism towards an older child can be committed only by a person who has attained the age of 16 years. That ensures that the bill will not inadvertently criminalise an older child who consensually observes another older child engaging in a private act. If an older child engages in what would conventionally be considered to be voyeurism—spying on another older child without their knowledge or consent—that could be prosecuted under part 1.

Amendment 105 will make a consequential amendment to section 29. Amendments 113, 114, 116 and 117 provide for the maximum penalties for the new offences.

I move amendment 80.

Amendment 80 agreed to.

Amendment 81 moved—[Kenny MacAskill]—and agreed to.

Sections 20 and 21 agreed to.

After section 21

Amendment 82 moved—[Kenny MacAskill]—and agreed to.

Section 22—Engaging in sexual activity with or towards an older child

Amendments 83 and 36 moved—[Kenny MacAskill]—and agreed to.

Section 22, as amended, agreed to.

Section 23—Causing an older child to participate in a sexual activity

Amendment 37 moved—[Kenny MacAskill]—and agreed to.

Section 23, as amended, agreed to.

Section 24—Causing an older child to be present during a sexual activity

Amendment 38 moved—[Kenny MacAskill]—and agreed to.

Section 24, as amended, agreed to.

Section 25—Causing an older child to look at an image of a sexual activity

Amendments 39 to 42 moved—[Kenny MacAskill]—and agreed to.

Section 25, as amended, agreed to.

Section 26—Communicating indecently with an older child etc

Amendment 43 moved—[Kenny MacAskill]—and agreed to.

Section 26, as amended, agreed to.

After section 26

Amendments 84 and 85 moved—[Kenny MacAskill]—and agreed to.

Section 27—Older children engaging in penetrative sexual conduct with each other

The Convener: Amendment 86, in the name of the minister, is grouped with amendments 87 to 95, 118 and 119.

Kenny MacAskill: Amendments 86 to 94 extend the scope of the offences in section 27 concerning sexual activity between older children. They will ensure that the offences in section 27 will cover oral sex in addition to sexual intercourse. The fact that oral sex is defined as oral contact with the genitals or anus will ensure that the provisions do not inadvertently criminalise kissing. In view of the fact that the section covers oral sex and is no longer concerned solely with penetrative sexual activity, we are changing its name to, "Older children engaging in sexual activity with each other". Amendments 118 and 119 make consequential changes to reflect the changed name of the section.

Amendment 95 will remove the provisions concerning the Lord Advocate's power to issue instructions to chief constables. We agree that that power is not necessary, as the Lord Advocate's existing powers are sufficient to enable her to issue such instructions. As the committee is aware, we included the provision in the bill to make it clear that the Lord Advocate's power to direct chief constables on which offences should be reported to the procurator fiscal so that a prosecution can be considered will continue to apply to offences that relate to underage sexual activity. In particular, the Lord Advocate will continue to have the power to direct chief constables on the circumstances in which such cases should be reported to the children's reporter.

In the light of the committee's recommendation, and given that it is clear that the Parliament is content that the vast majority of offences that are alleged to have been committed by children, including the offence in question, will continue to be dealt with by the children's panel, we are content that the provision is not necessary. Amendment 95 will remove it from the bill.

I move amendment 86.

The Convener: Amendment 86 deals with material that was contained in the committee's report. Members have no comments. Do you feel the need to wind up, minister?

Kenny MacAskill: No, that is not necessary.

Amendment 86 agreed to.

Amendments 87 to 95 moved—[Kenny MacAskill]—and agreed to.

Section 27, as amended, agreed to.

Section 28—Penetration and consent for the purposes of section 27

Amendments 44 and 96 moved—[Kenny MacAskill]—and agreed to.

Section 28, as amended, agreed to.

Section 29—Defences in relation to offences against older children

The Convener: Amendment 97, in the name of the minister, is grouped with amendments 98 to 100, 106 to 108 and 131.

Kenny MacAskill: The amendments in this group make a number of changes to the provisions that restrict the use of the defence of reasonable mistaken belief as to age. Section 29(1) provides that the defence is not available to a person who has been charged with an offence under sections 21 to 27(1) and section 27(4) if that person has previously been charged by the police with a relevant offence.

The Justice Committee recommended that relevant offences should be defined in the bill other than through the use of an order-making power. Amendment 108 seeks to introduce a new schedule that lists sexual offences that may be committed against a child who is under the age of consent, which include specific child sex offences and more general sexual offences, such as rape and sexual assault when the victim is a child. Amendments 97 and 99 are consequential on the insertion of the new schedule.

Amendments 98, 100 and 106 provide that the defence shall not be available to a person in respect of whom a risk of sexual harm order is in place. A risk of sexual harm order can be imposed on a person by a sheriff if he is satisfied that the person has on at least two occasions engaged in sexually explicit conduct or communication with a child or children and, as a result, there is reasonable cause to believe that the order is necessary to protect a child or children from harm arising out of future acts by that person. The Crown recommended making specific provision for that, as it is possible that a risk of sexual harm order could be imposed on a person who has never been charged with a relevant sexual offence against a child.

Amendment 107 introduces an order-making power to amend the new schedule, so that a relevant sexual offence can be added to or removed from it. It also provides that the power to add new offences shall be restricted to offences against children involving sexual conduct. Amendment 131 provides that any order shall be subject to the affirmative resolution procedure. We have lodged those amendments to address the recommendations made by the Subordinate Legislation Committee.

I move amendment 97.

The Convener: Again, those matters came up in the committee's report and consideration.

Amendment 97 agreed to.

Amendments 98 to 100 moved—[Kenny MacAskill]—and agreed to.

The Convener: Amendment 101, in the name of the minister, is grouped with amendments 102 to 104.

Kenny MacAskill: These amendments amend the provisions in section 29 concerning the defence of proximity of age. The defence applies to certain offences concerning sexual activity with 13 to 15-year-old children and applies when the accused is not more than two calendar years older than the child. In its report, the committee asked the Government to reconsider the scope of the

defence in the light of its recommendation concerning oral sex between older children. The amendments restrict the scope of the defence of proximity of age, so that it will not apply in respect of any activity that would constitute an offence under section 27 when both parties are aged 13 to 15. That is to say that the defence does not apply in respect of sexual intercourse or oral sex.

I move amendment 101.

The Convener: There are no comments from members and there is no requirement for the minister to wind up—that is an unusual circumstance in your case, Mr MacAskill.

Amendment 101 agreed to.

Amendments 102 to 107 moved—[Kenny MacAskill]—and agreed to.

Section 29, as amended, agreed to.

Before schedule 1

Amendment 108 moved—[Kenny MacAskill]—and agreed to.

Section 30—Special provision as regards failure to establish whether child has or has not attained age of 13 years

The Convener: Amendment 109, in the name of the minister, is grouped with amendment 110.

Kenny MacAskill: Amendments 109 and 110 are technical amendments that are intended to address gaps in the provisions in section 30 concerning circumstances in which there has been a failure to establish whether a child has attained a certain age. As the bill is currently drafted, those provisions do not address circumstances in which the accused has been charged under section 27 and it has not been possible to establish the age of either the accused or the other party. The amendments address that gap.

The opportunity has also been taken to separate out more clearly the two sets of circumstances that section 30 deals with. Section 30 is now solely concerned with deeming the age of a child victim or the accused when doubt as to his or her age may open up the possibility of the accused being convicted of a more serious offence. The second set of circumstances dealt with in section 30—namely the cases in which doubt as to the accused's or victim's age might give rise to a conviction of a less serious offence—are now to be dealt with in section 38, by virtue of amendments in the group entitled "Power to convict for offence other than that charged", which address that issue.

I move amendment 109.

Amendment 109 agreed to.

Section 30, as amended, agreed to.

The Convener: That concludes consideration of amendments to sections 9 to 12 and sections 14 to 30. At next week's meeting, the committee will consider amendments from section 31 to the end of the bill. I thank the cabinet secretary and committee members for such an expeditious process this morning.

Meeting closed at 11:00.

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