JUSTICE COMMITTEE

Tuesday 31 March 2009

Session 3

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JUSTICE COMMITTEE
11th 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:

Patrick Harvie (Glasgow) (Green)
Kenny MacAskill (Cabinet Secretary for Justice)

CLERK TO THE COMMITTEE

Douglas Wands

SENIOR ASSISTANT CLERK

Anne Peat

ASSISTANT CLERK

Andrew Proudfoot

LOCATION

Committee Room 1

Scottish Parliament

Justice Committee

Tuesday 31 March 2009

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

Subordinate Legislation

The Convener (Bill Aitken): I remind everyone to switch off mobile phones. We have received no apologies and have a full turn-out of members.

Agenda item 1 is consideration of four items of subordinate legislation under the negative procedure.

Bankruptcy Fees (Scotland) Amendment Regulations 2009 (SSI 2009/97)

The Convener: The Subordinate Legislation Committee raised no points on the regulations. As members have no questions, are we content to note the regulations?

Members *indicated agreement*.

Act of Sederunt (Fees of Shorthand Writers in the Sheriff Court) (Amendment) 2009 (SSI 2009/103)

The Convener: The Subordinate Legislation Committee raised no points on the instrument. Do members have any questions?

Robert Brown (Glasgow) (LD): The 4.35 per cent increase in fees sounds a bit above the rate of inflation, as the fees were last raised in 2008. That is not a big issue, but I wonder whether we have any information on the logic behind the figure.

The Convener: You are right—it is not a big issue. The answer is that we do not have any information. However, the issue is not particularly significant. Are members content to note the instrument?

Members *indicated agreement*.

Crime (International Co-operation) Act 2003 (Designation of Participating Countries) (Scotland) Order 2009 (SSI 2009/106)

Enforcement of Fines etc (Diligence) (Scotland) Regulations 2009 (SSI 2009/110)

The Convener: The Subordinate Legislation Committee raised no points on the instruments. As members have no questions, are we content to note the instruments?

Members *indicated agreement*.

The Convener: I suspend the meeting briefly to allow the Cabinet Secretary for Justice and his officials to take their seats.

10:21

Meeting suspended.

10:22

On resuming—

Sexual Offences (Scotland) Bill: Stage 2

The Convener: Agenda item 2 is consideration of the Sexual Offences (Scotland) Bill. This is the third and final day of stage 2 proceedings on the bill. The committee will consider amendments to section 31 to the end of the bill. I welcome the Cabinet Secretary for Justice, Mr Kenny MacAskill, and his officials. I also welcome Patrick Harvie MSP. Members should have their copies of the bill, the marshalled list of amendments and the groupings of amendments.

After section 30

Amendment 110 moved—[Kenny MacAskill]—and agreed to.

The Convener: Amendment 133, in the name of Robert Brown, is in a group on its own.

Robert Brown: The committee will remember that, in our stage 1 discussions on the bill, one of the more significant issues was the Government's lack of pre-consultation with young people, which was commented on by Scotland's Commissioner for Children and Young People and several organisations.

The committee made certain recommendations on the issue in its stage 1 report. The committee was

"surprised by the lack of willingness on the part of the Scottish Government to carry out … meaningful … consultation",

and the report recommended:

"following enactment of the Bill the Government should implement an age-appropriate information and publicity campaign after having consulted appropriately with this age group."

In fairness, the Government has responded to that to a degree and said that it will implement an age-appropriate information and publicity campaign, but what is starkly missing from that undertaking is any commitment to consult that age group appropriately. That is my motivation for lodging amendment 133: I want to hear the Government's view on the issue.

As the cabinet secretary will be aware, the amendment relates to all sorts of issues, such as how young people react to legislative prompts and the motivations and background reasons behind the fact that about 30 per cent of young people have sexual relations before the age of 16, with all the health worries and issues that go with that. There are also issues about encouraging young people to engage, when appropriate, with health, advice and counselling services, as well as the underlying issue of teenage pregnancies.

The Government ought to inform its work through proper consultation arrangements with young people. The minister may be able to satisfy me in that regard; I know that work has been done on considering the facilities that are available, but this important issue underlies not just the immediate proposals but the committee's consideration of the age of consent and the implications of various other things.

My views on the matter are borne out by the representations that have been made by Scotland's Commissioner for Children and Young People and organisations such as Children 1st, which expressed similar views and concerns. The British Medical Association also expressed similar views and concerns about what it thinks might be the implications of our legislative activities. That background impels me to seek the minister's views on the issues that have been raised by the proposal, which is quite complicated in some ways, and to move the amendment.

I move amendment 133.

Bill Butler (Glasgow Anniesland) (Lab): Amendment 133 seems to be a reasonable addendum. Consulting young people appropriately chimes with what the committee said in its stage 1 report. I hope that the Government sees the amendment as rational and that it will take the proposal on board. I look forward to hearing the cabinet secretary's response. The amendment seems rational to me.

The Convener: The amendment is consistent with the committee's report, although there have been doubts about the practicality of the proposal.

Stewart Maxwell (West of Scotland) (SNP): I sympathise with Robert Brown's and Bill Butler's comments on the intention behind amendment 133, but am not entirely convinced that such information should be in the bill. I understand that the Government has already said that it intends to undertake an information and publicity campaign—I am sure that the cabinet secretary will explain what will happen—but it does not seem entirely appropriate to include such information in the bill.

The convener mentioned practicality. I am slightly concerned about the practicality of putting in the bill a declaration that would force the Government to undertake a campaign but that did not include any details of that campaign, what it would entail, how it would be progressed and what it would cost. I would prefer it if the cabinet secretary explained his intention clearly and confirmed that the Government will undertake such a campaign.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): Almost every organisation that represents young people that gave evidence to the committee expressed serious concerns about the lack of age-appropriate consultation with young people on such a major piece of legislation that will affect them. It is clear that we have a serious problem with young people and their attitudes to underage sex and that a full education programme is needed.

The committee expressed concern that the Government had not consulted. There have been several months for taking evidence on the matter, and the committee has expressed its concerns. As far as I know, the Government has not engaged in any way with young people in that period. The amendment is worth considering, and I would like to hear what the cabinet secretary has to say about it.

10:30

The Cabinet Secretary for Justice (Kenny MacAskill): Amendment 133 seeks to impose on the Government two obligations that would require to be discharged before commencement of part 4. The first would be to consult those aged under 18 on their attitudes to part 4. It is not clear from the amendment what that consultation is intended to accomplish; I am grateful to Mr Brown for his explanation in that context.

During stage 1, the committee expressed concerns that the Government had not directly consulted children on the bill, although we did consult children's organisations extensively, including Scotland's Commissioner for Children and Young People, Children 1st and Barnardo's.

A requirement to consult children on their attitudes to part 4 after it has passed into law seems to be of limited value. It would be useful to consult children to help us to decide how we can best take forward the legislation, but their attitudes to part 4 should not be focused on; it would be more productive to consult them on how we can best communicate with them on the issues that are dealt with in the bill—in part 4, certainly, but not exclusively. There are other important issues that are dealt with in the bill that will be of particular relevance to young adults, particularly its provisions on consent and positions of trust.

The second obligation that the amendment would impose on the Government is to undertake an information and publicity campaign. Our response to the stage 1 report on the bill confirmed that the Government intends to undertake an information and publicity campaign following enactment of the bill, and that that will include age-appropriate material that is aimed at young people. I am happy to confirm and to put on the record that we continue to intend to undertake such a campaign and that our intention is that that campaign will link into existing plans to increase drop-in services for young people throughout Scotland to provide direct contact with professionals.

As I have already said, as part of our planning for the campaign, we intend to consult children and young people on the most effective way of communicating with them on the important issues that the bill deals with. That consultation will shape the approach that we take on that aspect of our campaign, which will also extend to adults. I am grateful for Mr Maxwell's contribution in that context.

I should point out that we consider there to be technical defects in the drafting of the amendment. In particular, the absence of any qualification on the requirement to consult appears to require the Government to consult everyone in Scotland under the age of 18, which is clearly unachievable.

In summary, I am happy to give a commitment that the Government will undertake a publicity campaign before the commencement of part 4. I am also delighted to give a commitment that children and young people will be consulted on the best way in which the campaign can communicate with children on part 4. In light of those commitments and the amendment's technical faults, which I have highlighted, the imposition of such requirements in legislation is inappropriate and unnecessary, so I invite the member to seek to withdraw the amendment.

Robert Brown: I have been a minister and made observations about alleged technical deficiencies. I do not think that the amendment has technical deficiencies, because it would require ministers to

"consult in an appropriate manner".

When ministers rely on technical deficiencies in that sense, perhaps their argument is beginning to be a little bit weaker than it might otherwise be.

I am, nevertheless, grateful to the cabinet secretary for his response on the merits of the proposal. The key point is consultation with children and young people. I accept Stewart Maxwell's observation that it may not be appropriate to include such matters in the bill, but wonder whether the cabinet secretary will undertake to meet me to discuss the detail of the proposal further prior to stage 3—I see him indicating that he will; that is helpful. Against that background, I am prepared to seek to withdraw the amendment.

There are requirements in the Children (Scotland) Act 1995 and other legislative arrangements for the views of young people to be

taken into account. The Government should bear that in mind in the future and deal with the spirit and the letter of the proposal in that regard. With those observations, I am happy to seek to withdraw the amendment.

Amendment 133, by agreement, withdrawn.

Section 31—Sexual abuse of trust

Amendment 45 moved—[Kenny MacAskill]—and agreed to.

Section 31, as amended, agreed to.

Section 32—Positions of trust

The Convener: Amendment 135, in the name of the minister, is grouped with amendments 143 and 151.

Kenny MacAskill: The amendments would amend the power in section 32 to modify the definition of a position of trust. Amendment 135 deletes the existing power to define additional conditions constituting a position of trust; amendment 143 creates a new order-making power to add, modify or delete a condition constituting a position of trust; and amendment 151 provides that that order-making power shall be subject to the affirmative resolution procedure. That meets the recommendation by the Subordinate Legislation Committee, which was endorsed by the Justice Committee in its stage 1 report, that, given the potential impact of the exercise of that power to widen the scope of the offence of sexual abuse of trust, affirmative procedure provides the appropriate level of parliamentary scrutiny.

The committee will be aware that the Government indicated to the Subordinate Legislation Committee that we will lodge amendments to provide that any direct modification of primary legislation using the order-making power in section 45 will attract the affirmative procedure. Subsequently, general discussions of the matter have taken place with parliamentary officials, as a similar issue has arisen with other legislation. The Government is, therefore, considering its general approach to the matter in liaison with the Subordinate Legislation Committee and its officials. As a result, we have not lodged any amendments to section 45 at this stage. We will, however, lodge at stage 3 any amendments that are required. I hope that that explanation, although not directly connected to this group of amendments, is helpful to the committee.

I move amendment 135.

Amendment 135 agreed to.

The Convener: Amendment 136, in the name of the minister, is grouped with amendments 137 to 142, 144 and 145.

Kenny MacAskill: The amendments alter what constitutes a position of trust in relation to a person B who is under 18. The amendments will ensure that any teacher, care home worker, hospital worker or other relevant person will be considered to be in a position of trust in relation to B if B is detained in, resides at or attends an institution and A looks after any individuals who are under 18 in that institution rather than just looking after B. The amendments will maintain the criteria for what constitutes a position of trust under the law at present.

The Scottish Law Commission rejected this approach, as it considered the provision too wide and that it would create a relationship of trust between, for example, a tutor in a law school on one campus of a university and a student of medicine who is based on another, even though there is no professional contact between the two. We recognise the Law Commission's concerns regarding universities and further education institutions; therefore, amendment 139 amends the definition of a position of trust in respect of a person who works in an educational establishment so that, in those circumstances, a position of trust exists only when the adult looks after B, the child in question.

Amendments 144 and 145 are consequential on amendment 139.

Amendments 140 to 142 make consequential changes to the definition of "looks after" in section 32(7). Amendment 141 extends the definition of "looks after" explicitly to include the circumstances in which A teaches B.

I move amendment 136.

Amendment 136 agreed to.

Amendments 137 to 143 moved—[Kenny MacAskill]—and agreed to.

Section 32, as amended, agreed to.

Section 33—Interpretation of section 32

Amendments 144 and 145 moved—[Kenny MacAskill]—and agreed to.

Section 33, as amended, agreed to.

Section 34—Sexual abuse of trust: defences

Amendment 46 moved—[Kenny MacAskill]—and agreed to.

Section 34, as amended, agreed to.

Section 35—Sexual abuse of trust of a mentally disordered person

Amendment 47 moved—[Kenny MacAskill]—and agreed to.

Section 35, as amended, agreed to.

Section 36—Sexual abuse of trust of a mentally disordered person: defences

Amendment 48 moved—[Kenny MacAskill]—and agreed to.

Section 36, as amended, agreed to.

Section 37—Penalties

The Convener: Amendment 111, in the name of the minister, is grouped with amendments 50 to 52, 55, 112 and 56.

Kenny MacAskill: The Justice Committee's stage 1 report recommended that the Government lodge amendments to rule out the possibility of a fine being imposed as a sole penalty when a person is convicted of rape, rape of a young child or serious sexual assault. Our response to the report confirmed that we would do so. Having considered the committee's recommendations, we have concluded that serious sexual assaults should be defined for this purpose as those tried on indictment.

Amendment 111 therefore amends section 37 to provide that a fine may not be imposed as a sole penalty when the accused is convicted of rape, sexual assault by penetration or rape of a young child, or when the accused is convicted on indictment of sexual assault, sexual assault by penetration of a young child or sexual assault of a young child. The amendments that create the new offence of sexual assault by penetration and sexual assault of a young child by penetration provide that the offence can be tried only on indictment. All such assaults will, therefore, be treated as serious sexual assaults for these and other purposes. Furthermore, amendment 111 provides that the court's powers to substitute a fine for a penalty of imprisonment under section 199(2) of the Criminal Procedure (Scotland) Act 1995 shall not apply.

The other amendments in the group make consequential changes to schedule 1 to remove the phrase "or a fine" from the maximum penalties for the offences.

I move amendment 111.

Paul Martin (Glasgow Springburn) (Lab): We are sometimes quick to advise Governments when we think that they have got it wrong, but on this occasion the Government has responded appropriately to ensure that the potential loophole whereby the rape of a child could result in a fine has been dealt with. I commend the minister for lodging excellent amendments to deal with that.

The Convener: Yes. The committee was concerned about that. I doubt that it would ever have happened, but it is as well to underline in statute the gravity of that type of offence. Amendment 111 and its related amendments do so.

Amendment 111 agreed to.

Section 37, as amended, agreed to.

Schedule 1

PENALTIES

Amendments 50 to 55, 112, 56, 57, 113 to 115, 58 and 116 to 119 moved—[Kenny MacAskill]—and agreed to.

Schedule 1, as amended, agreed to.

Before section 38

The Convener: Amendment 120, in the name of the minister, is in a group on its own.

Kenny MacAskill: Amendment 120 introduces a new section concerning the establishment, for offences that require that the accused acts for the purpose of obtaining sexual gratification or causing humiliation, alarm or distress, of the purpose for which the accused acts. The proposed new section provides that the requirement to prove that the accused acted for the purpose of obtaining sexual gratification or causing humiliation, alarm or distress shall be satisfied if it may reasonably be inferred from all the facts and circumstances of the case that the accused acted for that purpose.

The test is similar to that which is used in section 57 of the Civic Government (Scotland) Act 1982 in relation to a person being on premises without lawful authority with the intent to commit theft. Both offences provide that the accused may be convicted if it can be inferred from all the facts and circumstances that the accused had the specified intent. The amendment also provides that, for the avoidance of doubt, there is no requirement that the accused has caused the victim actual humiliation, alarm or distress in determining the accused's purpose.

I move amendment 120.

Amendment 120 agreed to.

10:45

The Convener: Amendment 172, in the name of Patrick Harvie, is in a group on its own. I invite Patrick Harvie, who is a welcome guest to the committee, to speak to the amendment.

Patrick Harvie (Glasgow) (Green): Thank you, convener. It has been a while.

Amendment 172 relates to the Scottish Law Commission's recommendation in paragraph 5.27 of its report that what it described as "sado-masochistic practices"—perhaps more widely known in society as BDSM activity—should not be a criminal offence. The commission's draft bill included a provision to clarify that, and amendment 172 uses text from that draft bill. The Scottish Government decided not to include the provision in its bill. It is perhaps understandable that a decision not to include a particular measure has had less scrutiny than aspects that are proposed in the bill. I lodged the amendment to ensure that there is some examination of and discussion about the Government's decision not to legislate. Even if the amendment is regarded as a probing amendment, I am keen to give the cabinet secretary the opportunity to state the Government's position and to address some of the underlying questions.

The reason why the Government's decision not to include the provision stands out for me is that it appears to conflict with the Government's intention to place a well-understood concept of consent at the heart of the law on sexual offences. It seems to me that if that principle is applied, consenting adults who take part in BDSM activity would not in normal circumstances expect to be committing an offence.

As I understand it, the Government is concerned that, if the proposal was included in the legislation, it could be misused by those who are accused of assault that is not part of consensual activity. The example of domestic abuse has been suggested, and the possibility has been raised that such cases could become more difficult to prosecute. I have no wish for that to happen, and I am sure that the committee takes seriously the possibility of unintended consequences. None of us would want to underestimate the harm that domestic abuse causes.

However, there are those who argue that it is inherently abusive or wrong for adults to take part in consensual BDSM activity. That is the first issue that I would like the cabinet secretary to address—I would like to be assured that that is not the Government's position. Is the decision not to legislate based on general views about BDSM activity or solely on the possibility of unintended consequences for other cases, such as cases of domestic abuse? If the latter is the case, I would expect the Government to have considered other approaches that might avoid those consequences while recognising adults' right to consent to activity in which they choose to take part.

Secondly, if that principle of consent is important, I ask the Government to clarify its understanding of the law both now and under the new legislation, assuming that the bill is passed. Is it the Government's view that BDSM activity between consenting adults when no other party is involved is, in fact, a criminal offence? The Scottish Law Commission's report rightly recognises that there is a lack of clarity in that area, so I would like to know the Government's view. If the cabinet secretary believes that that is a criminal offence at present, does he agree that that is an anomaly and that, all other things being equal, such situations should not be regarded as a priority for prosecution? Situations in which consent is uncontested—where all the people involved agree that there was complete and informed consent between them—should surely not be treated as assaults that are worthy of prosecution and punishment.

Finally, and reiterating the importance that we all place on ending the harm that is caused by domestic abuse, I make the case that the situation that faces the BDSM community can also cause harm. Those people are, in many respects, in a similar situation to that in which gay men were before decriminalisation. Perhaps fearing prosecution, and certainly being vulnerable to condemnation in the media, many ordinary people who simply have a different kind of sex life to other people can lose their jobs, their homes and their families as a result of public disapproval. I am not talking about people who have the resources of Max Mosley, who can put up a fight in the courts based on the principle of privacy. I am not talking about people who are in the public eye, against whom a newspaper may make some form of public interest argument, however dubious. There is no clear law on privacy, so it is right that vigorous debate takes place on the matter on both sides. However, when people are caught in the crossfire of that debate, their lives can be ruined.

The final question that I ask the cabinet secretary to address is whether the Government recognises the harm that many people in the BDSM community experience due to the current legal uncertainty, regardless of whether prosecutions actually take place? If so, is he open to re-examining the law in the future, with a view to finding ways in which to recognise the legitimacy of consent in the area and to reduce the harm that many ordinary people experience? I know that he and his colleagues have thought carefully about the concept of consent, and I am sure that the committee has also done so during its consideration of the bill. Many people in the BDSM community give more detailed and thoughtful consideration to the meaning and importance of consent than most people do in their daily lives. Surely there should be some scope to take that insight and let it inform the law in the area. I look

forward to hearing the cabinet secretary's response.

I move amendment 172.

Stewart Maxwell: I appreciate Patrick Harvie's comment—and I believe him—that amendment 172 is not intended in any way to put at risk women who have violent partners, and that it is not intended that such partners should be able to use the provision as a defence. The problem that I have with the amendment is that that is exactly what would happen. Eventually, there would be cases in which the defence was that what happened was consensual sexual activity. Some people might say that the woman or the other partner, whoever that might be, could say that it was not consensual and it was therefore an assault, but I am afraid that the reality of society is that many people find it almost impossible to speak out in their own defence when they find themselves at the mercy of a violent partner. In that situation, it is not unknown for women to refuse to speak up and give evidence against violent partners.

Although I understand the logic of what Patrick Harvie says, I cannot support amendment 172 because, when we take the logic to its extreme conclusion, we end up with an illogicality. If we were to agree to the amendment, violent men would use the provision as a defence for violence against women in particular, and against same-sex partners as well. We cannot allow any possibility that that door will be opened.

I suspect that if the authorities, particularly the police, were to come across consensual sexual activity of the type that we are discussing, they would not pursue a prosecution. I do not see that it would be in anybody's interest to pursue a prosecution.

Therefore, although it might seem illogical, I have to say that I could not support an amendment that would in any way risk putting women even more at risk than some of them currently are.

Nigel Don (North East Scotland) (SNP): I will reiterate my position, although Stewart Maxwell has already stated a large part of it. It has seemed to me from the very beginning that amendment 172 should not be considered. During discussion of all the provisions in the bill, we have come down firmly in favour of the idea that, if we have to, we should stray from the obvious and logical line towards the direction of ensuring that the Crown has the best opportunity of convicting the real offender. On the other side of that, we expect that the Crown will use its discretion appropriately. We recognise that we cannot actually write the words in such a way that we hold the fine line between the two.

Amendment 172 relates to activity that I plainly do not understand and do not wish to comment on, but I would go further than Stewart Maxwell and say that, if the amendment was agreed to, rather than the provision's being used as a defence "eventually", it would be led as the defence whenever there was a previous relationship—a defence lawyer would be duty bound to introduce it. It would simply open up a hole in the legislation and create one more way for unscrupulous defendants to get off.

We have to rely on the Crown Office and Procurator Fiscal Service to use its discretion appropriately and not to convict or even attempt to convict where there is genuine consent. As I said, I will make no comment on the behaviour because I simply do not understand it.

Cathie Craigie: I will make just the same point, I think. I agree with Nigel Don. The bill contains a lot of good provisions that will become law when the bill is enacted. Agreement to amendment 172 would open up a defence for violent partners—regardless of whether they are male or female. I hope that the minister will be able to put up a strong case for not including the amendment in the bill.

The Convener: Patrick Harvie is right to bring the matter before the committee. Although some of his arguments are interesting, I have difficulty in accepting them. However, I agree that the type of behaviour that we are talking about—although it might be difficult to understand or even, according to the committee's view, bizarre—is not analogous with domestic violence. I perhaps differ from Stewart Maxwell on that point.

I wonder whether we are debating the issue in a vacuum. It could be argued that what goes on behind closed doors, between consenting couples, is a matter for them and them alone. However, there would have to be two very important caveats to that: first, that the degree of violence involved did not result in anyone being injured; and secondly, that the activity be consensual. I am open to correction, but I cannot envisage circumstances in which a matter would come to the attention of the police or the prosecuting authorities that had not breached those caveats. On that basis, I feel unable to support amendment 172. Like Nigel Don, I take the view that it is highly probable—indeed, almost inevitable—that the Crown, in considering the circumstances of each case, would be reluctant to prosecute. There is sufficient safety in that.

Patrick Harvie was correct to bring the matter before the committee, particularly bearing in mind that the draft bill, as represented in the report by the Scottish Law Commission, would have included such a provision. Although it is appropriate that the matter be aired today, I just

have some doubts as to amendment 172's efficacy.

Kenny MacAskill: Amendment 172 is intended to decriminalise acts of consensual sexual violence between those aged over 16 provided that the acts are unlikely to result in serious injury. Like the convener, I appreciate that the provision was included in the Scottish Law Commission's draft bill. However, as Stewart Maxwell, Nigel Don and Cathie Craigie have said, we rejected the Law Commission's recommendation because of serious concerns that were expressed by consultation respondents that such a provision could provide a loophole for accused persons in cases of rape, sexual assault and domestic violence.

At present, assault is a crime, regardless of whether the victim consented to being assaulted. If amendment 172 were to be agreed to, the accused might seek to argue in such cases that the complainer had consented to the assault and that the assault was for the purpose of obtaining sexual gratification. In some cases, it may be very difficult for the Crown to disprove such a claim.

Respondents to the Government's consultation and the Law Commission's report were almost all opposed to the recommendation, with many citing concerns that it could undermine prosecutions for domestic abuse and rape.

Issues have been raised, including by the convener, regarding police and prosecution. Obviously, the Scottish Government does not set prosecution policy, and clearly there is a public interest test that the prosecution requires to consider. In many instances, the comments that were made by the convener represent how the prosecution would view such matters. The prosecution has to consider whether a crime has been committed, whether the crime can be proven and whether it is in the public interest to pursue the matter. Clearly, there are also questions as to whether cases would ever be reported to the police if they were about activity between two consenting adults in the privacy of their own house. As I say, prosecution policy is a matter for the Crown.

Patrick Harvie: The convener said that some of the arguments behind amendment 172 are interesting, which is one of the reasons why it is worth airing them at the committee and having at least some discussion of them.

It appears that the sole reason for not legislating in this area is the possibility of unintended consequences. The cabinet secretary has not said anything to suggest that there is another reason behind the decision. There is still an outstanding question about what alternative approaches were considered that could have recognised the rights of adults to consent, without causing unintended consequences, whether legal or in terms of the experience that those people have in society.

Stewart Maxwell said that most of us would not expect prosecutions to take place in circumstances in which individuals had clearly and freely given informed consent, and in which no one was involved who had not consented. I would like to expect that, but I am not sure that it is always the case. I reiterate that it is not a question simply of which prosecutions take place, but of other kinds of harm that those people can experience, such as threats, blackmail and the fear of losing their jobs if their private lives become public in some way. That happens, and real people's lives are torn apart by such experiences.

11:00

I am grateful for the recognition that I am not seeking to do anything that would undermine the importance that we place on ending the harm that is caused by domestic abuse and I would like wider recognition that harm is being done. At the moment, the law appears not to recognise that or to give it any due importance.

However, having raised the issues and, I hope, having opened up the debate and perhaps stimulated further consideration of what the Government might do in the future, I recognise that the question of unintended consequences is unresolved. It is a strong argument. On that basis, I seek to withdraw amendment 172. I hope that it has been valuable to have some of the issues behind it aired at committee.

Amendment 172, by agreement, withdrawn.

Section 38—Power to convict for offence other than that charged

The Convener: Amendment 146, in the name of the minister, is grouped with amendment 147.

Kenny MacAskill: Amendments 146 and 147 will amend section 38, which is on the power to convict for an offence other than that charged. Where an accused is charged with an offence under the bill, section 38(1) would permit the court or the jury to convict of an alternative offence, provided that it is one of the alternative offences corresponding to the offence, as set out in schedule 2.

At present, it is a precondition of the exercise of that power that the accused has been given "fair notice" of the effect that section 38(1) might have on his case. It is further provided that fair notice will be deemed to have been given where a notice of the alternative verdicts that would be available in the accused's case is appended to the indictment or complaint.

As I explained in my letter to the committee of 22 December last year, our view is that it is undesirable to place unnecessary procedural burdens on the prosecution and that the accused can, if a statute provides for alternatives, be deemed to have been given sufficient notice of the possibility of being convicted of an alternate offence.

Amendments 146 and 147 will remove the reference to the giving of fair notice as a precondition to the operation of section 38(1).

I move amendment 146.

Amendment 146 agreed to.

The Convener: Amendment 121, in the name of the minister, is grouped with amendments 122 to 130.

Kenny MacAskill: As section 30 is now solely concerned with deeming the age of a child victim or accused where doubt as to his or her age may open up the possibility of the accused being convicted of a more serious offence, amendment 121 and the other amendments in the group are required to address circumstances in which doubt as to the accused's or victim's age might give rise to conviction of a less serious alternative offence.

The amendments will amend schedule 2 so that the provisions concerning power to convict for alternative offences take account of the offences concerning sexual activity between older children.

I move amendment 121.

Amendment 121 agreed to.

Amendment 147 moved—[Kenny MacAskill]—and agreed to.

Section 38, as amended, agreed to.

Schedule 2

ALTERNATIVE VERDICTS

Amendments 60 to 64 moved—[Kenny MacAskill]—and agreed to.

The Convener: Amendment 148, in the name of the minister, is in a group on its own.

Kenny MacAskill: Amendment 148 will amend schedule 2, such that it will provide that the common-law offences of breach of the peace and public indecency shall be alternative verdicts when an accused is charged with sexual exposure. In circumstances in which an accused is charged with sexual exposure and a court is not satisfied that the accused committed the offence, but is satisfied that they committed either of the alternative offences of breach of the peace or public indecency, the accused may be convicted of those offences.

I move amendment 148.

Amendment 148 agreed to.

Amendments 122, 123, 65, 124, 66, 125, 67, 126, 68, 127, 69, 128 to 130 and 70 to 74 moved—[Kenny MacAskill]—and agreed to.

Schedule 2, as amended, agreed to.

Sections 39 to 41 agreed to.

Section 42—Incitement to commit certain sexual acts outside the United Kingdom

The Convener: Amendment 149, in the name of the minister, is grouped with amendment 150.

Kenny MacAskill: Amendments 149 and 150 are technical amendments that seek to amend references to acts and to conduct in sections 42 and 43, which deal with offences that relate to incitement to commit certain sexual acts outside the United Kingdom and offences that are committed outside the UK, to ensure drafting consistency.

I move amendment 149.

Amendment 149 agreed to.

Section 42, as amended, agreed to.

Schedule 3 agreed to.

Section 43—Offences committed outside the United Kingdom

Amendment 150 moved—[Kenny MacAskill]—and agreed to.

Section 43, as amended, agreed to.

Sections 44 and 45 agreed to.

Section 46—Orders

Amendments 131 and 151 moved—[Kenny MacAskill]—and agreed to.

Section 46, as amended, agreed to.

Section 47—Interpretation

Amendment 75 moved—[Kenny MacAskill]—and agreed to.

Section 47, as amended, agreed to.

Section 48 agreed to.

Schedule 4

MINOR AND CONSEQUENTIAL AMENDMENTS

The Convener: Amendment 152, in the name of the minister, is grouped with amendment 152A.

Kenny MacAskill: Amendment 152 addresses the concerns that the committee raised, in paragraphs 388 and 389 of its report, about the

definition of a homosexual act that is contained in section 13 of the Criminal Law (Consolidation) (Scotland) Act 1995. The current definition of a homosexual act is that it is an act of sodomy or

"an act of gross indecency or shameless indecency by one male person with another male person."

The committee highlighted the concerns that were expressed during evidence at stage 1 that the current definition is potentially offensive. In the Government's response to the stage 1 report, we made it clear that we agree with those concerns. Amendment 152 seeks to amend the definition by providing that a homosexual act is a sexual act by one male person on another male person. An act is considered to be sexual

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

Amendment 152A, in the name of Robert Brown, seeks to change the title of section 13 of the 1995 act to reflect the fact that, following the proposed amendment, section 13 of the 1995 act would be concerned solely with male prostitution. Amendment 152A also seeks to ensure that the offence that is dealt with in section 13(9) of the 1995 act, which concerns male soliciting or importuning

"for the purpose of procuring the commission of a homosexual act",

applies only in the context of male prostitution.

However, from a technical point of view, that part of amendment 152A does not quite work as we presume that it was intended to, because it would not result in the provision of a clear and unambiguous definition in section 13(9) of the 1995 act. That is because reference would be made, in the same phrase, to two different purposes—that of "male prostitution" and that of

"procuring the commission of a homosexual act".

That said, I am grateful to Mr Brown for raising the issue and am happy to give a commitment to consider it further, with a view to determining whether an amendment is required at stage 3.

I move amendment 152.

Robert Brown: I am grateful to the cabinet secretary for lodging amendment 152, which responds to an issue that was raised by me and other members of the committee during the stage 1 debate.

Amendment 152A was stimulated by the Equality Network, which expressed a number of concerns about the language that remains in the Criminal Law (Consolidation) (Scotland) Act 1995. There are two points. The first is that the phrase "homosexual offences" is an outdated and now inappropriate piece of terminology. Secondly, there is an issue about whether the offence in section 13(9) of the 1995 act goes beyond prostitution-related behaviour, which the cabinet secretary took on board. I am told that there have been no prosecutions for such offences that do not relate to prostitution for some years, but there remains a concern that the offence is not restricted to prosecution—

The Convener: Did you mean "prostitution"?

Robert Brown: What did I say?

The Convener: "Prosecution".

Robert Brown: I beg your pardon.

There is a fear that any man who sexually propositions another man might commit the offence, which is contrary to the principle of the bill that consenting acts between adults should be dealt with without sexual orientation discrimination. The intention of amendment 152A is to clarify the scope of the offence by ensuring that it applies only if the soliciting or importuning was for the purposes of prostitution. It would not alter the law on prostitution in any way, which is beyond the scope of the bill.

Proposed new subparagraph (d) of the new paragraph that amendment 152 seeks to insert in schedule 4 would change the heading of section 13 of the 1995 act from "Homosexual offences", which is inaccurate and, to lesbian, gay, bisexual and transgender people, offensive, to "Offences relating to male prostitution". That heading should be more accurate, as it reflects the reduced scope of section 13 of the 1995 act, following the other changes to it.

I am not obsessed by the technical aspects of the bill and am grateful for the cabinet secretary's helpful response. In those circumstances and in the light of the undertaking that he has given, I will be happy to seek leave to withdraw my amendment.

I move amendment 152A.

The Convener: No one else has comments to make. Do you want to wind up, Mr MacAskill?

Kenny MacAskill: I am happy to repeat the undertaking that we will consider whether an amendment is required at stage 3.

Amendment 152A, by agreement, withdrawn.

Amendment 152 agreed to.

The Convener: Amendment 134, in the name of Robert Brown, is in a group on its own.

Robert Brown: Again, this is a probing amendment that deals with an issue that I raised in the stage 1 debate and which was mentioned in the committee's stage 1 report. It relates to how the arrangements for notification that someone has been on the sex offenders register or has a

criminal conviction of a type that can follow them through their lives would be affected by the bill.

Quite manifestly, no one would object to convictions for serious crimes of a sexual nature being subject to appropriate notification, but there were concerns that the bill could mean that a number of much more minor matters would follow people throughout their lives. It is quite a complicated area, the implications of which I am not sure that I fully understand. It is my understanding that the Disclosure Scotland arrangements mean that although a supervision order that was imposed by a children's hearing, for example, will not be disclosed when a basic disclosure check is carried out, it might be disclosed when a standard or an enhanced disclosure check is carried out, depending on why such a check is made.

11:15

I know that the cabinet secretary has lodged a variety of amendments to take out offences that would normally attract penalties of imprisonment. That is entirely reasonable. However, the committee also sought—I would be interested in hearing some background on this—an expert review of the notification requirements. By implication, that suggests that key stakeholders should be involved. We need to ensure that the remaining provisions on notification of criminal convictions or references to the children's panel are fit for purpose and meet our requirements without unnecessarily criminalising children and young people. The notification arrangements need to work appropriately.

The format of amendment 134—perhaps oddly for me—would widen ministerial powers to allow other offences to be removed from the provisions on notification. Perhaps the minister will be able to give us some satisfaction on the current provisions, but I think that something wider than an internal review might be useful. We should involve stakeholders in the issue to ensure that we get this one right. In a limited number of cases, there might be substantial implications for young people if such notifications follow them throughout their lives.

Against that background, I move amendment 134.

The Convener: Amendment 134 contains some important material. As no other members wish to speak to the amendment, I invite the minister to respond.

Kenny MacAskill: I am grateful for the spirit in which Mr Brown spoke to matters on which I will seek to give some clarification and explanation.

Amendment 134 seeks to provide the Government with a power to make provision for separate sex offender notification requirements for those who are under 16. The amendment would achieve that by providing a power to amend by order the provisions of part 2 and paragraphs 36 to 60 of schedule 3 to the Sexual Offences Act 2003, for the purpose of modifying the application of that part to persons who were aged under 16 at the time of committing an offence that is specified in one of those paragraphs.

Although we have every sympathy with the view that children require to be treated sensitively and appropriately by such arrangements, the Government's view is that amendment 134 is unnecessary. We take that view primarily because the current arrangements already make clear provision for children to be treated differently. The vast majority of such cases are handled by the children's reporter rather than the criminal courts. In addition, separate arrangements for sex offender notification are already in place for those aged under 18.

As I have said, there is already considerable discretion in the system for handling under-16-year-olds. Subject to any guidelines from the Lord Advocate, the Crown Office and Procurator Fiscal Service has the option to refer a case involving an under-16-year-old to the children's hearings system for disposal. Only the most serious offences that are committed by under-16-year-olds are dealt with through the courts. Where a case is referred to and disposed of by the children's hearings system, the child will not be subject to sex offender notification requirements.

However, we must recognise that a small minority of children and young people present a clear danger to others. If a person who is under 16 is convicted of a sexual offence in the criminal courts, that reflects the fact that a serious offence has been committed. The duration of the sentence that is imposed will further underline the seriousness of the offence, particularly in light of the fact that the court will no doubt take the age of the offender into account when passing sentence. Given that those who are under 16 have the capacity to commit serious offences, it is important that the police know of their whereabouts so that measures can be taken to protect the public. That is important because some young people change address as they move into and out of secure establishments.

As I have said, the notification requirements already make special provision for young sex offenders. Section 82(2) of the 2003 act defines a young sex offender as a person who is under the age of 18. For such offenders who are sentenced to less than 30 months, the notification period is half that set for an adult offender who is sentenced

to a similar period. Furthermore, for some offences, certain criteria need to be met before a person who is under 18 becomes subject to the notification requirements. Likewise, some of the amendments that we have lodged make special provision for offenders under the age of 18 who are charged with sexual offences involving consensual sexual conduct with older children. In the Government's view, it would be an unnecessary complication to the working of the notification system to provide for a different regime for the very small number of offenders subject to notification requirements who are under the age of 16.

Part 2 of the 2003 act also makes provision regarding foreign travel orders and sexual offences prevention orders as well as notification orders. The proposed order-making power would enable those aspects to be modified as they apply to those under the age of 16. Such orders are imposed by a court for a certain period of time, up to the maximum that is set in the legislation. In our view, a court is best placed to determine whether, in the light of the seriousness of the grounds that are set out in the application, it is appropriate in an individual case to impose such an order on an under-16-year-old and, if it is appropriate, for how long such an order should be imposed.

It might be useful to clarify that the sex offender notification requirements in the bill and in the Government's amendments are not intended to be discretionary. The measures are simply an administrative consequence of a person's conviction of certain offences in certain circumstances. It is the Government's view that that should remain the way in which the requirements operate.

The interaction between the panel's activities and disclosure is something that we are considering, and I will respond on that issue when I meet Mr Brown before stage 3.

In summary, I think that it is unnecessary to modify the application of part 2 of the 2003 act to those aged under 16, as the system that is in place already makes special provision for young people. Therefore, the proposed power in amendment 134 is unnecessary and I invite Mr Brown to withdraw it.

Robert Brown: I am grateful for the cabinet secretary's response on the matter. I just want to clarify whether I have understood him correctly. I understood him to say that notification requirements in relation to the register do not apply in situations in which the matter has gone to a hearing as opposed to being prosecuted in the courts.

Kenny MacAskill: Yes.

Robert Brown: That is half the issue. The other half, which the cabinet secretary dealt with in his closing comments, relates to the standing of convictions—in inverted commas—before a children's hearing. By that, I mean situations in which the matter either has been accepted or has been established before a court. As I understand it, these offences would constitute a previous conviction under the definitions in the Rehabilitation of Offenders Act 1974. That is the key bit of information that affects such things as young people's employment opportunities. I am grateful for the cabinet secretary's undertaking to discuss the matter further with me. It is a complex area and, as I indicated, I was not sure that I had got wholly to the heart of it. Perhaps we can consider the matter before stage 3, as he suggests, and see whether we can arrive at a common position on it.

Against that background, I am prepared to withdraw amendment 134.

The Convener: Does the committee agree that Robert Brown may withdraw the amendment, which would, as I recollect, have granted the cabinet secretary additional powers? I am sure that Mr Brown will not make a habit of lodging amendments of that type.

Amendment 134, by agreement, withdrawn.

The Convener: Amendment 153, in the name of the minister, is grouped with amendments 154 to 168 and 171.

Kenny MacAskill: Amendments 153, 155, 156, 157, 159 and 166 amend schedule 4 to add to schedule 3 to the Sexual Offences Act 2003 the new offences that have been introduced at stage 2, which relate to sexual assault by penetration, voyeurism and sexual exposure to children, so as to provide that persons who are convicted of those offences shall be subject to sex offender notification requirements. That is subject to the proviso that offenders under the age of 18 who are convicted of offences against older children under part 4, where it is not a requirement that the child did not consent, shall be made subject to the notification requirements only when they are sentenced to a term of imprisonment.

Amendment 154 amends schedule 4 so as to provide that a person who is convicted of sexual exposure shall be subject to sex offender notification requirements only when he or she is sentenced to a term of imprisonment or when the offender is over 18 and the victim is under 18. We have made those changes to avoid persons being placed on the sex offenders register who do not pose a danger to public safety. Our approach is based on the equivalent provisions concerning the offence of sexual exposure in the Sexual Offences Act 2003.

Amendments 158 and 160 to 165 amend schedule 4 so as to provide that a person under the age of 18 who is convicted of a sexual offence against an older child under part 4 shall be subject to sex offender notification requirements only when he or she is sentenced to a term of imprisonment. As I outlined in my response to the committee's stage 1 report, we consider that it might be disproportionate to provide that offenders under the age of 18 who are convicted of offences concerning consensual sexual conduct with older children should always be made subject to sex offender notification requirements.

Amendments 167 and 168 make the same changes in respect of the offences concerning older children engaging in sexual activity with each other.

Amendment 171 amends schedule 4 to remove the reference to the offence of shameless indecency from schedule 3 to the 2003 act. The case of Webster v Dominick 2003 determined that shameless indecency is not a nomen juris and that, when the indecent conduct involves no individual victim but affronts public sensibilities, the offence is one of "public indecency".

The offence of public indecency is not solely a sexual offence, and it would not always be appropriate to make offenders subject to sex offender notification requirements. We consider that the best way to resolve the matter is to delete the reference to shameless indecency in paragraph 42 of schedule 3 to the 2003 act. In cases in which an accused is convicted of the offence of public indecency and the court considers that there was a significant sexual aspect to the offender's behaviour, he will become subject to the sex offender notification requirements by virtue of paragraph 60 of schedule 3 to the 2003 act.

I move amendment 153.

Amendment 153 agreed to.

Amendments 154 to 168 moved—[Kenny MacAskill]—and agreed to.

Schedule 4, as amended, agreed to.

Schedule 5

REPEALS

The Convener: Amendment 169, in the name of the minister, is grouped with amendment 170.

Kenny MacAskill: Amendment 169 seeks to remove from schedule 5 the provision that repeals sections 78(2A) and 78(2B) of the Criminal Procedure (Scotland) Act 1995, which require that, in a case that is tried on indictment, an accused must notify the Crown, the court and any co-accused in advance of the trial if he intends to claim, as his defence against a charge of a sexual offence, that the complainer consented. Amendment 170 seeks to remove from schedule 5 the provision that repeals section 149A of the 1995 act, which made the equivalent change in respect of cases that are tried under the summary procedure.

The Law Commission had provided for the repeal of those provisions as it considered them to be redundant, because the offences are now defined in terms of the absence of consent. As such, that is an element of the crime that the Crown would always have to prove. However, the Crown Office and Rape Crisis Scotland are both of the view that the provisions are valuable in that they provide for advance notice to be given to the complainer of the accused's intent to claim that sexual activity occurred but that the complainer consented to the act. In the view of those organisations, the bill's provisions do not change that fact.

During consideration of the Sexual Offences (Procedure and Evidence) (Scotland) Bill, the then Deputy Minister for Justice made it clear that the primary purpose of requiring the accused to give prior notice in that way was

"to give fair warning to the complainer. Such notification will allow the complainer to be as well prepared as possible—not in a legal sense, but emotionally and personally—for what they are likely to face in a criminal court."—[*Official Report*, *Justice 2 Committee*, 24 October 2001; c 537.]

I move amendment 169.

Amendment 169 agreed to.

Amendments 170 and 171 moved—[Kenny MacAskill]—and agreed to.

Schedule 5, as amended, agreed to.

Section 49 agreed to.

Long title agreed to.

The Convener: That ends stage 2 consideration of the bill.

Over the weeks, the committee has had to deal with a complex, technical piece of legislation that addresses some highly sensitive matters. I thank all the officials and witnesses who gave evidence to us, and I thank everyone for their professionalism.

11:29

Meeting continued in private until 11:43.

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