

LOCAL GOVERNMENT AND TRANSPORT COMMITTEE

Tuesday 7 November 2006

Session 2

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LOCAL GOVERNMENT AND TRANSPORT COMMITTEE

27th Meeting 2006, Session 2

CONVENER

*Bristow Muldoon (Livingston) (Lab)

DEPUTY CONVENER

*Fergus Ewing (Inverness East, Nairn and Lochaber) (SNP)

COMMITTEE MEMBERS

Dr Sylvia Jackson (Stirling) (Lab)

*Paul Martin (Glasgow Springburn) (Lab)

*David McLetchie (Edinburgh Pentlands) (Con)

*Michael McMahon (Hamilton North and Bellshill) (Lab)

*Mike Rumbles (West Aberdeenshire and Kincardine) (LD)

*Tommy Sheridan (Glasgow) (Sol)

*Ms Maureen Watt (North East Scotland) (SNP)

COMMITTEE SUBSTITUTES

Mr Bruce McFee (West of Scotland) (SNP)

John Farquhar Munro (Ross, Skye and Inverness West) (LD)

Dr Elaine Murray (Dumfries) (Lab)

Murray Tosh (West of Scotland) (Con)

*attended

THE FOLLOWING ALSO ATTENDED:

Margo MacDonald (Lothians) (Ind)

Frank McAveety (Glasgow Shettleston) (Lab)

THE FOLLOWING GAVE EVIDENCE:

Alison Douglas (Scottish Executive Justice Department)

Paul Johnston (Scottish Executive Legal and Parliamentary Services)

George Lyon (Deputy Minister for Finance, Public Service Reform and Parliamentary Business)

Andrew McIntyre (Crown Office and Procurator Fiscal Service)

CLERK TO THE COMMITTEE

Martin Verity

SENIOR ASSISTANT CLERK

Alastair Macfie

ASSISTANT CLERK

Rebecca Lamb

LOCATION

Committee Room 1

Scottish Parliament

Local Government and Transport Committee

Tuesday 7 November 2006

[THE CONVENER *opened the meeting at 14:07*]

Items in Private

The Convener (Bristow Muldoon): I call today's meeting to order. Under item 1 on our agenda, I ask committee members to agree to take in private agenda item 4, which is consideration of the content of our stage 1 report on the Prostitution (Public Places) (Scotland) Bill, and item 5, which is consideration of the content of our stage 1 report on the Transport and Works (Scotland) Bill. Is that agreed?

Fergus Ewing (Inverness East, Nairn and Lochaber) (SNP): I have to go to an important meeting with a minister about a constituency issue later this afternoon, which could not be arranged for any other time. Despite my absence, I have no objection to the items being considered in private.

Tommy Sheridan (Glasgow) (Sol): I disagree.

The Convener: Tommy Sheridan wishes to record his disagreement to our considering the items in private. Are the other members agreed?

Members indicated agreement.

Prostitution (Public Places) (Scotland) Bill: Stage 1

14:08

The Convener: Agenda item 2 is further consideration of the Prostitution (Public Places) (Scotland) Bill at stage 1. Today marks the last of our evidence-taking sessions. I welcome George Lyon MSP, the Deputy Minister for Finance and Public Service Reform. Supporting Mr Lyon are Alison Douglas, who is head of the Executive's corporate killing and prostitution team; Patrick Down, who is a policy officer in the corporate killing and prostitution team; Paul Johnston is a solicitor in the office of the solicitor to the Scottish Executive; and Andrew McIntyre is principal procurator fiscal depute. I welcome the officials to the meeting.

I invite George Lyon to make some introductory remarks, after which we will move to questions from the committee.

The Deputy Minister for Finance, Public Service Reform and Parliamentary Business (George Lyon): Thank you, convener. I begin by apologising for the fact that Paul Johnston, the solicitor on the bill, did not appear with officials at the first meeting at which the committee considered the bill. I welcome him to the meeting today. I hope that he will answer some of the questions that were asked at the first meeting and which have continued to be asked throughout the committee's consideration of the bill. I thank the committee for giving me the opportunity to address some of the issues that have arisen in the evidence so far and to hear members' concerns at first hand.

I will start by providing a bit of context. In 2003, we established an expert group on prostitution to review the legal, policing, health and social justice issues to do with prostitution in Scotland. The first phase of the group's work focused on street prostitution involving women. The group recommended a change in the law to cover purchasers and sellers and to protect the public from offensive conduct. Following a broadly supportive consultation on the group's report, the Executive made a commitment to reform the law along the lines that the group proposed.

The Association of Chief Police Officers in Scotland said in its response to the expert group's proposals that the criminal law alone will never eliminate prostitution from our streets. We agree: we need local multi-agency strategies that address all facets of the problem. For that reason, we have issued draft guidance for local authorities and their community planning partners in order to help them tackle street prostitution by preventing individuals

from becoming involved in prostitution, by reducing the harm that such individuals—the victims—experience, by helping them to leave prostitution and by protecting communities.

However, the criminal law has an important role to play in addressing the nuisance that street prostitution can cause in our communities. Legislation can signal the kind of behaviour that society regards as unacceptable and it can help to deter such behaviour. Legislating on prostitution is not easy. It is an essential requirement of Scots criminal law that persons are presumed innocent until proven guilty and that guilt must be established beyond reasonable doubt. That is challenging in this context, given that behaviour might amount to no more than a conversation between two individuals. However, that is not an argument for doing nothing. We need to ensure that offences are as effective as possible and we are willing to listen to suggestions about how they might be improved.

During evidence taking, two main criticisms of the proposed offences emerged: first, they might be unenforceable, and secondly, they do not go far enough. The first criticism is more fundamental. I am aware that ACPOS implied in oral evidence that the new offence would not be as robust against sellers as is the current offence under section 46 of the Civic Government (Scotland) Act 1982. We refute that and I am pleased that ACPOS has written to the committee to say:

"In terms of section 1 of the bill which relates to both sellers and buyers the new legislation will not change the process that currently exists within section 46 of the Civic Government (Scotland) Act in relation to sellers."

The burden of proof under the new offence will, in essence, remain unchanged. The only difference is the nuisance, alarm or offence component; the Crown Office and Procurator Fiscal Service does not consider that that component will present a particular barrier to prosecution. Andrew McIntyre, who is here to represent the COPFS will address the matter in more detail. It is also worth noting that in its response to the expert group's consultation, ACPOS requested that nuisance be added to the offence.

ACPOS also expressed concern about enforceability against purchasers of the soliciting offence. We accept that there are challenges in that regard, but we do not think that the offence is unworkable. Evidence could be led, for example, from individuals who were approached by someone seeking to purchase sex, from a third party who overheard the exchange, or from an admission or incriminating remarks that were made by the accused. Again, Andrew McIntyre will address that in more detail.

The second criticism was that the bill does not go far enough because it will not criminalise loitering in a motor vehicle. It is worth noting that the kerb-crawling offence in England and Wales criminalises people who solicit from cars or in the vicinity of cars but does not criminalise loitering in a car. The offence in the bill is equivalent to the English offence in that regard. I understand the wish for a broader offence, but there are profound difficulties in proving intent if behaviour is limited to driving slowly without attempting to solicit.

Committee members suggested that the problem might be overcome by creating a reverse burden of proof, so that the accused would have to prove that they were not loitering in the area for prostitution-related purposes. As my officials indicated in a letter to the committee, it would not be justifiable, proportionate or necessary to establish such a reverse burden of proof. Innocent drivers might be found guilty of the proposed offence simply because they were unable to provide proof of their legitimate reasons for driving in a particular area. We are also concerned that such a reverse burden could fall foul of the European convention on human rights. Nevertheless, we are willing to listen to concerns about how the offences are framed and to consider ways in which those might be addressed.

14:15

I hope that members will agree that the overall objective of the bill to address the nuisance behaviour—whether by the purchaser or the seller—that is associated with street prostitution is worthy of support. I am happy to answer any questions that the committee may have. First, however, I ask Andrew McIntyre to provide more detail on the enforcement aspects. I understand that you specifically asked for Elish Angiolini or a representative of the Crown Office to come along to deal with that issue.

Andrew McIntyre (Crown Office and Procurator Fiscal Service): There are a couple of areas that I want to comment on from the perspective of a prosecutor. They are issues that are expanded on in the letter that I submitted to the committee, which you should have to reflect on.

The bill will extend the scope of the criminal law to cover, for the first time, the acts of people who purchase for the purposes of prostitution; it will not criminalise only the acts of sellers. That is a necessary extension if people who purchase for the purposes of prostitution are to be criminalised. Under the current law, there is no basis on which to prosecute people who purchase for the purposes of prostitution unless the acts of the people who do so contravene some other criminal law: unless, for example, they commit a breach of

the peace or an act of public indecency, there is no basis at present on which to prosecute people who purchase.

It is important to record that experience of prosecuting this type of crime shows that the intentions of those who operate in discreet circumstances for the purposes of prostitution have always been difficult to prove and will continue to be a challenge for prosecutors, especially—as has been alluded to—in the context of Scottish criminal law, which requires corroboration and proof beyond reasonable doubt.

The offences in the bill are broadly similar to the current offence of prostitution in so far as it requires that there has been loitering or soliciting for the purposes of prostitution. In a moment, I will talk about the additional element—the nuisance part. However, the principal part of the offence will remain broadly unchanged. That is important because it means that prosecutions against purchasers will proceed on the basis of the same type of evidence on which prosecutions currently proceed against sellers.

The essential difference is in the introduction of the test of alarm, offence or nuisance. That creates an additional evidential threshold and changes the nature of the conduct that will fall foul of the criminal law if the bill is passed. As prosecutors, we do not, for several reasons, see that as an insurmountable evidential threshold. Because the test is an objective one, it would not be necessary to prove under the provisions of the bill that actual alarm, offence or nuisance had been caused; it would be necessary to prove only that that was likely to have been the impact of the conduct on the reasonable person. That is important because it means that prosecutions would not require to be predicated on the basis of evidence from the individuals who had been affected by the conduct and who, for good reasons, may be reluctant to become involved in criminal prosecutions.

The test is also very similar—but not identical—to the test that currently applies in relation to the offence of breach of the peace. That is important because it is a test with which prosecutors in the criminal courts in Scotland are familiar. Convictions are achieved daily through the test for breach of the peace.

From a prosecutor's perspective, the bill will provide a basis on which to continue to prosecute people who sell, and on which to begin to prosecute those who purchase. It would also ensure that the conduct that was criminalised was restricted to that which satisfied the nuisance test.

Mike Rumbles (West Aberdeenshire and Kincardine) (LD): I have just received a copy of the letter from the assistant chief constable of

Strathclyde police. We are all interested in ensuring that, if we pass the bill, the changes will be practical. Everyone is aiming at the principle of prosecuting sellers and purchasers of sex. The second paragraph of the letter states:

“In terms of section 1 of the bill which relates to both sellers and buyers the new legislation will not change the process that currently exists within Section 46 of the Civic Government (Scotland) Act in relation to sellers.”

We are happy with that. However, the assistant chief constable goes on to say that

“To effectively prosecute purchasers, there would require to be a statement taken from the seller supported by a self incriminating response by the purchaser ... While not impossible to report such offences to the PF in relation to the purchasers, on a practical basis, it is my opinion that the incriminating reply will not be forthcoming in the majority of cases.”

What an assistant chief constable told us in evidence last week and what the letter says is that the bill will not change the law on selling sex and that, if we want to change the law to allow purchasers of sex to be prosecuted, the bill will not do that effectively.

My question therefore focuses on the second offence that we seek to create. If the bill will not be effective on the first offence, perhaps we can catch people under the second one—that of loitering. However, if people are to be prosecuted for loitering to purchase sex or kerb crawling—we are all interested in enabling that—what is the point of having a section that states that no offence is committed if a person loiters in a motor vehicle? From the evidence that has been given to us, we know that 95 per cent of people who purchase sex loiter in a vehicle. What is the point of that measure?

George Lyon: I will answer your point that the soliciting offence that will be created for purchasers will be of no value. As we have outlined in our evidence, the offence is drawn from the English law that aims to tackle kerb crawling, and which creates basically a soliciting offence. In 2004, 761 people were convicted of kerb-crawling offences south of the border. The figure was 837 in 2003 and 891 in 2002. Although no one doubts that it will be challenging to secure the soliciting offence, we believe that it will be possible. I will pass to Andrew McIntyre to give a further detailed explanation of the legalities. The policy is not without merits and we believe that prosecutions will be secured under the offence. We would not have put the measure before the committee if we did not think that it has merit.

Mike Rumbles: Before Andrew McIntyre speaks, I ask him for clarification. We are comparing English law with Scots law. Please correct me if I am wrong, but it is my understanding that the law of evidence is different

in Scotland from that in England and that the difference hinges on corroboration. Therefore, is not it the case that a comparison of the English laws on kerb crawling with what we are trying to do here will come unstuck in respect of corroboration?

Andrew McIntyre: It is certainly the case that prosecutors in England do not require corroboration to take criminal proceedings or to prove an offence, whereas prosecutors here do. That is an essential element of Scots law and is an issue for prosecutors in securing the necessary evidence in relation to a range of criminal conduct. I cannot speculate as to the impact that the rule has on the number of prosecutions or resulting convictions, but the rule certainly gives us a much more stringent test to apply in Scotland on whether a prosecution can be taken in the first place.

Mike Rumbles: If that is the case, I will return to the point on which I would like to concentrate, which is about section 1(6). We are all interested in ensuring that we have a practical law to tackle purchasers of sex or, in other words, kerb-crawlers. You have specifically ruled out the offence of loitering in a motor vehicle. I understand that that decision stems from a worry about a ruling from back in the 1920s, when motor vehicles first came on the scene. Things have changed dramatically since then, so why are we persisting in retaining section 1(6), which excludes the offence of loitering in a car?

George Lyon: First, the main reason for framing the bill in a way that excludes loitering in a car relates to the fact that the prosecution service and the police consider that it would be difficult to prove that a person was loitering in a motor vehicle for prostitution-related purposes rather than for any other reason. It would be difficult to prove intent.

We have discussed the matter with the police and the prosecution service and have concluded that it would be extremely difficult to gather sufficient evidence to prove that someone who was driving slowly in an area that was known for prostitution, but who was doing nothing more than that, was there to obtain the services of someone who was engaged in prostitution. The kerb-crawling offence in England and Wales does not cover loitering—it focuses purely on soliciting. As I said, significant numbers of convictions have been secured down south on that ground.

Andrew McIntyre: If I may, I will come in at this point. I did not get a chance to answer earlier the principal question on corroboration. In its letter of 6 November, ACPOS states:

“To effectively prosecute purchasers, there would require to be a statement taken from the seller supported by a self

incriminating response by the purchaser following common law caution.”

I am aware of the discussions that have taken place at previous committee meetings. In terms of the discussion around what may or may not constitute evidence, there has been a tendency to focus on the specifics of what may be sufficient in a given case, which has caused some confusion. In terms of forming the basis of a prosecution, it is not absolutely necessary to require a “statement ... from the seller”—speaking to the fact that she was approached for the purposes of prostitution—and

“a self-incriminating response by the purchaser”

when asked about his conduct under caution.

In its letter, ACPOS describes two sources of evidence that may well form the basis of a prosecution, but it is possible to envisage other circumstances in which sufficient evidence may be obtained. For example, where the purchaser makes an incriminating remark, it is conceivable that the surrounding facts and circumstances would be sufficient to form the basis of a prosecution. I am not necessarily talking about someone making a full admission or confession. It is often the case that people who are accused of crimes say enough to incriminate themselves while not suspecting that they are admitting the crime. It is then for the court to determine whether it is satisfied that the evidence is sufficient and compelling enough to return a conviction. I am not certain that the scenario that ACPOS puts forward in its letter is the only one in which criminal proceedings could be brought.

It is important to note that the procurator fiscal at the local level is the expert in assessing the current state of the criminal law, the current state of evidence and what, at any given time, constitutes sufficient evidence. The prosecutors make those decisions. Although evidence as suggested in the ACPOS letter would be sufficient, it is perhaps a bit misleading to suggest that that is the only circumstance in which a prosecution could be brought.

George Lyon: There could be other sets of circumstances. For example, we have had reports that ordinary people—females—coming out of work at night in the financial district in Glasgow, are being stopped and propositioned. The soliciting offence in the bill would allow action to be taken against individuals who do that. At the moment, that cannot happen.

Mike Rumbles: I will stick to the point that I am trying to pursue, which is—as the minister said—the difficulty of trying to prove an offence of loitering in a motor car. However, it is also difficult to prove an offence of loitering outwith a motor car. The minister may grimace, but I see no

difference between trying to prove the offence of loitering on foot for prostitution and trying to prove the offence of loitering in a motor vehicle. Can someone please explain the difference?

George Lyon: The fundamental difference is that the individual on foot can be seen, but the individual in the car cannot so easily be seen, especially if the car has blacked-out windows. It is therefore hard to prove intent—to prove that the person in the car was loitering for the purposes of prostitution. We have to remember that that is the offence.

14:30

Mike Rumbles: We have just watched a video in which all the loitering is done in cars, except in two incidents. The committee has received complaints from citizens of Leith Links and other places who have been upset by people kerb crawling, then purchasing sex and creating demand for prostitution. The point of the bill is to remove that demand. We will have a real problem if we do not stop people loitering in cars.

Paul Johnston (Scottish Executive Legal and Parliamentary Services): It might be worth saying a little more about kerb crawling. It seems to me that some offences that have been described as kerb-crawling offences in evidence are more akin to breach of the peace offences because no evidence can be produced of any intent to purchase sex. A person may slowly drive a motor vehicle along a street, slow down and stare at and intimidate people, but there could be no evidence at all in such incidents that the intention of the person in the vehicle was to purchase sex—indeed, that person could intend to commit a much more serious offence against the person who was being followed. The reality is that a person in a vehicle who intimidates a member of the public can be prosecuted for breach of the peace. Once the person in the vehicle makes an approach to someone and asks for sex or sexual services, the incident takes us into the realm of soliciting, which is what section 1(1) of the bill and what the kerb-crawling offence in England and Wales catch.

Michael McMahon (Hamilton North and Bellshill) (Lab): It has been suggested in evidence to us in the past couple of weeks that women who want to move out of prostitution and away from the stigmatisation that it causes could be hampered by the title of the bill. People are concerned about that. I am sure that the minister will have heard the arguments relating to the issue. Will you say something about those arguments, minister, and whether any consideration has been given to changing the title of the bill?

George Lyon: ACPOS first raised the matter with me when we were involved in the initial round of consultation on the bill, just before it was published. We were concerned that the title of the bill could hamper those who want to try to find a route out of prostitution because it may reveal the status of an offence that they had committed and thereby stigmatise them during attempts to find employment, or in other matters in which the offence may be revealed.

We have sent a letter to the committee that clarifies what would currently be revealed in an enhanced disclosure as a result of an application to Disclosure Scotland. Unfortunately, the offence in question would be disclosed. The letter gives as an example of what might be said on a disclosure document,

“Prostitute (Male or Female) soliciting ... Civic Government (Scotland) Act 1982”,

therefore that issue already exists.

We must reflect on whether any changes to the bill would prevent the stigmatisation that could result from the enhanced disclosure process. We received that information only recently after we had made inquiries as a result of concerns that had been raised with us. A copy of the letter was sent to the committee at the end of last week.

Michael McMahon: So, you are prepared to reflect on the matter.

George Lyon: We will do so if the committee thinks that it may be an issue. Since our initial discussions with ACPOS and others, we have made it clear that if it is thought that the title of the bill may be a barrier for victims of prostitution who are trying to find a route out of prostitution, we are willing to re-examine the matter. We are interested in the committee's views at this stage of the process.

Michael McMahon: I want to ask a question on another issue, which we have already discussed. The creation of a reverse burden of proof seems to be causing a problem for the Executive. In her letter to the committee, Alison Douglas addresses the heart of the matter by pointing out that people might have legitimate reasons for driving slowly in an area. They might be looking for a parking space or an address, or they might simply be lost. However, ACPOS told us last week that the police would take further action that might lead to a conviction only if there had been persistent activity. If I was driving around looking for a parking space and the police pulled me over and said, “You might be causing a nuisance, because there's a problem with street prostitution in this area,” but I went back to the area twice to look for somewhere to park, I should be arrested for my stupidity. It is not believable that someone would be arrested because they were driving around

looking for a parking space. That is a poor argument for not taking action on the burden of proof.

George Lyon: Our view is that the creation of a reverse burden of proof that would apply to a person who was doing no more than loitering in a vehicle could cause considerable problems for many innocent drivers. Everyone who was stopped by the police in those circumstances would be required to prove that they had legitimate reasons for being in the area. They might have to appear in court. There could be many reasons for driving slowly in an area and we would be very nervous about creating a reverse burden of proof.

Many people work late at night in the financial district in Glasgow, in call centres, for example. Those people's friends, relatives or husbands might pick them up from work and could be caught by the proposed offence if they drove round the area a couple of times. We do not want to go down that road, which would raise ECHR issues. Paul Johnston might clarify the legal position.

Paul Johnston: I am happy to do so. I am aware that there are many reverse burdens in statutory offences, as one or two members have noted. However, it is important that every reverse burden of proof that is to be included in a statutory provision is assessed carefully in its context, to establish that it is justifiable, proportionate and necessary, because a reverse burden of proof might conflict with the presumption of innocence that is guaranteed in article 6 of the ECHR.

There is a lot of complex case law around particular reverse burdens on the statute book. A number of reverse burdens have been found to be justifiable and ECHR compatible, but a number of others have been found to be incompatible with the convention. We have tried to assess whether a reverse burden in the context of an offence that relates simply to loitering in a vehicle would be ECHR compatible. We asked whether it would be possible to have an offence whereby it would be assumed that, unless they could prove the contrary, someone who was loitering in a vehicle was doing so for the purposes of obtaining the services of a person engaged in prostitution. Our assessment of the ECHR authorities is that such an offence would risk being incompatible with the convention.

Michael McMahon: Whose rights are we talking about? The committee has heard from people in communities—especially women—who think that they have the right to live peacefully and not be harassed and subjected to nuisance because of the behaviour of some men who drive round in cars. What does the ECHR say about those women? Are you telling me that the criminal justice might of Scotland cannot come up with an ECHR-compliant justification for a police officer

stopping a person in a car and saying, "Did you know that you might be causing a nuisance in this area?" The person might then take on board the community's concerns and behave differently. Would that really constitute a breach of the ECHR?

George Lyon: I appreciate the concerns about the loitering offence. We signal today that we are willing to listen to and reflect on the concerns, to see whether anything further can be done. The way in which the bill is drafted means that difficulties would arise in creating a reverse burden of proof, but we have not closed the door on further considering other actions or mechanisms that might address some of the concerns.

Fergus Ewing: Are prostitution offences serious?

George Lyon: Yes. Prostitution and the nuisance that it causes to communities are serious offences.

Fergus Ewing: In the letter that we have from Alison Douglas of the Justice Department, she says that an example of an offence for which a reverse burden is justified is the offence of sex with a girl who is under 16. That is described as a serious offence, which implies that prostitution offences are not serious. That is at odds with the views of people who have given evidence.

As I was the committee member who raised the burden of proof issue, I will say that using the phrase "reverse burden" is misleading. I did not suggest that the burden of proof should be automatically transferred to the accused so that he had to prove beyond reasonable doubt that he was not guilty. I mentioned that such a transfer occurs in bankruptcy law, a breach of which many people would regard as less serious than prostitution, which concerns violence against women. In bankruptcy law, such a transfer may occur when someone has not disclosed assets to his trustees. However, he can exculpate himself simply by proving on a balance of probabilities that he had a reasonable excuse for his failure to comply with a technical measure. That does not fall foul of the ECHR. I hope that the minister will reconsider the matter.

The Executive's thinking seems confused. The Executive says that because it is difficult to prove offences relating to prostitution, we should not make them a crime. It is difficult to prove some murders and to obtain evidence to prove that someone has committed murder, but no one suggests that murder should not be a crime. Having studied all the evidence, does the minister think that we have heard strong evidence from the police, from people from Calton in Glasgow and from the councils that kerb crawling should be a

crime and that the bill is inadequate in that respect?

George Lyon: I say with due respect that the Executive proposes to introduce the offences to tackle kerb crawling. I said that the soliciting offence that we are creating for purchasers is the mirror-image of the offence south of the border, where substantial convictions have been secured to tackle kerb crawling. You cannot accuse us of wanting to do nothing. We have acknowledged the challenge of obtaining a conviction in court and I will not gloss over that. However, our proposals go significantly further than what is on the statute book and they will tackle the purchaser, which is what the working group wanted to happen.

Fergus Ewing: I return to the minister's arguments in response to Mr McMahon. The minister said that it would be difficult to prove that somebody who was leaving work was going to pick up a colleague or his wife. In those circumstances, would the colleague or wife not be happy to give evidence that they were being picked up?

George Lyon: In that instance, I have no doubt that people would do that. However, it might not be possible to prove that in other instances. You take us into difficult territory. The way in which the offence is constructed means that ECHR issues would arise from creating a reverse burden of proof. As I said, we are willing to re-examine the loitering offence, about which the committee has expressed concern. I reinforce the point that although we believe that the committee will support the policy intent, we hear what the committee says about technical issues relating to the loitering offence and we will reflect on that.

14:45

Fergus Ewing: It was the minister who gave those examples as justification for the Executive's approach of not transferring the burden of proof to the male to provide a reasonable explanation. If someone were picking up his wife, girlfriend or friend, that person would be willing to give evidence and tell the truth and that would be an end to the matter. The minister did not deal with Mr McMahon's other point, which was made by ACPOS in its original letter to us, that in England

"it is an offence for a person to solicit from a motor vehicle persistently".

The word "persistently" means that in England there has to be more than one instance. Does that not deal with the point that the minister tried to make, namely that someone who is innocently in a red light zone or an area that prostitutes are known to frequent might be caught up and charged on the basis of one occasion? As ACPOS stressed, a persistent pattern of behaviour must

be demonstrated in England. Therefore, if the police have evidence that they believe establishes a pattern, presumably because the car registration number has been taken, the person has been warned or the police have other such factual evidence, what is the risk of breaching the ECHR compared with the risks to the community?

I remind the minister of what Jennifer McCarey said about kerb crawling. She described it as

"a car slowly following you and creeping along beside you. Often you are the only person in the street. The car stops until you catch up, then it drives slowly beside you and stops. It is tremendously intimidating behaviour, which does not involve rolling down a window and talking to you."—*[Official Report, Local Government and Transport Committee, 24 October 2006; c 4149.]*

That seems a serious offence. The arguments that the minister adduces do not deal with the fact that, in England, kerb-crawlers are perfectly well dealt with by the requirement to show persistent behaviour. Surely the adoption of a similar formula in Scotland would allow us to transfer the burden of proof, start deterring men from buying sex and thereby protect women from the associated violence. According to Ann Hamilton of Glasgow City Council, we could then find out about the men who are kerb crawling, as is done in England, where such men are often found to be involved with serious sexual or violent offences. Surely the transfer of the burden of proof would allow us to tackle prostitution in a way that the bill patently will not.

George Lyon: I am not sure whether you misheard me, but I made it clear in my introduction that the soliciting offence that we will create in Scotland is the same as that down south, where the offence does not require a reverse burden of proof—

Fergus Ewing: It is not the same.

George Lyon: I am sorry, but we believe that it is. The only difference down south is that evidence of persistent behaviour is required. Under our bill, the men need to commit only one offence, they do not need to do it repeatedly and they can be arrested the first time that they are spotted soliciting. The offence that we are creating might be more easily enforced than the similar offence in England.

Andrew McIntyre: There is some confusion because the wording of the most recent ACPOS letter is slightly misleading. The persistence element in the English offence relates to persistently soliciting and not to persistently loitering or kerb crawling. If the offence that we are creating contained the element of persistence that is in the English legislation, it would mean that we would not be able to prosecute on the basis of one offence even if the necessary standard of evidence existed, because we would need to have

evidence to show that the behaviour happened repeatedly before we could prosecute. That has been confused with the arguments about reverse burdens.

George Lyon: The way in which we have framed the offence in Scotland will make it easier to secure a prosecution.

Mr Frank McAveety (Glasgow Shettleston) (Lab): I welcome your comment that you might look at a number of issues that have been raised in evidence. Indeed, compelling evidence was produced by my constituents in Calton, which is markedly different from the business district where, historically, much of Glasgow's street prostitution has taken place. As the business district has undergone regeneration, this activity has become more of a problem for and had more of an impact on the community in Calton.

My first question is for Paul Johnston, who said that if people feel intimidated by the behaviour of an individual in a vehicle, that individual could be charged with breach of the peace. Local residents have already made it clear that they feel intimidated by that kind of behaviour. How many breach of the peace arrests and prosecutions have there been in that respect?

Paul Johnston: I have no information on the number of prosecutions that have been brought.

Andrew McIntyre: It is a question for the Crown Office, but I do not have that information.

Mr McAveety: I suggest that there have not been many such prosecutions. I remember civil servants and the police telling me seven years ago that the breach of the peace provisions in existing legislation would be sufficient to deal with these matters. However, they have had little or no impact, even in cases in which the police have taken action. As I am concerned that this breach of the peace argument might be acting as some kind of comfort blanket, I wonder whether you will expand on your earlier comments before I ask my next question.

Paul Johnston: I did not mean to suggest that breach of the peace would be enough to tackle kerb crawling. Having read in the *Official Report* of last week's evidence-taking session some of the descriptions of what had been called kerb crawling, I felt that it would not be possible to detect any sexual element or motive on the part of the person in the vehicle and, therefore, that such behaviour would not necessarily be caught by any prostitution-related offence. I simply suggested that we would need to consider some other area of the law such as breach of the peace.

Mr McAveety: I have twice accompanied Strathclyde police officers on their evening duty and have experienced the pleasure of the Friday

night shift; I saw that some men who were kerb crawling were picked up largely because they had committed road traffic offences or because of the sheer stupidity of other aspects of their behaviour. The police felt that they could not deal with the men's core behaviour under the existing legislation. The focus of the committee's deliberations—and I hope that the Parliament will reach some good conclusions on this matter—is the question whether we can put in place powers that provide a genuine response to a genuine cry of despair from communities such as Calton. After all, none of us would feel comfortable living in a neighbourhood where such activity took place daily—and nightly. It would be helpful if, between now and stage 2, the minister could think seriously about how we can address this issue and ensure that people feel safer and more secure.

George Lyon: We acknowledge the fact that you have consistently expressed concerns about this matter from day one. The proposed offence of soliciting, which can be used against the purchaser of sexual services, will, at long last, give the police the ability to tackle this problem. For example, they will be able to stop people who they believe are engaged in soliciting, no matter whether those individuals are on foot or in a vehicle. If we were to do something more about the loitering offence with regard to vehicles, we would go further than they have down south. After all, the offence proposed in the bill is similar to that introduced south of the border, which has been significantly successful in increasing the number of prosecutions and convictions on this matter.

As I have said, I acknowledge the concerns of members such as Mr McAveety who have to deal regularly with these problems. I am willing to reflect on the matter, but I should point out that, by creating this new offence, we have taken a significant step towards giving the police the ability to tackle these problems.

Mr McAveety: When I read in ACPOS's written submission about the scenario that it had run past the Procurator Fiscal Service in Glasgow, I have to say that alarm bells started ringing. I might be wrong, but it strikes me that any reasonable individual who saw such activity would conclude that something rather dodgy was taking place. Are the comments in the ACPOS submission right, or have things moved on since that evidence came to light?

Andrew McIntyre: A myth has been promulgated about the views of local prosecutors in Glasgow. It relates particularly to the views of the procurator fiscal for Glasgow city centre, but also to the views of prosecutors in other divisions. I was concerned, to say the least, when I read some of the views attributed to the fiscal in Glasgow. I have spoken to him in great detail

about his views on how the prosecution service would deal with offences under the bill, and I would say that the letter from ACPOS has recorded his views incompletely. As I say in my written submission, the recording of his views has been misleading.

A lot of discussion has focused on a video that was made available for committee members to see. Many of the views attributed to the fiscal were based on that video. I have seen the video and—as has always been the case in proving that such crimes are taking place—such a video would not provide a sufficient basis on which to take proceedings. The video, which shows any number of transactions that might seem suspect, would not provide a basis to allow us to prove to a court beyond all reasonable doubt that what was happening was soliciting or loitering for the purposes of prostitution.

The procurator's views have not been recorded completely. To say that the video showing those transactions would not prove matters beyond all reasonable doubt is not to say that it would not be admissible or would not be a very important source of evidence—perhaps compelling evidence—in prosecutions against purchasers under the legislation. However, the video would not be enough on its own; additional investigative work would be required. For example, the drivers of the cars would have to be cautioned and interviewed as to their purpose, to find out whether they had an explanation. Also, the people selling could be questioned about a purchaser's intentions; they could be asked, "What did this man say when he approached you in his car?" Such investigations might yield further evidence to corroborate the evidence of the video. It is not that nothing could be done about what is seen in the video; it is simply that the video itself is not a sufficient basis on which to prosecute. That is the case under the present law and it would be the case under the provisions in the new bill.

George Lyon: All that applies to both purchaser and seller.

Andrew McIntyre: Yes.

George Lyon: Obviously, the video could play a part in securing a conviction against the purchaser. It would be one part of the evidence. There might also be other evidence, especially if incidents were caught on more than one occasion in the same area.

Andrew McIntyre: At present, there is no basis on which to prosecute purchasers, unless they commit some other criminal offence such as breach of the peace, which requires a higher standard of proof than does the nuisance element in the bill. Under the bill, it would be necessary to prove that there had been a nuisance element, but

nuisance alone does not constitute a breach of the peace. A breach of the peace prosecution would therefore not be open in all cases that are covered by the provisions of the bill.

Fergus Ewing: The role of Parliament is not to try cases, hear evidence or decide whether evidence is sufficient; that is a role for sheriffs, juries and the courts. We are here to make the law, to protect the public and—I hope—to buttress the values of society.

I want to put a point of principle to the minister. In the bill, we should be making it a crime for men to buy sex from women or from other men, rather than making it a crime to solicit in a way that would be

"likely to cause alarm, offence or nuisance".

Does the minister not agree that there is a strong moral case that men who buy sex, from men or women, are behaving in a way that many people in Scotland—perhaps the majority—think is morally wrong, is entirely unacceptable, and should, in itself, be a crime?

15:00

George Lyon: I would not agree with your view. Sweden took the route of criminalising completely the purchase of sex, but the measures do not seem to have delivered the results hoped for. We have to be aware that the offence in the bill is targeted at street prostitution and that further work needs to be done on the wider area of indoor prostitution, trafficking and so on. This is the first step, which is about tackling the nuisance, fear and alarm that are caused by both the purchasers and the sellers in prostitution. I do not agree that we should widen out the offence in the way that you suggest. There is no evidence that such an approach worked in Sweden. We need to consider the wider issues involved in the whole gamut of prostitution, including indoor prostitution and the trafficking industry. Further work is being undertaken and once it is completed it will have to be taken forward in the next session.

Fergus Ewing: We will have to agree to disagree about that. If it is a crime for men to buy sex, surely the fear of being caught—setting aside the fact that there might always be an element of difficulty about that—would have a significant deterrent effect on those who currently do so.

George Lyon: I would argue that the offence that we are creating will have a similar effect because, for the first time, purchasers will face the real possibility that they will appear before a court. That will send out the strong message that those who are involved in purchasing on the street will come under the full gamut of the law and could be prosecuted for their activities. That would send out

a strong signal to those who are engaged regularly in purchasing.

Fergus Ewing: Again, we will have to agree to disagree. I simply do not believe that the offence will have such a significant deterrent effect, although I hope that it turns out that the minister is right and I am wrong.

The minister referred to the gamut of measures that would have a deterrent effect. We have heard evidence that in England and Wales those who are found guilty of kerb crawling can have their motor vehicles confiscated and can be disqualified from holding a driving licence. Can those remedies be applied in relation to the offences in the bill? If not—and I see no provision in the bill that would allow us to use that part of the gamut of measures, to use the minister's term—will the minister introduce comparable measures in Scotland, so that the courts would have the powers to disqualify men who are found to be soliciting from driving and to confiscate their vehicles? Does the minister agree that that might have a severe deterrent effect?

George Lyon: The sanction that we propose is a level 2 fine of up to £500, which is the same for both purchaser and seller. We might choose to reflect on these issues as we proceed.

Fergus Ewing: I am grateful that the minister will reflect on the issues. I hope that he will consider specifically disqualification from driving and confiscation of vehicles. It might be appropriate for the relevant authorities to provide the committee and Parliament with evidence of the experience in England, the extent to which the powers are used and how effective they have been in reducing the incidence of men buying sex.

George Lyon: We will try to provide that information; I have already asked for it for my own use. I am keen to pass it on to the committee as soon as we can get hold of it.

Paul Martin (Glasgow Springburn) (Lab): This is a question for Andrew McIntyre. The reverse burden, which we discussed in previous evidence sessions, sounds appealing. However, could not those accused of particular crimes be quite creative about the reasons why they are in a particular area?

Andrew McIntyre: The reverse burden question is properly for Paul Johnston to answer. However, as a prosecutor, I can say that the experience of prosecuting crime in general is that accused people can be creative in giving all sorts of excuses and reasons for their conduct. Equally, accused persons can be less than wise in comments that they make. As I said earlier, very often, they will make incriminating remarks, if not give full confessions.

Paul Martin: Do you agree that an individual who works in one of the areas that we are talking about might always have an excuse for being in that particular area? Might that be a loophole in the legislation?

Andrew McIntyre: Yes, that would be a natural risk of a reverse burden of proof. The system of criminal prosecution in Scotland is predicated on the basis that we do not assume that people are guilty of the offences that the police and prosecutors allege that they are guilty of.

Paul Johnston: I am not sure that I can add a lot to what has been said already. However, if the loitering offence in the bill were to be accompanied by a reverse burden, my understanding is that the accused person would have to prove, on a balance of probabilities, that they were not doing a particular thing for purposes relating to prostitution. They might be able to come up with convincing evidence to prove that, but our concern is that there could be innocent drivers who could not satisfy the requirement to prove, on a balance of probabilities, that they were not loitering in their vehicles for purposes relating to prostitution.

Paul Martin: What kind of dialogue has taken place on ECHR? As you can appreciate, in our evidence sessions, someone always mentions ECHR. You say that someone has given you an initial view, but has the issue been probed further with the compliance team? If so, has that team said that there is no way that the proposal can be delivered? How comprehensive is that view?

George Lyon: We have taken advice on the matter and know that there are significant challenges around the issue of creating a reverse burden of proof.

Paul Martin: You will appreciate that we are looking at the matter from the outside and that you have more information than us. Has a solicitor given you a verbal view or has someone written to you to say that there is no way that we can go down that road?

George Lyon: As always, we have received internal advice from the law officers. As I said in my earlier response to Michael McMahon, we believe that there are significant ECHR problems with regard to the way in which the proposed offence is currently structured. We are willing to reflect on that and consider whether alternative approaches can be taken.

Paul Martin: I can speculate about the ECHR issues that might have arisen with regard to the proposed offence. Would you be happy to share with us the legal advice that you have received?

George Lyon: We have already sent the committee a letter that outlined the advice and our position on it.

Paul Martin: Did the letter give specific details of where the proposed offence would not comply with ECHR law?

Paul Johnston: That letter referred to the leading ECHR authority on reverse burdens of proof, which is *Sheldrake v the Director of Public Prosecutions*. It drew conclusions from that case about why, in the context of the loitering offence, a reverse burden could be problematic.

Paul Martin: A number of organisations have given us evidence that has made a powerful case for the argument that women are victims in many of the situations that we are discussing. It has been argued that we should upgrade the sentencing tariffs that are available in respect of the purchaser. Has the Executive considered that suggestion, which adds to the possibilities that Fergus Ewing raised?

George Lyon: At the moment, the proposal is that the penalty should be a level 2 fine of up to £500. However, we will listen to what the committee has to say and will reflect on the committee's views on whether particular sanctions are appropriate.

Paul Martin: Last week, we heard evidence from Aberdeen City Council that, after we have passed the bill, which will in effect make purchasing sex an illegal act, the council would consider the possibility of a management zone similar to the zone that is already in place in Aberdeen. Would a management zone be illegal under the new arrangements?

George Lyon: I understood from the evidence from Aberdeen City Council and the police that deciding on whether there is a management zone in Aberdeen is an operational matter. I imagine that that will still be the case when the new legislation comes into force.

Paul Martin: I want to be clear about this. For the first time, purchasing sex will in effect be an illegal act. Are you saying that, in tolerance or management zones, the police will turn a blind eye to, or manage, such acts? Will that be compliant with the bill?

George Lyon: What I am saying is that we create the laws of Scotland and we should expect those laws to be enforced. As I said, that is an operational matter.

Paul Martin: Will management zones be illegal or legal?

George Lyon: They are not currently legal, as I understand the matter.

Paul Johnston: At present, section 46 of the Civic Government (Scotland) Act 1982 makes it an offence for a prostitute to loiter or solicit in a public place. I cannot comment on the legality or

otherwise of management zones at present. I simply point to the fact that we have a law that makes it an offence throughout Scotland to solicit or loiter in a public place for purposes relating to prostitution.

Paul Martin: I assume that, once the bill receives royal assent, if someone goes into a management zone to purchase sex, they will be charged with an offence. Therefore, management zones cannot continue.

George Lyon: Clearly, it would be for the police to charge such an individual and take action against them. We are creating the legislation to allow them to do that.

Paul Martin: So if a management zone is in place or if somebody proposes a management zone, you expect the police to take action against that.

George Lyon: As I said, we create the law. We expect chief constables, who have responsibility for operational matters free from political interference, to enforce the legislation that the Scottish Parliament creates.

David McLetchie (Edinburgh Pentlands) (Con): I want to follow up on that discussion. The issue about management zones is that the present law, as a deliberate act of policy, is simply not being enforced, and it appears that that will happen with the proposed law. The minister says that the issue is not a matter for political interference but is operational. However, the issue is not purely an operational policing one, because, as we heard in evidence, the zone in Aberdeen is the result of a policy determined by the police and the local authority. The decision not to enforce the present law is not an individual policing one; it is a political decision in which the police play a part. Is that not the case?

Andrew McIntyre: I cannot speak for local authorities but, as a prosecutor, I am acutely aware that a lot of work is done between local prosecutors and police forces to tackle the issues that arise in their areas. That happens in Glasgow, for example. If Parliament, with a view to responding to public demands and needs in Scotland, passes legislation that criminalises for the first time certain conduct, local prosecutors, who are obliged to consider the public interest in every case, will have to work closely with local police officers to make clear the circumstances in which they expect offences to be reported to them. That will be the key to the enforcement of the legislation.

David McLetchie: Yes, but my point is that the decision is reached not simply as a result of discussions between people in the justice system—the procurators and the police—but is a

deliberate act of policy that involves the local authority.

The management zone in Aberdeen is the result of a political decision. You suggest that it has arisen simply because of an aggregation of individual decisions taken by police and prosecutors, but all the evidence that we have taken says that that is demonstrably not the case.

15:15

Andrew McIntyre: I cannot comment on the role of the local authority in that case. What I can say is that it would be for local prosecutors to give clear instructions to police forces regarding the circumstances in which they expected offences to be reported to them.

David McLetchie: Are you saying that the local procurators fiscal in Aberdeen—and in other places where people purport or attempt to run management zones—are entitled to say to the police that they are not going to play ball with the management zone any more and that they want those who are engaged in these acts, whether under the present law or under the new law, to be prosecuted?

Andrew McIntyre: I am not aware of the specific arrangement in Aberdeen, but on a range of issues, it is open to prosecutors to give guidance to the police on the circumstances in which they expect to receive reports of alleged crimes.

David McLetchie: Is it the business of procurators fiscal to give guidance to the police that says that they should not arrest anyone who is engaged in these acts within defined areas?

Andrew McIntyre: I am not aware of any such guidance having been issued.

David McLetchie: So, nowhere in Scotland have the procurators fiscal said to the police that the law of the land should not be enforced in a defined part of a city.

Andrew McIntyre: I simply cannot comment on that. I do not know. I do not have enough information about the local circumstances.

David McLetchie: It makes me wonder how a management zone came into being in the first place. It did not just appear out of thin air.

George Lyon: I recall that there used to be management zones in Edinburgh, but because local residents and local representatives objected to them, that policy was discontinued. The policy was the result of an operational decision by the local police force, and the council played a role in it.

David McLetchie: Indeed. That is my point. The council played a role in that policy: it was a political decision. The reason why there is no management zone—or tolerance zone, or whatever it was called—in Edinburgh is that the law is now being enforced. As a result of that, according to the evidence that has been presented to the committee, the incidence in Edinburgh of street prostitution—in its narrow sense—has diminished. That has happened because the law is being enforced.

George Lyon: Yes, but there was always a pretty low incidence of street prostitution in Edinburgh in comparison with Glasgow. The comparative figures show that an average of six females are on the streets in Edinburgh of a night, whereas there are around 85 in Glasgow. There has been a much lower level of street prostitution in Edinburgh over a long period of time.

David McLetchie: The evidence that we have heard from residents is that there are significantly more than six women on the streets in Edinburgh. However, we will leave that issue.

I want to ask about the video that I saw at lunch time with Mr Ewing and the clerks. It does not quite merit the X-certificate rating that was suggested at our previous committee meeting. I hope that no one in the public gallery is too disappointed that they have not seen it. How many members of the panel have seen the video and participated in the discussion about cases?

Andrew McIntyre: I saw the video immediately before today's meeting. I am aware that reference has been made to an earlier discussion about the significance of the video and what it was used for, but I was not party to that.

David McLetchie: Were you part of that discussion, Mr Johnston?

Paul Johnston: No, I have not seen the video.

Alison Douglas (Scottish Executive Justice Department): Patrick Down and I were at the meeting, but at no point did we systematically go through each and every instance, as is implied in the letter from ACPOS. We did not look at every case, and there was no detailed discussion of the video and the evidence that it provided. It was just provided as an illustration of what happens on the streets in Glasgow.

David McLetchie: Assistant Chief Constable Neilson told us last week that, after the video was shown, there was a discussion involving yourselves and others from the Executive as well as members of the Crown Office and Procurator Fiscal Service. He said that the question was asked whether, under the proposed law, any person—a buyer or a seller—could be charged having regard to the incidents portrayed in that

video. According to Assistant Chief Constable Neilson, the response to that question—which he posed as a senior police officer—was that, despite 23 transactions being captured on video, nobody could be charged. Is that correct or incorrect?

George Lyon: I think that the matter has been dealt with by Andrew McIntyre in his response to another question. There would need to be corroboration, as is required for the current offence; a conviction could not be secured purely on the video evidence.

David McLetchie: No. The question is not whether the only evidential item is the video evidence. I want to move away from that.

George Lyon: Sorry. I must have misunderstood you.

David McLetchie: The question is not whether the video may be used as evidence; it is whether the incident and everything that surrounded it—the man driving up in the car, the fact that that may have been observed by others, the fact that it was captured on video and so on—could have given rise to charges and successful prosecution under the new law. The answer that we were given was that they could not.

Andrew McIntyre: Again, I think that there is confusion around this. If the question is whether the conduct that is portrayed would fall foul of the new law—which is separate from the question whether it could be proved—the answer is that, yes, to all intents and purposes the conduct that is portrayed in the video is of men in cars soliciting women for purposes relating to prostitution. The reason why the video alone would not be sufficient evidence is that we can only surmise such conduct from seeing the video; we cannot prove it without further evidence. I am talking not just about proving the matter in law. If further evidence confirmed that a transaction had taken place that involved a purchaser soliciting a seller for purposes relating to prostitution then, yes, the conduct of itself would fall foul of the criminal law as proposed by the bill.

David McLetchie: Well, that is nothing like how the matter was presented by a police officer last week.

As you will be aware, I then asked the police officers whether anybody could be prosecuted under the current law having regard to the incidents portrayed in the video. The emphatic answer was yes, because the video captured and observed the behaviour of known prostitutes who were loitering in a public place. Therefore, the incidents portrayed in the video could lead to a successful prosecution under section 46 of the 1982 act. However, that could not happen under the proposed law, as the proposed law does not

include the concept of a known prostitute loitering in a public place. Is that correct?

Andrew McIntyre: You refer to a comment to which I was not privy at your previous meeting, but I see the logic in that argument. However, I would not necessarily say that it would be more difficult to prove the offence in relation to the prostitute. At present, there would generally be questioning of the prostitute and, as I understand it, the vast majority of prosecutions against prostitutes proceed on the basis of admissions by the prostitutes of their purpose. I cannot see that the removal of the known prostitute element would make it more difficult to prove that the prostitute was soliciting for purposes relating to prostitution.

David McLetchie: Yes, except that if a known prostitute with characteristic behaviour is standing around on a street corner and is challenged by a police officer, it is likely that they will admit that that is why they are there.

Andrew McIntyre: That may be the case.

David McLetchie: That is what the police said to us.

George Lyon: That is correct. No doubt, they could be arrested every time that they appeared in the street. The information that we were given when we spoke to the various organisations is that known prostitutes tend to plead guilty immediately, receive a fine and go back out on the streets in order to get enough money to pay the fine. The point that we are making is that, because they always admit to the offence, a prosecution can usually be obtained. I suggest that that will not change under the new proposals.

David McLetchie: Ah, but it will—because the concept of the known prostitute with a history of convictions will not exist any more.

Paul Johnston: My understanding is that the existing offence requires a number of elements to be in place. First, there must be a prostitute, and that is where the known prostitute concept comes in. If somebody has been cautioned a couple of times, the court can take it—Andrew McIntyre can correct me if I am wrong—that that person is a prostitute, so that element of the offence will have been established. It must then be established that, for purposes relating to prostitution, that prostitute was loitering or soliciting.

The offence in the bill does not use the word prostitute. It refers simply to “a person”, and it must simply be established that “a person” was soliciting or loitering for purposes relating to prostitution. In a way, the whole argument about whether or not that person was a prostitute becomes irrelevant.

David McLetchie: That is not an argument, because the fact that the person is a known prostitute is known.

Paul Johnston: At the moment, it can be established that the person is a prostitute because they have been cautioned twice. My point is that, in relation to the offence in the bill, there will be no requirement for those two cautions, although that is not to say that they could not have been given. There is no such requirement in the bill to establish that somebody is a prostitute. The bill applies to any person who, for purposes relating to prostitution, solicits or loiters in a relevant place.

David McLetchie: I quite understand that, but my point is that, under the present law, the 1982 act already takes you over a substantial evidential hurdle. Given the person's previous history and their presence loitering in the street, that hurdle having been crossed will almost inevitably result in a successful prosecution, an admission of guilt and a conviction. Under the proposed new law, that will be a lot harder to achieve—that is exactly what the police said in evidence last week. They said that fewer people will be prosecuted successfully under the new law proposed in the bill than are prosecuted successfully at present.

Andrew McIntyre: I have to say that there is a grave misunderstanding here. Under the present law, although the current provisions apply only to known prostitutes, it is still necessary to prove that they were loitering or soliciting for the purposes of prostitution. That is identical to what is being proposed, so there is no change in relation to that part of the offence. The current law requires there to be two cautions, meaning that the person is a known prostitute. There is no difficulty for the prosecutor in proving that, because unless it is challenged it is taken as a given. However, once that hurdle is overcome—this happens frequently in prosecutions—the prosecutor must still establish that the person was loitering for the purposes of prostitution, and that is what is being proposed under the new legislation. The types of evidence and the standard of evidence in relation to the principal part of the offence would be the same under the proposed legislation as under the current legislation.

The Convener: You seem comfortable with the concept of the offence of loitering with intent to solicit for prostitution in the case of someone on foot, but not for somebody in a car. If somebody is loitering on the street on foot, you cannot prove that they are there for purposes relating to prostitution until the point at which they actually solicit for purposes related to prostitution. Why cannot you have a similar offence for someone in a car? Is it just because the present practice is that many prostitutes will admit the offence, so that a prosecution results? Is it the case that equality

under the law falls down because you do not anticipate that the man in the car will admit the offence, and that that is the evidential difference?

George Lyon: I do not think that that is a correct interpretation. As was said earlier, it will be easier to prove the loitering offence for the individual on foot because you can see what they are up to and what their actions are, and you will be able to lead that evidence in court. However, if an individual is in a car, you cannot see what their actions are, so we believe that it would be extremely difficult to lead evidence proving such an individual's intent under the loitering offence.

The Convener: Presumably, you cannot prosecute that loitering offence unless the person attempts to solicit.

George Lyon: That is right. That is why the current proposal is that the soliciting offence will apply to people in vehicles. That provision is used to tackle kerb crawling down south, where there has been significant success in achieving prosecutions.

The Convener: Unless I am missing something, somebody loitering on foot before they solicit can be prosecuted. How do you prove that they intend to solicit? How do you prove that they are not waiting for a bus?

Paul Johnston: Under the current offence, there is no need to prove an intention to solicit. All that must be established is that a person is loitering for purposes relating to prostitution.

The Convener: That is my question: how can you prove that with any more conviction than you can prove that someone in a car intends to solicit?

15:30

Andrew McIntyre: I wish to be clear about my role in this. As an independent prosecutor, it is not for me to talk about the policy intention behind the legislation or whether the legislation should go further. I shall comment purely on questions of proof—for example, how prosecutors can prove offences. The act of loitering on foot is overt rather than—as is the case for people in cars—covert, so there may be better grounds for suspicion on the part of the police, and thereafter for questioning a suspect with a view to yielding sufficient evidence.

George Lyon: To be fair, I have signalled that I understand the committee's concerns on that issue and that I will reflect on it after this evidence session.

Mike Rumbles: A letter to the committee from the Justice Department mentions a ruling of Lord Hunter in 1924. It also says:

"Ultimately, if the Bill were to refer to 'loitering in a motor vehicle' for prostitution related purposes then we"—

that is, the Justice Department—

“recognise that this would signal to the courts that the Parliament considers that it is possible to loiter in a vehicle.”

The Scottish Executive is saying, “If we decide to signal to the courts that loitering in a motor vehicle for prostitution-related purposes is illegal, it will be illegal.” It is as simple as that, is it not?

George Lyon: I think that that is correct, but the question has always been about how we then take the offence forward, prosecute and establish the intent.

Mike Rumbles: Committee members cannot see any difference between—

George Lyon: I understand where you are coming from, which is why I signalled that I would be willing to reflect on the issue.

Mike Rumbles: I would like you to say that you will change the bill.

George Lyon: I shall reflect.

David McLetchie: We all appreciate the problems of proving intent or motive and the whole business about something being done for the purposes relating to prostitution. Why is it not possible to address the behaviour of someone who is driving around, with there being a more tenuous relationship to the question whether the driver is intending to buy sexual services? Why is it not, for instance, possible to say that it is an offence persistently to drive a car in a manner that might cause offence, nuisance and alarm in an area where prostitutes are known to consort? In other words, you would basically say to someone, “To drive slowly and persistently in this kind of area, in which, as everyone knows, prostitutes ply their trade, is offensive behaviour and we won’t tolerate it.” You would not have to prove anything specific, other than that they were driving around for, one would assume, no good reason—unless they could demonstrate a good reason—in an area where prostitutes consort.

George Lyon: How would the driver know that they were in such an area if they were a stranger to the city? That is pretty fundamental—

David McLetchie: The issue is persistence—it is about the same people doing something again and again; they would not be a stranger for long. It comes back to the issue of persistence that Mr McMahon raised. It is not too difficult to establish that someone is persistently driving their car in a manner that causes nuisance, alarm or offence to people in an area in which prostitutes are known to consort—there will be strings of conviction records to show that. If they are a new boy in town, that is fine and they will not be prosecuted,

but if they come back week after week, why not prosecute them?

George Lyon: That type of evidence could be used to ensure that a conviction is secured under the soliciting offence. I imagine that the prosecutor would be able to lead evidence in court that the individual in the car had been seen circling around the area on previous occasions. That is one part of the evidence that could be led to secure a conviction—

David McLetchie: I do not think so, because no one has solicited. That is the problem.

Andrew McIntyre: Yes, to prove the soliciting offence, there would need to be an act of soliciting—the behaviour would have to go further. On Mr McLetchie’s question, again, as an independent prosecutor, it is not for me to comment on whether the policy intent should be extended in that way.

George Lyon: As I said, it is an area that we will reflect on and examine. Clearly, the committee has concerns on the issue.

Ms Maureen Watt (North East Scotland) (SNP): Most of what I was going to say has been covered in questioning. My understanding is that one of the intentions of the bill is to establish equality of treatment between the seller and the buyer of sex. In all that has been said today, I note that members have come to the conclusion that the bill will make it easier to prosecute someone for soliciting but that the difficulty of prosecuting someone for kerb crawling remains. That is not equality.

George Lyon: As I said earlier, the bill introduces the offence that has been successfully prosecuted down south. In terms of the purchaser, the offence is the mirror image of the offence down south.

Our argument is that the bill starts to tackle the problems with the purchaser. Certainly it puts the purchaser and the seller on a more level playing field. That provision was one of the key recommendations of the expert group’s report, which I am sure Maureen Watt has read.

Ms Watt: We have just heard that the offence of kerb crawling in England is very different—

George Lyon: No.

Ms Watt: We heard that it will be led differently under Scots law. Does the minister accept that most of the prostitution in public places is done by way of individuals in private vehicles picking up prostitutes?

George Lyon: Yes. Most of the offences will involve that. The member may have seen the video evidence that Strathclyde police prepared. I

understand that some of what took place was on foot. I do not have the exact split.

Ms Watt: Yes, but most of it is done using vehicles. The minister has admitted that it will be very difficult to prosecute someone who is just kerb crawling.

George Lyon: I said that we propose a new offence in Scotland that is equivalent to the kerb-crawling offence down south, which is based on soliciting. Successful prosecutions have been achieved down south each year since the offence was introduced. If we went further and dealt with loitering, which is of concern to the committee, we would be going beyond the bounds of the kerb-crawling offence. I have signalled that I am willing to reflect on that issue. I hope that that clarifies exactly where we are.

Ms Watt: Yes, but I return to something that was said earlier. We have agreed that prostitutes normally hold up their hands and admit guilt, but I think one of your officials said that the prostitute would let slip the name of the person she was going to meet. With all due respect, that will not happen. Given that the purchaser provides a lifeline for drugs and so forth, no prostitute will incriminate their client. It is naive to suggest that prostitutes will name and shame the buyers of sex. Clearly, they will not.

George Lyon: That is not the only scenario that was envisaged. Corroborative evidence can be led over a range of circumstances. It may be that, in his interview with the police, the purchaser will let slip something that helps with the conviction. Other evidence may also be led to secure the conviction. We are not suggesting for one minute that we should rely only on the seller grassing up the purchaser. That is not what we envisage. They may choose to do so, but a range of other evidence can be led to secure conviction.

Under the new offence, the police can, for the first time, stop purchasers and interview them as to what they are doing in the area. The hope is that that will lead to a charge of soliciting being brought against the purchaser.

Ms Watt: I will take up that point. We have heard in evidence that if that happens the problem is likely to be moved on to another area that probably makes prostitutes much more vulnerable, such as a suburb or woodland. Given all the problems that have been highlighted in the evidence, which you have read, would it not be better to forget about the bill? As you said, other work needs to be done on saunas and the illegal sex trade. Should all public prostitution be dealt with in one bill?

George Lyon: As I have said, the bill is only the first step in the process. The decision was made to take action on the narrow subject of street

prostitution. As you say, bigger issues such as indoor prostitution and trafficking will have to be tackled later. Work on that continues.

Another matter that has not been talked about much in the committee meeting is all the good work by the local authorities in Glasgow and Edinburgh to help the victims, who are the prostitutes who are out on the street, exposed to danger nightly. We have seen some consequences of that. Guidance has been given to local authorities to ensure that the same level of service is provided throughout Scotland, although prostitution is centred on the four main cities. That is an important part of the work—perhaps it is just as important as creating a new offence.

Tackling the issue by supporting the individuals concerned and by trying to take them out of prostitution is one of the bigger challenges, along with creating the offence to tackle the problem of the purchaser and of the individuals who unfortunately find themselves on the street selling. Much good work has been done. We have worked closely with local authorities and health boards to ensure that service provision is as good as it can be. We help those unfortunate women to find a route out of prostitution. I hope that the committee supports that.

The Convener: The committee heard evidence about that previously, in relation to Margo MacDonald's bill. That was in addition to and in accordance with the evidence on the Executive's bill. We are now scrutinising the impact of the Executive's bill.

Ms Watt: No committee member who has heard all the evidence does not appreciate all the work that is being done, but any witness from a local authority or any prostitute will say that the bill creates the danger that people will move away from areas such as the managed zone in Aberdeen to areas that make prostitutes more vulnerable and that, if we do not tackle more fully the problem of kerb crawling, prostitutes will not access the services that are provided. Even if prostitutes are assisted out of prostitution, as long as demand continues and it is thought that purchasers will get away with it, more people will enter prostitution. We will get nowhere until you signal that you are taking a much stronger attitude towards purchasers, and the bill does not do that.

George Lyon: I disagree. At the moment, no offence can be attached to the purchaser, apart from breach of the peace. The bill presents a significant step forward as, for the first time, people who solicit and purchase will be open to prosecution. As I have heard today, the committee wants us to consider the loitering offence in relation to vehicles. Extending the offence would take us a step further than England and Wales

have gone. I will reflect on the concerns that have been expressed.

Tommy Sheridan: You have said that we have listened to much evidence, much of which you have read. We have heard from the police and councils and perhaps the most powerful evidence was from communities. Given your comments about reflection, do you accept that you are isolated on creating an offence of loitering in a vehicle?

George Lyon: We are not isolated. The issue has been genuinely discussed. We are having the debate because the Executive has proposed an offence that tackles purchasing for the first time. The evidence from down south is that the soliciting offence, which is the kerb-crawling offence in England and Wales, is securing a significant number of convictions. I hope that the same will happen in Scotland when the bill comes into force. I understand the concerns that have been expressed and that you want us to go beyond the England and Wales legislation, and I intend to reflect on those matters.

15:45

Tommy Sheridan: You and some members of the committee have been members of the Scottish Parliament for more than seven years. In that time, there has rarely been such unanimity that the Executive has got things wrong in proposed legislation. Does not the fact that the police, communities and councils are all saying the same thing indicate that you have got things wrong?

George Lyon: No. However, I have said that I am willing to listen to people's concerns. I hope that the parties that are represented in the Parliament and people outside it support our desire to take action against purchasers of sex. The offence that we have proposed will mean that action will be taken against them. We do not underestimate the challenges that will be faced in trying to secure convictions, but the evidence on what has happened as a result of the similar soliciting offence in England and Wales seems to demonstrate that the offence is tackling the problem down there.

Tommy Sheridan: I think you said that the bill's primary aim is to tackle the nuisance, fear and alarm that street prostitution causes. I am sure that the committee supports such a laudable aim. The proposals do not aim to tackle prostitution or the sex industry as a whole, which are issues that are so large that they cannot be dealt with by one piece of legislation. However, we have heard—particularly from the communities in Edinburgh and Calton in Glasgow—that kerb crawling is the big cause of fear and alarm, although it seems to be the one problem that the bill does not deal with.

You gave the example of someone driving in the financial district of a city—you may have been referring to Glasgow or to Aberdeen—but let us consider a person driving in Calton. What excuse could they use for driving slowly, stopping, starting and driving slowly again in a residential area?

George Lyon: We believe that such behaviour could constitute a breach of the peace but that we will strengthen the police's ability to tackle such matters by introducing the new offence of soliciting. The point of the bill is to tackle the general public's concerns about the nuisance, fear and alarm that are caused to communities. That is why we want to create the extra offence. I hear and understand the community's concerns about taking the offence further and have said that I am willing to reflect on them.

Tommy Sheridan: You are probably aware that the Association of Chief Police Officers in Scotland suggested in its written evidence that loitering should be defined in the bill as taking place

"when a person on foot or otherwise proceeds slowly or proceeds with many stops or remains in a public place for no obvious reason".

ACPOS suggested that that definition could strengthen the bill to meet communities' demands and concerns. Finding words that could address those concerns would not be a scientific impossibility.

George Lyon: I have said that I am willing to reflect on that matter and that there are ECHR issues to do with the creation of a reverse burden of proof with the current offence. There are issues relating to securing prosecutions as a result of removing section 1(6) of the bill, which is why I have undertaken to reflect on the concerns that have been expressed. I will read the committee's stage 1 report on the bill, which I am sure will flag up the area as an area in which action needs to be taken.

Tommy Sheridan: Surely you accept that proportionality and context must be looked at when ECHR compliance is being considered. The letter from the Justice Department states that there is

"nothing inherently objectionable about someone sitting or driving slow, in a motor vehicle and, as indicated above, there are many perfectly legitimate reasons why a person might do so."

If a person is legitimately lost in a residential area, seeking a parking bay in a residential area or delivering a Chinese meal in a residential area because they work for a Chinese carry-out, there is no problem, but if someone is persistently driving slowly in an area in the manner that was described to us by community representatives, surely we need the law to tackle that now. If you are suggesting that the law on breach of the peace

would tackle it now, you are saying that the police are not enforcing the current law to address a community problem that has been raised with them consistently. I do not think that that is fair. Everyone knows that the offence of breach of the peace is notoriously difficult to prove. From that point of view, what your letter to us says about ECHR compliance is out of context. If someone drove so slowly on a motorway, for instance, it would be against the law. If someone does that in a residential area, it will clearly cause nuisance or alarm. Would it not be better to create the offence, to give communities some extra assistance?

George Lyon: I return to the fact that we are creating a kerb-crawling offence that is based on the law on soliciting that has been successful in tackling the problem down south. We believe that that will go a substantial way towards addressing the concerns of communities. I hear what the committee is saying about the need to go slightly further. We have undertaken to reflect on that and investigate it.

Tommy Sheridan: I have a final question. None of us believes that a new offence of loitering in a vehicle would tackle the myriad problems related to prostitution, but do you accept that if that new offence were created, we could deter or change purchasing behaviour? If individuals knew that it was an offence persistently to arrive in an area looking to purchase prostitution or sexual services, would that not influence their behaviour? We have talked about tackling the demand instead of always concentrating on the supply. Do you accept that that new offence could help?

George Lyon: I think that the creation of the new kerb-crawling offence based on soliciting, which is used down south, where a significant number of people are convicted every year, will send a strong signal to those who are currently immune from any form of prosecution because their behaviour does not constitute an offence on the statute book. The creation of—

Tommy Sheridan: But what about corroboration, minister?

George Lyon: If you would let me finish my point—

Tommy Sheridan: I raise the point about corroboration because you cannot compare England and Scotland without—

George Lyon: With respect, the two offences are equivalent; that is the purpose of creating them. In England, the new offence has been successful. That will send a strong message to those who are engaged in the purchase of sex through street prostitution that, for the first time, they could be open to charges. For the first time, the police will have a reason to stop and interview those people about their activities.

The Convener: I will allow a brief supplementary question from Michael McMahon.

Michael McMahon: In relation to the questions that Tommy Sheridan has been asking, I need to get my head round the possibility of someone not using a car and the offence still being called kerb crawling. If you rule out the possibility that someone can commit the offence from a car, can you explain to me how someone can kerb crawl on foot?

George Lyon: But the offence does not rule that out.

Michael McMahon: You keep saying that you are creating an offence of kerb crawling, but you rule out the possibility that that can be done from a car. How can someone kerb crawl on foot?

George Lyon: No. The new offence is of soliciting from a vehicle.

Michael McMahon: That is not kerb crawling—that is soliciting.

George Lyon: Well, I am sorry, but that is the offence down south. It is called kerb crawling, and the offence under the English legislation is soliciting from a vehicle. We are proposing exactly the same offence here.

Tommy Sheridan: Where does the loitering element come in?

George Lyon: That does not apply to those people.

Tommy Sheridan: That is the point.

The Convener: I ask members to speak through the chair, please. Margo MacDonald was next.

Margo MacDonald (Lothians) (Ind): Do you mean to criminalise consensual sex between adults?

George Lyon: No.

Margo MacDonald: If you do not mean to criminalise consensual sex between adults where there is a monetary consideration, I wonder why we are going to all this trouble. On kerb crawling, the people in whose name the proposed legislation has been introduced are those who are offended or alarmed by an approach from someone, usually in a car. We have heard that if someone goes to an area where prostitutes are known to consort, they are more likely to be charged with the proposed new offence. Therefore, it is accepted that there are areas where prostitutes are known to consort. Is that right?

George Lyon: The offence will not be designated to any particular area; it will cover the whole of Scotland. The offence will be applicable no matter where the fear and alarm is caused to

residents or would be caused to a reasonable person.

Margo MacDonald: Yes, but how many cases are on record of fear and alarm being caused to a resident as a result of their being propositioned by someone driving a car outwith an area that is known to be one where prostitutes consort? Are there any?

George Lyon: I suspect that there are very few, but I do not have that information.

Margo MacDonald: All the mess that we have got into—forgive me for saying that, convener—might have been resolved if we had stuck to the expert group's original recommendation, which was that the new offence of causing alarm and nuisance should be triggered by the complaint of a third party. The idea was that only someone who was alarmed or put in a state of agitation would complain. If we had stuck with that, we would not have had to go through all the hoops on proof that we have gone through this afternoon. If the process were complaint led, a person—the third party—would have to be offended or alarmed. Would that not be the simplest way in which to deal with the matter? Can we hear from the prosecutor on that? The police made it plain last week that they would prefer the process to be complaint led.

Andrew McIntyre: To be clear, is the proposition that actual alarm or nuisance would need to be caused to an individual before the offence would be triggered?

Margo MacDonald: The expert group's proposition was that, on the complaint of a third person that nuisance was caused or that they were alarmed or put into a state of fear, in the normal way, the police officer would exercise their judgment and, if they decided that the complaint was reasonable, they would proceed to act on it, as, I presume, happens with other offences.

Andrew McIntyre: I will not comment on the policy behind the bill or any change to it, but under the current proposals—Paul Johnston can correct me if he disagrees—it would be possible to prove the alarm or nuisance element without the need to rely on an individual reporting the matter but, equally, if an individual reported that they were annoyed or alarmed by the conduct, that, too, would be relevant evidence in the proof of the alarm and annoyance aspect of the offence.

Margo MacDonald: If there are no recorded cases of anyone being accused of causing fear or alarm outwith areas that are known to be places where prostitutes consort, why on earth are we making assumptions about that?

Andrew McIntyre: We may be veering into a policy issue. I am not entirely clear about what is being proposed.

Margo MacDonald: I think that the policy has got screwed up and you have to try to make sense of it. Sorry, convener.

George Lyon: As you will recall, the expert group proposed three options and the Executive eventually decided to pursue option 3, which was

“the Scottish Law Commission codification route, which retains the penalisation of soliciting and adds the penalisation of the purchaser”,

but only with an objective test. That was the policy decision.

16:00

One of the arguments for not making the offence complaint led is that that approach would require the individual to testify in a court of law as to what alarm, nuisance or concern was caused to them. Whether individuals would be willing to do that is a question that was asked. We decided to choose option 3 from the recommendations of the expert working group.

Margo MacDonald: I think that you went for the wrong option.

George Lyon: There were three options: two used objective tests, the other offered a complaint-led approach.

Margo MacDonald: The complaint-led procedure would get rid of many of the objections that we have heard.

You said that kerb-crawling legislation in England has been a success. I listened carefully to everyone this afternoon. With the possible exception of Maureen Watt, they seemed to imply that they want the legislation to eliminate prostitution. How, therefore, do we judge the success of prosecutions for kerb crawling in England? Are there fewer prostitutes? Is there less prostitution? Has it moved to another area? Are fewer men purchasing sex? How do we know that, if they now use phones as an alternative means to purchase?

George Lyon: I do not have such figures to hand. When it comes to tackling street prostitution, the proposed legislation will for the first time deal with the purchaser and signal that if they purchase such services they are open to being charged. We hope that that will tackle demand. I am not saying that it will reduce demand; it might just shift it elsewhere, but that is the nature of prostitution and part of the bigger discussion on what we do about other issues, such as indoor prostitution and trafficking, with which Margo MacDonald is familiar.

Creating the offence is the first step in trying to tackle street prostitution and the problem of the purchaser, and trying to influence demand if possible.

Margo MacDonald: As you know, I think that it is absolutely correct to prosecute if offence and alarm are caused to the general public by the buyer, seller or both of sexual services—that is right in my book—but if the attempted buying and selling is done in a discreet manner out of the way of the public, why would we bother to prosecute? May I find out from the prosecutor?

Andrew McIntyre: The question why we should bother is probably not for me. Under the bill, if the transaction is in such discreet circumstances that no alarm, offence or nuisance are caused or it could not even be inferred that a reasonable person could be alarmed by the conduct, there could be no prosecution because we would not be able to lead evidence to get us past that necessary test, which is part of the bill.

Margo MacDonald: If the area in which prostitutes were known to consort was a discreet area where members of the public were unlikely to be offended by their transactions, there would not be many prosecutions.

Andrew McIntyre: The nature of the location, time of the transaction and all the surrounding facts and circumstances would be factors that would determine whether nuisance could be established. That is the best answer that I can give as a prosecutor.

Margo MacDonald: If it was in a dockside area after 9 o'clock at night and there were no houses or places of work for someone in a car to be going to, it is unlikely that there would be any offence.

Andrew McIntyre: It would not be for me to say in this forum whether there would be a prosecution on the basis of very specific circumstances such as those. It would be improper for me to comment; in effect, I would be binding independent prosecutors throughout the country. What I can say is that the factors that I have just described would be relevant in determining whether it could be proved that nuisance had taken place.

Paul Martin: If police in a patrol car passed by and saw the offence being committed, would they be in a position to refer that for prosecution or would they have to say, "Sorry, but this is a third-party complaint"?

Andrew McIntyre: There is confusion between a number of issues here. The point is that to form the basis of a prosecution it would be necessary to show that the circumstances were such that if a reasonable person had seen the offence, they would be alarmed or annoyed. The prosecution could be founded on the basis of evidence from

police officers of the surrounding facts and circumstances. The prosecutor would lead evidence of all the facts and circumstances before the court, which would decide not on the basis of someone saying, "I was annoyed," or, "I was alarmed," but on the basis of whether those were circumstances from which it was reasonable that annoyance or alarm would ensue.

Paul Martin: How do you frame legislation in that respect? You seem to be saying that there has to be a complainer, but regardless of whether there is a complainer there will be a set of circumstances in which the police could refer the matter anyway.

Andrew McIntyre: Again, I am slightly confused about what is being asked of me. It is not for me to comment on whether there should be a change to make the offence complainer-led, as that is a matter of policy. What I can say is that, as the bill currently stands, there could be prosecutions regardless of whether people were alarmed by the conduct.

The Convener: I will draw this session to an end. I thank the minister and his supporting officials for their evidence this afternoon. It has been a long session. There are areas in which some committee members have concerns about the bill as it is proposed. I am sure that many of those concerns will be reflected in the committee's stage 1 report to Parliament and that the minister will await the report's content with interest.

George Lyon: Thank you, convener—it has been a genuine exchange of views. Everybody wants to ensure that the offence tackles the problems that we have identified.

Subordinate Legislation

16:08

Meeting continued in private until 16:58.

National Health Service Central Register (Scotland) Regulations 2006 (SSI 2006/484)

The Convener: Agenda item 3 is consideration of one item of subordinate legislation. No members have raised any points on the instrument and no motion to annul has been lodged. Can I confirm that the committee has nothing to report on the instrument?

Members *indicated agreement.*

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