

LOCAL GOVERNMENT AND TRANSPORT COMMITTEE

Tuesday 28 November 2006

Session 2

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LOCAL GOVERNMENT AND TRANSPORT COMMITTEE

30th 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)

THE FOLLOWING GAVE EVIDENCE:

Patrick Down (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 4

Scottish Parliament

Local Government and Transport Committee

Tuesday 28 November 2006

[THE CONVENER *opened the meeting at 14:01*]

Decision on Taking Business in Private

The Convener (Bristow Muldoon): I call this meeting of the Local Government and Transport Committee to order. Fergus Ewing has indicated that he will be unable to attend today's meeting.

Before we move to the first substantive item of business, I ask members to agree that we will take item 4 in private. Item 4 is consideration of our draft stage 1 report on the Prostitution (Public Places) (Scotland) Bill. I also ask that members agree that any future consideration of that report will be in private until the report is published. Is that agreed?

Members *indicated agreement.*

Subordinate Legislation

Registration Services (Consequential Provisions) (Scotland) Order 2006 (Draft)

14:02

The Convener: Item 2 is subordinate legislation. I welcome George Lyon, the Deputy Minister for Finance, Public Service Reform and Parliamentary Business, to give evidence to the committee on the order. Supporting George Lyon are Paul Parr, who is the deputy registrar general for Scotland, and Graham Fisher, who is the principal legal officer from the office of the solicitor to the Scottish Executive.

The order has been laid under the affirmative procedure, which means that Parliament must approve it before its provisions come into force. It is our normal practice to give members the opportunity to question the minister and his officials prior to the start of the formal debate, as the officials cannot take part once we have started the formal debate. I give the minister the opportunity to make some introductory remarks on the order, after which I will allow members to ask any questions that they have.

The Deputy Minister for Finance, Public Service Reform and Parliamentary Business (George Lyon): Thank you, convener. I will be brief. The draft order makes some technical but necessary consequential amendments resulting from the provisions of part 2 of the Local Electoral Administration and Registration Services (Scotland) Act 2006. It simply tidies up the language in the Gender Recognition Act 2004 and some other statutes to reflect the language that is used in the 2006 act. Apart from some small changes in terminology, it maintains the status quo.

I hope that that helps the committee to understand the purpose of the draft order. My officials and I will be happy to answer or clarify any points that are raised by committee members.

The Convener: As no member has any questions for the minister, I ask the minister to move motion S2M-5144, in the name of Tom McCabe.

Motion moved,

That the Local Government and Transport Committee recommends that the draft Registration Services (Consequential Provisions) (Scotland) Order 2006 be approved.—[George Lyon.]

The Convener: As no member wishes to speak in the open debate on the motion, I will put the question on the motion.

Motion agreed to.

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

14:05

The Convener: Item 3 is further consideration of the Prostitution (Public Places) (Scotland) Bill. I will allow a short period in which the officials who are supporting the minister can take their seats. I welcome Paul Johnston, who is a solicitor from the office of the solicitor to the Scottish Executive; Patrick Down, who is a policy officer from the corporate killing and prostitution team; and Andrew McIntyre, who is the principal procurator fiscal depute from the victim, witness and vulnerable accused team.

At last week's meeting, during its discussion of stage 1 evidence on the bill, the committee agreed that it wished to invite the deputy minister to today's meeting to provide further oral evidence on the bill. I wrote to the minister, indicating some of the areas that we wanted to cover. For the record, the committee is interested, in particular, in the possible implications of using the test of causing alarm, offence or nuisance to a reasonable person to determine whether an offence has been committed under the bill. The committee also wishes to explore with the Executive whether that might mean, in practice, that soliciting and loitering could take place legally in certain locations and in certain circumstances under the bill. The committee would like to explore with the Executive the related question whether such an interpretation of the bill could make it easier for management zones to be legally established. I draw members' attention to the fact that the minister has given the committee a written reply in advance of his attendance today, of which members should have a copy.

Before you make your introductory remarks, minister, I thank you for attending the meeting at fairly short notice. We appreciate that. I hope that it has not caused any great inconvenience to your diary.

You now have the opportunity to make some introductory remarks on the areas that the committee wants to pursue with you and with the Executive. After that, we will move to questions from members.

George Lyon: I thank the committee for giving me the opportunity to address it on the issue of legal management zones. I have provided a detailed answer in my letter to the committee. I apologise for the fact that we could get the letter to you only at close of play last night; it took us some time to turn it round and to answer the questions that were contained in your letter of last week. I am happy to be here today to outline the position.

I make it clear that our proposals do not create or allow legal management or tolerance zones. The Executive has never been in favour of such zones and we are clear that that is not the effect of our proposals. Nevertheless, the new offences represent a deliberate departure from the existing offence in two key respects. First, they specifically target the negative impact of street prostitution on our local communities. Secondly, they explicitly include purchasers for the first time.

Why has the Executive proposed those changes? We have done so in the light of the recommendations that were made by the expert group on prostitution, which were broadly supported by consultees. Like the expert group, we recognise that changes to the criminal law alone cannot deliver our ultimate goal of eradicating street prostitution. We need local, multi-agency strategies that address all the facets of this extremely complex problem. That is why we have issued guidance to local authorities on how to tackle street prostitution. We must also ensure that whatever action we take now on street prostitution does not have unintended effects. That is why we have indicated that further action is likely to be required in the light of our on-going work on off-street prostitution and trafficking.

Convener, your letter outlined the committee's concern that the way in which the proposed offences are formulated could compromise enforcement and prosecution. I will address the question whether there are circumstances in which soliciting or loitering would not be an offence.

The bill criminalises soliciting or loitering for the purposes of prostitution in circumstances in which a reasonable person would consider it likely to cause alarm, offence or nuisance. Clearly, there may be some circumstances in which a reasonable person would not consider that the behaviour would be likely to cause alarm, offence or nuisance and therefore no offence would be committed.

It is worth noting that, under the current law, no charge can be brought unless and until the seller has received two police warnings for their conduct. However, under our proposals, the police would be able to charge an individual on the first occasion that a reasonable person would consider that their conduct was likely to cause alarm, offence or nuisance.

Furthermore, the offence does not require that actual nuisance, alarm or offence has been caused to a member of the public—it requires only that a reasonable person would consider that the behaviour would be likely to cause alarm, offence or nuisance. It will be for the courts to determine in any particular case whether the test is met, taking into account all the circumstances of the case. We adopted that objective test precisely because both

the Crown Office and the Association of Chief Police Officers in Scotland said that that would aid enforcement and prosecution.

As I have said, the Executive is not—nor ever has been—in favour of legal management or tolerance zones. Such zones are not in the interests of the wider community—especially not those of people who live or work near the zones—and there is little evidence that they do anything to improve the safety of those who are involved in prostitution. We are clear that the bill does not create legal management zones. The law will apply throughout Scotland. There will be no location or zone where it does not apply.

As with all offences, chief constables have discretion in operational policing matters and it will be for them to determine how they enforce the new offences at the local level. It will then be for the courts to determine in each individual case whether the test for the offence is met. In doing so, they must take account of the nature of an area and who was around at the time. They must also take account of the conduct of the accused, such as whether it was persistent, aggressive or targeted towards innocent passers-by.

However, soliciting or loitering in a manner that a reasonable person would consider likely to cause nuisance, alarm or offence, or in circumstances in which they would consider it likely to do so, will be an offence wherever it takes place. It is wrong to consider that there will be areas where the law cannot be enforced. We are clear that there is nowhere that public disorder arising from street prostitution should be tolerated.

I am happy to answer any questions that the committee may have. Andrew McIntyre, from the Crown Office, is also available to answer any detailed questions that you may have on prosecuting the proposed offences.

The Convener: Thank you.

Michael McMahon (Hamilton North and Bellshill) (Lab): Thank you for your comments and for the letter, which I have read a few times. I wanted to be clear about exactly what is proposed. On the face of it, you have given the committee the answers that it was looking for, following our serious discussion of the matter. However, the last sentence of the second-last paragraph of your letter almost snatches defeat from the jaws of victory. It states:

“as with all offences, chief constables have discretion on operational policing matters and it will be for them to determine how they enforce the new offences at the local level.”

To me, that undermines everything that you say in the previous three pages of the correspondence. That was the essence of what we were trying to clarify. Are the new offences going to be enforced

because they are offences? Can you give us that bottom line?

George Lyon: I can say that there is no location or zone where the new offences will not apply. I made that clear in my introduction. Also, as I said, each case will have to be assessed on its individual merits. There will be no zones or areas where the offences will not apply. However, as I said in my introduction, as with all offences, it is for the chief constables to determine how they enforce the new offences at the local level. That is absolutely the correct position. I do not think that there is an appetite for the introduction of politicians telling the police how to operate at the local level. It is for the police to decide how to do that. We have created offences that are enforceable throughout Scotland and we expect the police to enforce them.

Michael McMahon: Except where the police get a nod and a wink from the local authority to set up a wee zone where they will tolerate prostitution and allow things to happen because they have come to an agreement on how they will operate.

14:15

George Lyon: I return to my original point. It is correct that there is a separation between politicians and police and that the local police decide on operational policing matters. That applies to every offence. It is, rightly, up to the chief constable to decide on operational matters, and it will always be that way unless Parliament decides that it wishes to instruct chiefs of police on how to conduct such matters at the local level.

Mike Rumbles (West Aberdeenshire and Kincardine) (LD): We all accept that it is up to the police to decide how they conduct themselves and enforce the law. However, I do not think that anybody would agree—I am sure that the minister would not—that it is entirely appropriate for the police to ignore the will of Parliament and ignore the laws that Parliament passes.

Like Michael McMahon, I thought that your letter was a very good one. It makes it absolutely clear that the Executive has never supported the establishment of legal management zones. Nevertheless, when a representative of Grampian police gave evidence to the committee on that issue, he said that there was a management zone in operation in Aberdeen. Can your legal advisers explain to the committee the legal position of that so-called management zone in Aberdeen under the current law? If we pass the bill, will the status of that management zone change?

George Lyon: I will respond first and then let the lawyers add their comments.

I understand that there is an informal arrangement in Aberdeen whereby women who are involved in prostitution are not charged for soliciting or loitering provided that they do so within a certain area and at certain times. However, as a representative of the local authority told the committee, it will review that position in the light of the new offences that are being created. We believe that it will be harder for the police to justify not charging people for what is explicitly a public order offence than it is currently under section 46 of the Civic Government (Scotland) Act 1982. We believe that it will be harder for such justification to be made.

I will hand over to Paul Johnston to explain the legal position.

Paul Johnston (Scottish Executive Legal and Parliamentary Services): I am not sure that there is an awful lot further to add. Section 46 of the Civic Government (Scotland) Act 1982 applies throughout Scotland whenever a prostitute loiters or solicits for the purpose of prostitution. Ultimately, however, it is for the local police to decide how they enforce that law. The provisions in the bill, similarly, will apply throughout Scotland. The minister has made it clear that there are no locations where the law will not apply. Nevertheless, we simply cannot say that the police will be compelled to enforce the law in a particular way.

Mike Rumbles: I do not think that anybody would be asking the police to enforce the law in a particular way; we would be asking them just to enforce the law. Nobody would suggest to a chief constable how he should operate, but we suggest to every chief constable in Scotland that they enforce the law that the Parliament lays down.

The matter is still not clear to me from your responses, although I thought that my questions were fairly simple. Is the management zone that is operating in Aberdeen—it was called a management zone by Grampian police in evidence to us—legal under the current law? If we pass the bill, will it still be legal?

Andrew McIntyre (Crown Office and Procurator Fiscal Service): Your questions highlight an issue with the use of the term “management zone”, which suggests that there is some formality in the arrangement or its status. The law does not prescribe that it is legal to have management zones but, equally, the law does not prohibit their status or existence. Essentially, a management zone is the police taking a decision that they will exercise their discretion in a particular way in a particular area. Whereas usually—this applies to any kind of offence—the police have discretion not to charge, caution or report for prosecution any individual who is alleged to have committed any offence, a management

zone arises when the police say that they will exercise their discretion in a blanket way in a particular area. I cannot think of any offence in relation to which the police are always obligated, as a matter of law, to take some form of action, but they have a duty to enforce the law. Management zones are lawful under the current legislation.

Mike Rumbles: They are lawful?

Andrew McIntyre: Yes. It is lawful for the police to decide that they will enforce the law in a particular way in a particular area. Whether that will change under the new legislation is a different question. I cannot see that the new legislation will make it unlawful for the police to take a particular approach to the investigation of crime or enforcement of the law in a particular area, but the offence will be a different kind of offence. It will be a public order offence. The police will need to consider their policy and justify it on a different basis because, under the new law, if a decision were made to tolerate a particular type of offence, the offence that would be being tolerated would be a public order offence. That is different from the current position. I am speaking about decisions that would require to be taken by the police, so I am a little bit out of my territory, but I imagine that it would be reasonable to expect the police to review their practice.

Mike Rumbles: You make it clear that under current practice the management zone is lawful, but I will ask you the question that I asked the representative of Grampian police. I asked them whether there was any other law applicable in Scotland that the police took a conscious decision not to pursue in a particular area. They responded with a negative because they could not think of any other examples. That is on the record.

I think that you can see the frustration of committee members. As you have outlined, it is lawful for management zones to exist, but I think—I may be wrong—that a majority of committee members do not want there to be management zones in Scotland. From the evidence that you have given to us, it appears that the only way for us as legislators to ensure that we do not have management zones in Scotland is to include in the bill a reference to the fact that we do not have management zones in Scotland.

Andrew McIntyre: This is a slightly different issue, but the way in which the bill is framed ensures that it certainly would not be possible for a prosecutor to say that there are areas of the country in which someone would not be liable to prosecution. Even in remote, quiet or derelict areas there is always the risk that someone will cause alarm, offence or nuisance. Therefore, it does not all hinge on having a management zone. However, that is a separate question from the question whether the police would thereafter

choose to caution or report for prosecution people who are breaking the law. If the police chose not to report what has become a public order offence and refused to apply the new law in relation to public order, your concern would relate. You would need to get reassurance from the police on the matter, but it is certainly not the case that the law would disapply or could not be enforced in certain zones. As I see it, the bill does not make it easier for management zones to be created.

George Lyon: It would be for chief constables to consider Parliament's intention behind the creation of the new offence. Our discussion makes it clear on the record the intention behind how the offence will be applied throughout Scotland. The police will have to draw on the will of Parliament, the spirit of the legislation and what has been said in Parliament in coming to decisions on how they police the matter locally and enforce the legislation that we have created.

If I can take the analogy with speeding, not every speeding offence throughout the country will necessarily result in a prosecution.

Mike Rumbles: But the police do not say, "We will not stop speeding on the A90."

George Lyon: No, but the police have flexibility in determining whether they will prosecute various offences at certain times.

Mike Rumbles: I will ask a final question, which goes back to what Andrew McIntyre said about the bill making it harder for a chief constable to justify management zones. That is the crux of the issue. I am heartened by what the minister has said. I think that he is going as far as he can without legislation to make the situation clear. However, although Andrew McIntyre has said that it will be harder for a chief constable to justify having management zones if we pass the bill as it stands, it strikes me that that does not mean that a chief constable could not justify it. That is where I am coming from, and I think that other members might be coming from the same direction.

Andrew McIntyre: I think that the only way to exclude that possibility would be by having offences that the police had no discretion whatever in dealing with. I cannot think of other offences to which that applies, but that would be the way of resolving the issue that you have highlighted.

Mike Rumbles: Hang on. I thought that that would be my last question, but I want to pursue the matter. I am not arguing that we should not give the police discretion to implement the law. Far from it. It is essential that politicians—the lawmakers—leave it to chief constables' discretion how they apply the law. It is still about applying the law, though. We cannot have police simply not giving out speeding tickets on the A90, to continue

that analogy. We could not have the A90 as a zone where that is not done. It seems to me that there is no other area of the law where the police operate in such a way.

George Lyon: We are making it clear that, under the bill, there cannot be locations or zones where the offence is not enforceable. There can be certain circumstances, but no zone or location.

Mike Rumbles: Andrew McIntyre took a different view. In his evidence just now, he said that it would be harder to justify having management zones, not that chief constables could not justify them.

Andrew McIntyre: I was recognising the fact that chief constables could, notwithstanding the clear parliamentary intention, take a different approach, unless Parliament binds chief constables.

Patrick Down (Scottish Executive Justice Department): I should stress that there is no area where the offence will be unenforceable. That is not the same thing as saying that there is no area where the police will have the discretion to choose, in a particular instance, not to charge somebody for a soliciting or loitering offence.

The Convener: I would like to pursue this matter a little further. Mike Rumbles has been trying to draw out an analogy. He is not saying that the police will have to enforce every single law in the same way in every circumstance. Of course there is discretion. Mike Rumbles's point is that we cannot find any other example of a law for which the police, in agreement with a public authority, designate an area where they will choose not to enforce that law and it becomes well known that they will choose not to enforce the law there. The analogy that Mike Rumbles uses is that it is unthinkable that the police would agree with the local authority to choose a particular road on which they would not enforce speed limits and that that would become public knowledge.

I do not see how you can justify the statement that it will be harder for the police to justify such an approach under the new law as opposed to another law. Surely the police, and possibly the local authority, could say that, because of the nature of the area, it is unlikely that alarm and distress will be caused and public order offences will not result and that therefore they do not see a need to enforce the particular law in the particular area.

Andrew McIntyre: It is the very last part of that which makes me say what I have said. It is not possible to say that, just because an area is quiet or derelict, a public order offence will not arise there. It could take place for a number of reasons, such as the nature or circumstances in which the

soliciting takes place, regardless of the quietness of the area.

The point that I am trying to articulate to the committee is that it would be more difficult for the police to operate a management zone in the sense that they have done until now. To do that would mean having to take a blanket decision not to caution or report people to the procurator fiscal in respect of a certain type of offence. In this case, it would be a public order offence. The police would be making a decision that, regardless of the nuisance, the police should not be reporting the offences. That would be fairly different from what I understand happens with a management zone at present, where it is offences of soliciting per se that are tolerated.

14:30

Paul Martin (Glasgow Springburn) (Lab): We have been discussing management zones and we have raised concerns about the need for police officers to enforce the new legislation. For example, in an earlier evidence session we heard from residents of Calton. Could a situation be envisaged in which, following representations from such residents in which they raise concerns about the offence, a chief constable decides to give notice to their officers that they do not want to enforce the legislation in that particular location? That would be very much against the spirit of the bill. Is there anything that the Parliament could do to intervene in that situation? I appreciate the issue concerning the operational responsibilities of police officers. Legally, could we make any representations to ensure that the chief constable reversed such a decision?

George Lyon: There has been a set of circumstances in Edinburgh in which concerns were raised by local residents about the very situation that you described. Ultimately, chief constables report to their police boards. I would imagine that a chief constable would have to answer to the board if there had been complaints or concerns that they were not enforcing the legislation in an area. They would be forced to account for their actions. I imagine that, if there were concerns, they would be forced to take action.

Paul Martin: The point that that raises—

The Convener: I want to question one thing that the minister has said. Is it not the case that the relationship between the police force and the police board is such that the board cannot instruct the chief constable on operational matters?

George Lyon: They would still have to account to the board for their actions. The board is the forum for that discussion.

Paul Martin: I suppose that the—

The Convener: I think that Andrew McIntyre wishes to come in on that point.

Andrew McIntyre: We have been discussing what the legislation does and does not allow. Enforcement is an issue for the police. It is always open in a particular category of case and in a particular area of crime for local prosecutors to give instructions to the police about the circumstances in which they expect to receive a report on a particular type of crime. That is not required under law, and there is never an obligation on the local prosecutor to do that.

It comes back to the point about relying on discretion. There is a discretion on the local prosecutor to issue instructions to the police. That prosecutor has a duty to act in and reflect the public interest. As far as the prosecutor's decisions are concerned, it would be for the prosecutor to reflect the will of the Parliament in taking cognisance of the public interest. The fact that Parliament had considered the legislation necessary to protect communities against nuisance is a factor that would influence an assessment of the public interest. If the situation arose, there would be a role for local prosecutors to consider whether the current practice of the local police force was required and whether instructions were justified. Prosecutors could issue instructions if the law was not being enforced according to the spirit of the legislation. However, that is not required by law.

George Lyon: The Lord Advocate would also have a role in that because that post holds the same public interest role. Therefore, the Lord Advocate would have a role in ensuring that the will of Parliament was recognised and enforced. Perhaps Paul Johnston could explain the point a little further.

Paul Martin: Before Paul Johnston speaks about that, I want to ask whether there is an issue around the police having to gather the evidence in the first place in order for prosecutors to become involved. Are you saying, Andrew, that prosecutors could make direct approaches and gather evidence from a community themselves?

Andrew McIntyre: The police must be involved. If, when reviewing the situation, the local prosecutor or the Lord Advocate, to whom the minister has referred, decided that, as a matter of public interest, it was necessary for the police to use the new legislation in a particular way, and if there was a need to give an instruction because the law was not being used in the way that was required to reflect the public interest, an instruction could be given to police forces that the legislation should be enforced and used in a particular way. It

would still be the police who would investigate and report the offences.

That does not happen routinely in relation to all crimes. The Lord Advocate and procurators fiscal do not routinely issue the police with directions on how to investigate and enforce all sorts of crimes. The power is there, however, if it is necessary to issue such an instruction in the public interest.

Paul Johnston: The enforcement of the law is not a matter for a bill. It is not a matter that would require to be included in legislation and I am not aware of any criminal law that seeks to specify how that law is to be enforced. To reiterate what Andrew McIntyre said, if the Parliament had concerns about the enforcement of a particular offence, it could make those concerns known. The Lord Advocate has ultimate responsibility for the prosecution of all offences in Scotland and could, at her discretion, issue guidance or instructions to prosecutors if appropriate.

Paul Martin: We are talking about something that already happens and to which a blind eye is turned. That is why we are probing the point. If somebody decided to attack somebody else with a knife in Sauchiehall Street, it is unlikely that police officers would decide to turn a blind eye, but soliciting happens in various parts of Scotland and a blind eye is turned to it. How do we ensure that we put in place effective, enforceable legal remedies? Is the minister considering stage 2 amendments on inciting soliciting behaviour? Would setting up a management zone count as inciting soliciting behaviour?

George Lyon: I am not sure. We would need to reflect on that.

Paul Johnston: Inciting the commission of an offence or attempting to commit an offence is generally covered under Scots law. We do not normally need to specify in law that it is also an offence to incite the offending conduct, attempt to do it or be part of it in some way. It would be an entirely different issue to say who would be responsible for incitement.

Ms Maureen Watt (North East Scotland) (SNP): I ask for the convener's guidance on whether we are restricted to asking the minister about the contents of his letter. We raised other points that we thought needed clarification.

The Convener: I will allow you to ask other questions of the minister within reason, but I will not allow you to go over the whole of his previous evidence.

Ms Watt: No, that is absolutely not my intention.

Minister, is it not the case that the bill will result in more prosecutions, particularly of women and particularly—as members of the committee would like—in Aberdeen? Is that to the benefit of women

who are in prostitution and will it help them to get out of it or will it continue the vicious cycle that we have talked about in the committee for long enough?

George Lyon: I cannot predict how many prosecutions the new offence will create in future. However, I draw your attention to the experience down south, where significant numbers have been prosecuted under a similar offence. The new offence that we are creating in Scotland is the equivalent of the English offence, so we expect significant numbers of prosecutions to take place. I refer, of course, to prosecutions of the purchaser as well as the seller, which is not the case at the moment.

The criminal law on its own is not the answer to the problem for the victims of prostitution, who are the people who are involved in the selling. It has a small role to play, but there needs to be investment in support and help for women to allow them to find routes out of prostitution. That is just as important as the criminal law aspect of tackling the problem.

There is a vicious cycle that consists of the seller being arrested, inevitably pleading guilty because that gets the case over and done with quickly, being fined and being back out on the street within a couple of hours, desperately needing to go out and sell to raise the money to pay the fine. I do not know whether you have heard about that in evidence but, when I spoke to the various support groups for the women, I was shown evidence of it. Criminal law does not stop people being caught up in prostitution, and we must take that into consideration when we discuss the bill.

The bill does not stand on its own. A range of other measures need to be taken to ensure that we provide routes out of prostitution for the victims, who are the women. Simply to bang them up, fine them, then put them back on the street—the circumstances in which they find themselves mean that they are back out on the street within hours to try to raise the money for the fine through selling their services—perpetuates rather than ends the problem. That must be factored into the discretion that police forces have to tackle the problem. If simply constantly arresting those victims brought an end to prostitution, it would have ended long ago.

Ms Watt: Under the bill, prostitutes may scatter all over a city, for example, so street workers and all the agencies that try to help prostitutes will have a much bigger job to do in finding them to offer them services. If the bill is intended to help women involved in prostitution, that situation will not achieve that.

George Lyon: As I tried to explain in my previous answer, the bill is just a small part of the action that needs to be taken to address prostitution and to find routes out of prostitution for the women who are caught up in it. The statistics, which I am sure members received in evidence, show that more than 95 per cent of those women have a drug habit that needs to be fed, and some women have partners who force them to go out on to the streets to earn money. A set of social circumstances must be taken into consideration.

We must be careful not to take action that drives prostitution underground, because we need to ensure that those people are identified and that the help that Glasgow City Council and others give them can reach them to assist them in finding a way out of prostitution and into a normal lifestyle. That is not easy, given the chaotic lifestyles that many such women have.

Ms Watt: You mentioned examining evidence from down south. In relation to the prosecution of purchasers, what is your attitude to rehab programmes? We did not receive conclusive evidence about whether confiscating vehicles or disqualifying drivers helped purchasers to address their offending behaviour. Should punishment affect the families of purchasers?

George Lyon: In my previous evidence, I assured committee members who raised the issue that we take seriously their concerns about the punishment of purchasers and that we would reflect on them and consider how to address them.

Ms Watt: Have you gone further along that line?

George Lyon: I assure you that work has been done on those matters.

Tommy Sheridan (Glasgow) (Sol): At the previous meeting at which you appeared, you agreed to reflect on the extent of the law. You have repeated that we will come into line with England and Wales, but you heard at the previous meeting the concern of some members that we should go further, and you said that you would reflect on that. Has any reflection taken place? Is there anything to report? Are you waiting to receive a report?

George Lyon: I assure you that work has been undertaken to address the concerns that the committee expressed. We hope to respond to the committee once that work is concluded.

Tommy Sheridan: On chief constables' discretion for policing in their areas, will the Executive jealously guard the right of the police to decide on operational matters in their areas rather than be instructed by politicians about alleged lawbreaking or alleged criminality? Do you suggest that the bill will lead to greater pressure

on chief constables to act on a particular form of alleged criminality and alleged lawbreaking?

George Lyon: No. In my opening statement and in my answers to questions, I have made it clear that, in operational matters, chief constables have discretion and I hope that the committee supports that position. It is not for politicians to instruct chief constables on how they apply the law because that would take us into difficult territory as regards chief constables' independence and how that applies to the work of the officers in their areas. We have suggested that there are mechanisms whereby guidance could be issued, if it was felt that it would be in the public interest for that to happen.

14:45

Margo MacDonald (Lothians) (Ind): You mentioned the services that require to be delivered to the people who work as prostitutes and you said that the delivery of those services was as important as a change in the criminal law. Has there been discussion of how services can be delivered to the prostitutes who need them if they are not working in what is recognised as a red light area? I know that people are hung up on the business of management zones and so on, but I do not think that anyone would deny that there are red light areas. The whole point of drawing attention to such areas was to enable the delivery of services to be targeted where it was known that prostitutes were. That was a simple practical point. Have you given any thought to what would happen if you were unable to locate where the prostitutes were because red light areas were somehow magicked away?

George Lyon: If all prostitution is driven underground—or even indoors—the provision of services and support to enable the unfortunate victims to find routes out of prostitution will become much more difficult. We are talking about an even-handed approach, involving both the criminal law and the provision of support to the victims. We must ensure that we get the balance right.

Margo MacDonald: The minister made it plain that whether we are talking about a red light area or a management zone—frankly, I do not care what we call it—we should just recognise what the normal practice is and how, up until now, the police have been left holding the baby.

I wonder whether the minister is aware of what Assistant Chief Constable Neilson said when Fergus Ewing asked:

"Is it possible that there could be buying and selling of prostitution services without committing an offence of causing nuisance?"

Assistant Chief Constable Neilson replied:

"How do we prove intent? What nuisance are the people who are involved creating, other than for the two police officers who see what is happening, which is two people speaking on the street and a woman going into a man's car? To whom are they causing annoyance? We had difficulty understanding that ... In the city centre ... Who is making complaints after 5 o'clock in the evening? Who is being caused annoyance?"—[*Official Report, Local Government and Transport Committee*, 31 October 2006; c 4200-01.]

If the committee wants to get rid of soliciting in the street, I suggest that the bill will not do that. The bill recognises that street soliciting will continue and seeks to make the practice tolerable for people who may be affected by it, but who have no part in it.

George Lyon: The circumstances of each case will determine whether an offence has been committed, not the location. When the police decide whether to take action, the reasonable person test will have to be brought to bear by the officer who observed the transaction and that will have to be taken into account when the court comes to a view on whether an offence has been committed. In other words, the offence does not have to be witnessed by an individual—it is simply subject to the reasonable person test. The issue comes back to the circumstances of the case. That is why we believe that it will be harder for the police to justify not charging people for what is explicitly a public order offence than is the case under the existing section 46 offence.

Margo MacDonald: I fail to see any difference between the bill and any other piece of legislation. The bill does not seem anomalous to me.

David McLetchie (Edinburgh Pentlands) (Con): I want to explore the difference between the present law and that proposed in the bill. Mr McIntyre, you may be able to help with this point. Let us take the scenario of a known prostitute—someone with previous convictions for prostitution—who is in a non-residential, quiet industrial area like the one that you described earlier. Let us imagine that that person is dressed for work and engaging with people driving backwards and forwards slowly in motor cars. Am I right in thinking that, under the present law, such a person is guilty of the offence of soliciting and loitering?

Andrew McIntyre: Providing that they are a known prostitute, have received two cautions and are soliciting or loitering for the purposes of prostitution, they commit a criminal offence and can be prosecuted. There is no additional requirement for nuisance under the present law.

David McLetchie: Exactly—you have come to my point perfectly. In the situation that I described, the act of a long-standing sex worker being in

such an area and engaging with the drivers of slow cars would be an offence under the present law.

Andrew McIntyre: I am not commenting on the evidential significance of the scenario that you described. It is not possible to say what would constitute sufficient evidence, but under the present law if someone is a known prostitute and it can be proved that they are soliciting for the purposes of prostitution, they can be prosecuted. In effect, they can be prosecuted on the third occasion that the police detect and can prove that they are soliciting for the purpose of prostitution. A different category of people would be liable to prosecution under the proposed offence.

David McLetchie: Yes, but I am talking about the old hands—the experienced industry workers. We are having to deal with known prostitutes, rather than recruits who may come into the industry in future.

We have discussed the situation under the present law. For any offence to be committed under the proposed law, it would not be enough for someone to solicit, loiter or be a known prostitute. In fact, it would not matter at all whether someone was a known prostitute. There would be another hurdle to cross: the circumstances would have to cause—in the eyes of a reasonable person, not a blushing, delicate creature—alarm, nuisance and offence. Is that right?

Andrew McIntyre: That is exactly it. Under the new law, the offence would be triggered not by the fact that it is the third time that someone solicited but by the circumstances in which they solicit. The causing of nuisance would make someone liable to prosecution rather than the fact that they solicited per se.

David McLetchie: So, under the law at present a prostitute who is engaged in work is liable for prosecution, but under the proposed law a working prostitute would be prosecuted only if the circumstances in which they worked caused alarm, nuisance and offence. Is that right?

Andrew McIntyre: That is exactly it—there are different categories of offence.

David McLetchie: Therefore, one would have to assume that, given the additional hurdle to be overcome, it would be more difficult under the proposed law to prosecute known prostitutes.

Andrew McIntyre: The situation would be different. Someone would be prosecuted only if they caused a nuisance. At present, it is not relevant whether they cause a nuisance.

David McLetchie: That is exactly my point.

Andrew McIntyre: It would be a different offence—a public order offence. However, under

the bill, a prostitute could be prosecuted on the first occasion if they were causing a nuisance, which is another difference. There should be no misunderstanding about the fact that it would be a different offence. From my perspective as a prosecutor, the proposed offence tackles a different type of conduct.

David McLetchie: We understand that a first offence could be prosecuted under the proposals. However, the main problem in the areas that we have heard evidence about is not with novice prostitutes who have never previously been convicted, but with the nuisance caused by prostitutes who have been involved in prostitution for a considerable time. It is reasonable to conclude from the evidence that we have received that the real problem is with a significant number in Glasgow, Edinburgh and, to a lesser extent, Aberdeen, of known prostitutes who almost always have convictions.

Andrew McIntyre: I cannot comment on the policy intention or worthiness of any of the approaches, but the offence will be different and we will be prosecuting people in different circumstances.

George Lyon: It is worth remembering the reasonable person test in relation to the causing of nuisance. In the circumstances that David McLetchie described, most reasonable people would think that a nuisance was being caused if cars were driving by regularly and pick-ups were taking place.

David McLetchie: I am not wholly convinced of that, minister, but neither of us are prosecutors, so we will move on.

Andrew McIntyre: I want to be clear about my previous evidence. If the policy intention is to prosecute people who solicit in circumstances in which they cause a nuisance, the test that is laid down for proving the nuisance—as opposed to another test—is acceptable and would give us a basis for prosecuting them. That is why we said that it was important that the test was objective.

George Lyon: ACPOS made that comment, too.

David McLetchie: Does the Scottish Executive think that the current management zone in Aberdeen and the previous tolerance or management zone—or whatever it was called—in Edinburgh arose simply because of operational policing decisions taken by the chief constables?

George Lyon: Yes. That is the position.

David McLetchie: So, that whole policy arose simply because the chief constables of Grampian police and Lothian and Borders police decided, in consultation only with other officers, that that was how they would police the offence, and there was

no input whatever from councils, prosecutors or civil servants in the Scottish Executive or Scottish Office. It was generated entirely by the decisions taken by police officers. Is that your view of the situation?

George Lyon: I understand that there is an informal arrangement in Grampian police, in which representatives of Aberdeen City Council have been involved, but I am certainly not aware of any written policy statement on the management zone from the council.

David McLetchie: So, at no time since 1999 has any Scottish Executive minister or official expressed approval for the policy that was pursued in Aberdeen or, latterly, in Edinburgh. Is that correct?

George Lyon: I am certainly not aware of any statement to that effect by ministers or officials, but I will double check and get back to the committee if you want further evidence on that.

David McLetchie: I take it that the fact that that allegedly purely operational policy was being pursued would not be unknown to officials in the Scottish Executive and prosecutors in the Crown Office.

Andrew McIntyre: You asked about that when we gave evidence previously. I have been able to clarify the position in relation to Aberdeen and Edinburgh. There is certainly not an instruction from local prosecutors that a management zone should operate in either area, but it is clear that prosecutors are aware of the police policy and have not issued any instructions that the zone should not operate or that they should always receive reports in these cases. That reflects the current position.

David McLetchie: Can you say anything more about the Scottish Executive's view, minister?

15:00

George Lyon: Let us look back at how we arrived at where we are today. A bill was introduced by Margo MacDonald, and the committee examined it and recommended that the Executive set up a working group to look at the whole issue of prostitution, including management zones. The working group reflected on that for a couple of years—representatives from all over were involved in that group—before making a series of recommendations, one of which was to introduce the new type of offence that we are now considering. The working group also made other recommendations about the need to support victims and to provide services to those involved in prostitution, to help them find a way out. That is the approach that the Executive has taken. The Parliament was well aware of management zones,

as a result of Margo MacDonald's bill, and the Executive went ahead and set up the expert working group to consider how we could take the matter forward. That approach was recommended by the committee—I think, convener, that you were the committee's convener at that time.

David McLetchie: I understand all that, minister, and that is a fair analysis of how we got to the current situation. I just find it somewhat odd, as I am sure other members of the committee and the public would, that we have a policy that seems to emerge from the ether, although the official position is that it was never written down and is only an operational decision by the police. I put it to you that nobody believes that that is how it actually happened. I would like you to respond to that.

George Lyon: My understanding is that it is an informal arrangement, pursued by Grampian police and Aberdeen City Council. That is all that I can say, and I am saying it in good faith.

David McLetchie: I understand that, but I am simply asking how we have got to a situation in which this significant policy seems to operate entirely on a nod-and-a-wink basis, while the official position of the Scottish Executive—if I have understood your answers to my previous questions—is that it all happened simply because the chief constables in Aberdeen and in Edinburgh decided one morning that that was how it was going to be. Given the welter of other evidence, the expert group's investigation and the narrative described in chapter 4 of the expert group's report about the development of the zones and the policies, is it still your view that that all happened just because the chief constables decided that it was going to happen? Is that the official position?

George Lyon: As I said, I have given you my answer in good faith. The Executive clearly took the matter seriously, which is why the working group was set up with a view to looking at all those matters. The group originated from the bill that was promoted by Margo MacDonald and brought to the Parliament. It was decided, on the recommendation of the Local Government and Transport Committee, to set up the expert working group, which has now made recommendations for action. That is why we have introduced the change to the offence itself.

The Convener: I am advised by the clerks that, in fact, Margo MacDonald introduced her bill in the first session of Parliament. She will correct me if I am wrong, but I think that it was considered by the Local Government Committee during the previous session, and that it was that committee—a predecessor of part of the Local Government and Transport Committee—that made the recommendation to which the minister referred. Subsequently, the expert group was set up. Margo

reintroduced the bill during the current session of Parliament and, after some of the interim recommendations had been placed before Parliament by the expert group, she made the decision not to proceed with her bill, on the expectation that the Executive would take some action or introduce some legislation based on the expert group's recommendations. That is the chronology of events.

George Lyon: I stand corrected, convener.

Margo MacDonald: On a point of information—

Mike Rumbles: Excuse me. I do not think that it is Margo MacDonald's turn to speak.

The Convener: If your point relates to what we have said about the chronology of events, Margo, you may speak.

Margo MacDonald: My point relates to the considerable length of time that David McLetchie has spent trying to get the information that he seeks. In fact, Grampian police explained what their policy was, but as they did so a number of years ago I would not necessarily expect the minister to know about that.

In all cases, in all cities, there is co-operation. Assistant Chief Constable Richardson from Lothian and Borders police talked about the helping agencies and partners with whom we work. There was consultation over how the business was managed in all the various cities. The police did not make a unilateral decision about it.

The Convener: Has David McLetchie finished asking his questions?

David McLetchie: I have indeed.

Mike Rumbles: The evidence that the committee has received is that the Aberdeen management zone was set up in 2001 as a result of a joint decision of the chief constable at the time and the administration of Aberdeen City Council. It was not just an operational decision by the police.

I want to focus on your evidence, minister. Your letter said—and you have repeated it today—that the Executive has

"never supported the establishment of legal 'management' ... zones".

However, since 2001 there has been a legal management zone that the Government of Scotland does not support and which I do not think the Parliament would support. I think that I am fairly representing the views of the committee when I say that we do not want to turn a blind eye to the situation; it is our duty to consider the issues as the legislation goes through Parliament. It would therefore be very helpful if the Government and you, as the minister involved with the bill,

could back up your written and oral evidence that you do not support the establishment of management zones by lodging an amendment at stage 2 to make that absolutely clear. I would like you to make it clear that the so-called management zone is not operating within the law. It would be quite straightforward for a stage 2 amendment to be lodged that would make management zones illegal.

George Lyon: I reiterate what I said in my opening statement and what is in the letter: the Executive is not and never has been in favour of legal management zones. I am happy to restate that and I will certainly reflect on Mike Rumbles's proposal, in the same way as I have said that I will reflect on several other issues that the committee has raised during its evidence sessions. I cannot say much more than that at the moment.

The Convener: Are there any further questions?

Margo MacDonald: When the minister reflects on all the evidence, he should take into account the fact that there are members of this committee—they might be in the majority, for all I know—who would like to outlaw prostitution and the act of soliciting. That might be a counsel of extremity that we cannot hope to see expedited under the law. Even if a provision is inserted into the bill at stage 2 that makes management zones illegal, what will the minister do about red light zones?

George Lyon: I am not sure whether Margo MacDonald is asking me for a response. If there was a magic bullet that could eradicate street prostitution overnight, I am sure that it would have been found many years ago. The issue is complex and very difficult. It involves very unfortunate females who are driven into prostitution through a need to feed their drug habits or raise money for partners or other individuals who have control over them because they are vulnerable adults. The notion that a change in the law will change that overnight is overstressing things.

A range of work needs to be done—Glasgow City Council is one of the leaders in the field—on the services that can be provided to help such individuals address their drug habits and chaotic lifestyles and find a way out of prostitution. The legal remedy that we are discussing here is a small part of the work that needs to be done to tackle the problem, and I hope that the committee will bear that in mind and consider the bigger picture of how to address the needs of the victims—the women engaged in prostitution who are driven by their circumstances and their habits. We need to provide proper support to give those people an opportunity to find a way out of that life. I hope that that will be the committee's overriding concern.

The Convener: I thank the minister and the three officials. That concludes our questions and brings us to the end of the public part of the meeting.

15:10

Meeting continued in private until 15:58.

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