# MEETING OF THE PARLIAMENT

Wednesday 21 November 2001
(*Afternoon*)

Session 1

£5.00

© Parliamentary copyright. Scottish Parliamentary Corporate Body 2001.

Applications for reproduction should be made in writing to the Copyright Unit,
Her Majesty's Stationery Office, St Clements House, 2-16 Colegate, Norwich NR3 1BQ
Fax 01603 723000, which is administering the copyright on behalf of the Scottish Parliamentary Corporate Body.

Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by The Stationery Office Ltd.

Her Majesty's Stationery Office is independent of and separate from the company now trading as The Stationery Office Ltd, which is responsible for printing and publishing Scottish Parliamentary Corporate Body publications.

# CONTENTS

## Wednesday 21 November 2001

## Debates

# Scottish Parliament

*Wednesday 21 November 2001*

(*Afternoon*)

[THE PRESIDING OFFICER *opened the meeting at 14:30*]

## Time for Reflection

**The Presiding Officer (Sir David Steel):** To lead our time for reflection this afternoon, we welcome Eileen Baxendale, who is a Baptist lay member working with asylum seekers in Glasgow.

**Mrs Eileen Baxendale (Baptist Lay Member working with asylum seekers in Glasgow):** Sir David, thank you for the opportunity to share with our Parliament today. My reflections come out of the work that we in Castlemilk Churches Together are doing with asylum seekers dispersed to Castlemilk in Glasgow.

First, I bring you some statements from asylum seekers that have particularly moved us.

"When they killed my father and arrested my brothers we decided to flee. My wife and four-year-old daughter went by horse and cart up the mountains and over the border; I went another way. My daughter still hides every time there is a knock at the door."

A couple with a little daughter were expecting their next baby any day. I asked what they would call the child.

"If it's a boy we will call him Ali, as that was the name of our son that the police killed."

A young man of 21 said:

"I came home one day and both my parents had been left for dead. Only my mother survived. I fled the country."

The Christian Bible says:

"God defends the cause of the fatherless and the widow and loves the alien giving him food and clothing. And you are to love those who are aliens for you yourselves were aliens in Egypt."

It also says:

"If anyone has material possessions and sees his brother in need but has no pity on him, how can the love of God be in him? Dear children let us not love with words or tongue but with actions and in truth."

Our new friends from a variety of other faiths tell us that their holy writings have similar imperatives—that all should help the poor and the dispossessed. I believe that such a commitment to social justice is a crucial requirement for our society.

Let us pray, at this difficult time, for justice and peace, both in our country and throughout the world.

Lord God, we pray today for the leaders of our nation, here in Parliament, in business, and in the faith communities, that they may hear what you are saying to us about justice and righteousness. Help us all, Lord, to build a just society.

We also commit to you, Lord, the world situation, and ask that there may be a way forward to peace in the troubled areas of the world, especially in Afghanistan.

Amen.

**The Presiding Officer:** Before we begin our main business this afternoon, I am sure that members would like to welcome to the gallery the President of the Parliamentary Assembly of the Council of Europe, Lord Russell-Johnston, who is on an official visit today. [*Applause.*]

I also ask members to note, in the revised business bulletin that has been circulated, that I have agreed to take an emergency question immediately before decision time. It qualifies as an emergency question because the Scottish lines of Atlantic Telecom are due to be cut off this weekend.

# Sexual Offences (Procedure and Evidence) (Scotland) Bill: Stage 1

**The Presiding Officer (Sir David Steel):** The main business today is a stage 1 debate on motion S1M-2459, in the name of Jim Wallace, on the general principles of the Sexual Offences (Procedure and Evidence) (Scotland) Bill.

14:34

**The Deputy Minister for Justice (Iain Gray):** This is a short but important bill, whereby the Executive fulfils a commitment to improve significantly the way victims of sexual crimes are treated in our criminal justice system, while still ensuring that those accused of such crimes receive a fair trial. Those have been our twin objectives throughout the process leading up to today's debate. I am therefore encouraged to see that the Justice 2 Committee's stage 1 report concludes that the bill strikes the right balance between the protection of the complainer and the rights of the accused, and that the committee recommends that the Parliament agrees to the general principles of the bill.

The committee's conclusion was reached after a searching process of evidence taking from a wide range of interests. I would therefore like to record my thanks to the members of the committee and their staff for the hard work that has gone into producing the report. The report highlights a number of issues for us to consider further. If, at the conclusion of the debate, the Parliament sees fit to support the general principles of the bill, we will ensure that those issues are addressed in full before stage 2.

The Executive made a commitment to introduce the bill in June 2000. A pre-legislative consultation document, "Redressing the Balance: Cross-Examination in Rape and Sexual Offence Trials", was issued on 9 November 2000 and the consultation period officially closed on 31 January 2001. Our deadline for introducing the bill was 28 June. That was a very challenging deadline, but one that we were able to meet. I would like to thank everyone who took the time and trouble to participate in our consultation exercise. Without their contributions we would not have been able to introduce the bill on time.

The single most important aim of the bill is to reduce the fear factor that alienates victims of sexual crimes from our criminal justice system. That aim is an integral part of the Executive's commitment to support the victims of crime, which we made in our programme for government and confirmed in the Scottish strategy for victims.

Although the bill focuses particularly on complainer witnesses in sexual offence cases, it is part of a wider programme of work. Next year, we will be consulting on whether further changes to the law of evidence are needed to help other vulnerable or intimidated witnesses testify in court. We will be considering the whole range of witnesses who may have additional needs and examining whether changes to practices and procedures are needed.

The bill slots into a much wider framework, within which it is designed to tackle some of the particular problems faced by victims of sexual offences. We all know that the majority of such victims are women, but we should not forget that there are also male victims of sexual abuse and assault. They share the feelings of shame, humiliation, fear and anger that all victims experience. The Sexual Offences (Procedure and Evidence) (Scotland) Bill will protect them, too.

If it is passed, the bill will do three things. It will ban an accused in a sexual offence case from conducting his or her own defence. It will strengthen the existing law regulating the use of evidence about the complainer's character and past behaviour. Finally, it will require any defence of consent or belief in consent to be notified before the trial.

The first part of the bill responds to the concern created by three recent cases where an accused charged with a sexual offence did not have a lawyer and questioned the complainers himself. We have always acknowledged that such cases are rare, but their small number does not diminish the trauma caused to those individuals most closely involved. Furthermore, the publicity about recent cases may have exacerbated the fear of going to court among victims. A victim is always likely to dread questioning about the humiliating details of a sexual attack. That dread can only be made worse if there is a possibility of the questioning being done by the person who may be responsible for the attack. If someone were to ask us today whether that could happen, we would have to admit that it could; passing the bill would mean that we would be able to say in truth that it could not.

The bill bans an accused charged with a sexual offence from conducting his or her defence in person at the trial. We are taking a different approach from that adopted in England and Wales. We considered carefully the solution chosen in England and Wales, but came to the conclusion that there are significant differences between our respective systems, which mean that a different approach is needed here. In Scotland, there is usually no disclosure of evidence by each side to the other before the trial. In England and Wales there are rules that require pre-trial disclosure. In England and Wales the defence will

have seen the statements of the prosecution witnesses before the trial starts. In Scotland each side will interview witnesses separately as they see fit, and usually neither side will see the other's statements. A full picture of the evidence will emerge only during the trial itself.

A lawyer brought into the case for the sole purpose of questioning the complainer—who may not be the first witness—without having access to the prosecution statements, and without having had an opportunity to prepare the defence case in advance, would be unlikely to be able to represent the accused effectively. In our view, requiring the accused to be legally represented for the whole trial protects the interests of the complainer and the accused.

We have been careful in the bill to provide other protections for the accused. The schedule provides for a series of notices to be given, from arrest onwards, alerting an accused to the need to appoint a solicitor. He or she will have plenty of time to select their own lawyer, but if they refuse to appoint anyone, ultimately the court will choose a solicitor for them. That solicitor will be under a duty to try to get instructions from the accused. Where the accused does not co-operate, the solicitor will have the authority to act in the accused's best interests on the basis of the material available.

The other major change proposed by the bill is in relation to questioning about the complainer's character and past behaviour. At the moment, applications to introduce sexual history evidence about the complainer can be made orally in the course of the trial with no prior notice. Discussion of those applications may be fairly brief. Sometimes, the evidence slips through without application and before any objection can be made to stop it. Furthermore, there is currently no need to make an application when the evidence is about the complainer's general character or non-sexual behaviour, rather than about sexual activity. Questioning of the complainer as to whether she is an alcoholic, has used drugs or has suffered mental illness may be made without any formal application at all, and with little, if any, examination as to whether such questioning is relevant to the issues at trial.

Published research suggests that there are subtle character attacks, using non-sexual evidence to hint at sexual behaviour or to undermine the complainer's credibility, which the current law does little or nothing to prevent. That research is not recent, and it may be that that situation is now less common, but the perception is that it happens. The bill must give confidence that it will not.

The bill tackles those problems in two ways. First, it brings the question of the relevance of the evidence, and the purpose for which it is to be used, much more to the forefront. Secondly, it sets down a clear process by which the admissibility of the evidence is to be determined, a process that involves consideration of the rights of the complainer as well as of the accused.

The bill sets out the criteria to be used to decide whether an application to introduce character or sexual history evidence should be granted. There is a series of stages at which the evidence must be assessed before it can be admitted. First, the evidence must be about specific instances of behaviour by the complainer or specific facts. Secondly, the evidence must be relevant to an issue at stake in the trial. Thirdly, the evidence will have to have significant probative value, that is, it will need to be of potentially significant help to the judge or jury in resolving the case. Fourthly, that significant value must outweigh any prejudice to the proper administration of justice that will be caused by admitting the evidence. The proper administration of justice, of course, includes ensuring that the accused can present a full and fair defence. That is a fundamental pillar of our system of justice.

The bill does, however, draw the court's attention to two other factors in assessing whether justice requires that the evidence be admitted. One of those is the possibility of diverting the jury's attention from the major issues it has to decide. It is not, after all, the function of the trial to pass judgment on the character of the complainer. The other factor is the need to give appropriate protection to the complainer's privacy and dignity. This is the first time that the complainer's rights and interests have been given any express status in the process. I hope that members will agree that that is a major step forward.

The bill also introduces a written application process for the admission of that evidence and, unless there is a good reason for lateness, the application must be lodged before the trial. As the Justice 2 Committee recognised in its report, that is intended to ensure that such evidence is considered in a thorough, detailed and structured way. It is also intended to ensure that the issues are clarified and dealt with before the trial begins.

However, I note the concerns that the committee has expressed about some aspects of the application process and the potential for delay, either before or during the trial. I assure members that we will consider carefully how to address those concerns before stage 2 of the bill.

The bill will also require the accused to give notice before the trial of any intended defence of consent, including a defence of belief in consent. That would be the third effect of the bill, should it become law. Late notification will still be permitted on cause shown. I know that, at the committee stage, doubts were expressed about the practical

benefit of such a provision to the complainer. I will therefore take a moment to set out clearly the aims of the provision.

First, the provision will give the complainer fair warning that consent will be an issue and will allow her to prepare psychologically for the type of questioning that she might face. Of course, in most sexual offence cases, the absence of consent is an essential element of the crime. Evidence of that will have to be led by the prosecution, and that might involve evidence of the use of force or threats.

In cases where the accused and the complainer are known to each other, the complainer might expect that the accused's position will be that the complainer consented. However, there are other cases where such a defence might be entirely unexpected—for example, in a case where the complainer has suffered injuries, clearly showing that force was used. It is not unknown for an accuser to counter such evidence with argument that the complainer enjoyed being treated roughly and that consent was given.

Even in cases where the accused and the complainer are total strangers, and where there is a strong prosecution case, the accused might still argue that the complainer consented. In such cases, the suggestion that she actually consented to the violence against her could come as a complete shock to the complainer. Advance notification will prevent that from happening.

The provision also links in with the requirement to make an application to lead evidence about the complainer's character or sexual history. That sort of evidence will rarely be relevant, unless the defence is consent. Before considering any application, it is important that the court knows that the accused is alleging consent.

In combination with the provisions on sexual history evidence, the provision tries to create a situation where, before the trial begins, both sides are clear on what the issues are and what evidence about the complainer the accused will be seeking to lead, if any. The trial should be concerned primarily with whether the accused did or did not commit the alleged offence and not with the conduct of the complainer.

During stage 1 evidence, it was suggested to the committee that the provision is an attempt to shift the burden of proof from the prosecution to the accused. That has never been our intention and I am pleased to see that the committee's report accepts that the provision would not have that effect. We acknowledge, however, that some of the words in the bill could be used to imply that a burden has been placed on the accused. We will consider that wording carefully and see whether a stage 2 amendment might be needed in order to dispel that ambiguity.

Some concerns have also been expressed about the range of offences to which the bill applies. The Equality Network has made some good points about the treatment of homosexual offences. We are committed to ensuring that the bill does not have a discriminatory impact based on sexual orientation. There are some practical problems with certain aspects of the Equality Network's suggested amendments. However, we intend to lodge an Executive amendment at stage 2 to deal with the issues that have been raised.

In the consultation document "Redressing the Balance: Cross-Examination in Rape and Sexual Offence Trials", we sought views on whether an accused's previous convictions for sexual offences should automatically go before the court following a successful application to lead character or sexual history evidence about the complainer. Large numbers of consultees backed that proposal. However, arguments were made in opposition to it. At the time that the bill was drafted, it was felt that such a provision could be too sweeping and that we should consider the matter further.

After further consideration, we have decided to introduce a modified proposal. If members agree to the general principles of the bill, we will lodge an amendment at stage 2 that will require the judge, following a successful application by the accused to lead evidence about the complainer's past, to consider whether any previous sexual offence convictions of the accused should be disclosed.

A presumption will be made in favour of disclosure, but it will be open to the accused to overturn that by satisfying the court that revealing his or her record would be contrary to the interests of justice. The normal presumption of innocence will apply in relation to the offence being tried, and it will be for the prosecution to convince the jury of the accused's guilt beyond any reasonable doubt.

Under current law, it is open to the court to grant a prosecution application to admit evidence of the accused's previous convictions when the defence has attacked the complainer's character. However, members of the Justice 2 Committee will be aware from Professor Gane's evidence to them that that provision is rarely used in sexual offence trials.

In the months preceding this debate, concerns have been voiced about whether the bill is compatible with the European convention on human rights. Such compatibility is a fundamental requirement of our legislative process.

At the heart of most human rights issues lies a balance that must be struck. The bill is no different. Article 6.3(c) of the convention confers on an accused the right

"to defend himself in person or through legal assistance of his own choosing".

The question is whether that gives him an absolute right to conduct his defence personally. In our view, it does not.

The body of case law that the European Court of Human Rights has built up suggests that a rule that requires an accused to be legally represented is usually regarded as legitimate. It is clear that limitations on the rights conferred by article 6.3(c) may be justified by circumstances that make them appropriate in the interests of justice. Such circumstances may arise when the accused's rights under article 6 must be balanced against the rights of others under the convention.

**Phil Gallie (South of Scotland) (Con):** Under bail law, someone who has been charged with rape and who decides to conduct their own defence would have limited access to the complainer. Would that contravene the ECHR, because the accused would not be able to precognosce the complainer?

**Iain Gray:** Mr Gallie raises an interesting question, but it is perhaps not for this debate, because the bill would set such a situation right by changing the legislative framework. I might take advice on that issue and write to Phil Gallie.

The questioning that complainers experience in sexual offence trials may relate to rights that are protected by article 8 of the convention. Article 8 does not confer any absolute right to non-interference in privacy, but it requires such interference to be in the public interest and proportionate. Some interference with article 8 rights is justifiable as an unavoidable part of the prosecution of a crime.

When an accused conducts his or her own defence, the complainer and alleged attacker are in direct confrontation. Such a confrontation is unnecessary for a fair trial. There have been very few Scottish sexual offence cases in which the accused has conducted his own defence, but there have been some.

The courts have a duty to protect complainers from harassment and intimidation. I do not suggest that they failed to observe that duty in the three cases that we know have occurred, but even legitimate questioning of complainers in sexual offence trials is likely to be embarrassing, humiliating and intrusive. That position is aggravated if the alleged attacker conducts the questioning.

In relation to character and sexual history evidence, article 6.3(d) of the ECHR confers on the accused the right

"to examine or have examined witnesses against him".

That does not entitle an accused to put whatever questions he chooses to witnesses. It is permissible to restrict the evidence that is admissible, provided that the fundamental right to a fair trial is not infringed. Those provisions in the bill are also directed towards protecting the right of complainers to respect for their private lives under article 8.

Questioning about character and sexual history that is intended to back up a consent defence could cause a complainer great distress and be a considerable invasion of his or her privacy. The law already accepts that that needs to be regulated, but the law is too loosely drawn to ensure that aim. Once again, a balance must be struck between the rights of the complainer and those of the accused.

The bill's consultation document was not called "Redressing the Balance" for nothing. That title describes what the bill is intended to do. It should redress the balance between the rights of the complainer and those of the accused. The bill represents a reasoned, just and realistic balance for sexual offence trials. I urge members to support it.

I move,

That the Parliament agrees to the general principles of the Sexual Offences (Procedure and Evidence) (Scotland) Bill.

**The Presiding Officer:** Before I call the next speaker, I see at least five members in the chamber who have indicated that they would like to speak, but who have not pressed their request-to-speak buttons. The advance notices that the Presiding Officers are given are purely advisory; we make our selection of speakers only from the members' names that appear on our screens. It is in members' interests to press their request-to-speak buttons early in the proceedings.

14:55

**Roseanna Cunningham (Perth) (SNP):** The Scottish National Party supports and welcomes the general intent of the bill, which is—of course—aimed at protecting the complainer and other witnesses from humiliating and distressing questioning, principally in rape trials.

The case that brought the issue firmly into the spotlight took place in my constituency, when the now infamous John Anderson refused legal counsel and cross-examined the complainer, a 13-year-old girl, for three hours. He was acquitted and it emerged subsequently that he had previously been on trial for rape and that on that occasion he had employed the same tactic in his defence.

I understand that statistics are not gathered on the number of accused who choose to represent

themselves from the outset of their trials, but that is generally thought to be a fairly rare occurrence. Perhaps it would have been useful to monitor the incidence and examine the outcomes. However, there is no doubt that high-profile cases such as that of John Anderson are likely to deter some women from reporting a rape and from going through the whole process.

We know that in Scotland the majority of rapes go unreported and that of those that are reported, the majority go untried. Of the rape cases that are tried, we know that the majority result in acquittals. In truth, most women are unconvinced that if they put themselves through the trauma of a trial, the system will give them justice. If we were honest, even the women in the chamber would feel ambivalent about that. However, the last thing we need is fewer victims coming forward.

If we look back at the statistics of the past six years, we see that in any one year the percentage of rapes that were reported to the police and that ended in a conviction has never reached double figures. Those figures were revealed in a parliamentary answer to a question that was lodged by my colleague, Gil Paterson. Let us be honest about the figures—they are a disgrace. What is more, they suggest that the problem is bigger than the provisions that are encompassed in the bill.

In dealing with that wider problem, I believe sincerely that the Crown Office needs more resources. We also need specialised procurators fiscal who are trained in dealing with rape and sexual assault cases. In California, a similar move has been very successful. Conviction rates there have increased substantially, not by making it easier to convict, but by the prosecution being beefed up in the first place.

We need to send out the message to the women of Scotland that they will be taken seriously if they make an accusation of rape. We also need to send out the message that a man who rapes a woman will be charged, prosecuted and—where possible—convicted.

It is unfortunate that rape can be a difficult crime to prove. There are rarely any witnesses. Many women cannot face going through the whole process of a prosecution in which they must relive their ordeal. In many cases, women feel that they have also been put on trial.

I ask people—in particular the men in the chamber—to put themselves in the position of a woman who has been raped. Imagine how that woman feels when she must tell the world about what she went through—reliving the emotions and remembering the pain. Imagine also how the woman feels as she sits alone in the witness box; the man who attacked her gets to do it all over again in open court, questioning her and undermining her recollections. It might be that a tone in his voice or a turn of phrase reminds her of the power that he had over her and which is echoed in the power that he again holds over her in court. We need to remember that rape is not about sex; it is about power. Rape is an abuse of power. When the accused is allowed to cross-examine the complainant in court, the balance of power swings back to him. The victim, who already feels more like an accused person, has that feeling dished up to her in spades while the accused is put in a position of authority. In effect, he becomes a seeker after truth.

I remember a conversation that I had with a number of advocate deputes—advocate deputes are responsible for prosecuting in the High Court. One of them, who is now a prominent Queen's counsel, admitted that if his teenage daughter was raped, the last thing that he would allow her to do would be to go anywhere near a courtroom. If even the practitioners feel like that, something is badly wrong.

I do not deny that the balance between the right of the accused to a fair trial and the right of witnesses to be treated humanely is a difficult one to strike. However, if we are to protect the vulnerable without falling foul of the European convention on human rights—indeed, of centuries of precedent in the practice of Scots law—we will need to locate specifically that point of equilibrium.

There are difficulties with the bill, which we need to consider. Perhaps the minister will, in his closing remarks, elaborate on something that he mentioned in his opening remarks: the potential for making previous convictions admissible in trials such as those we are discussing. I would like to hear more about that. Is it intended to include such provision through amendment to the bill? If that were the case, I would be concerned about the effect of lack of scrutiny of the longer-term impact of introducing that notion into our criminal courts. We need to think carefully about that.

We must ensure that we close every loophole. The last thing I would want is for a rapist to walk out of court a free man because we in the chamber had been careless and had produced legislation that did not meet the stringent human rights criteria that we set ourselves. Article 6.3(c) of the ECHR provides a minimum right to an accused

"to defend himself in person or through legal assistance of his own choosing".

We already know that that is not an absolute right. There are areas, however, in which the legislation might—or more likely will—face challenges. First, if we do what we intend to do with the bill, accused persons will be completely barred from conducting

their defence in person. Because we have not restricted the measure to cross-examination of complainers, I am slightly concerned that it might end up being construed as a greater than necessary interference with the right that is set out in article 6.3(c) of the ECHR. I wonder whether the minister will address that.

Secondly, I am curious about why we are in the process of preventing the accused from conducting his own defence in homosexuality cases in which there is no complainer. I am not sure about the purpose of that.

Thirdly—this goes back to the first question—can there be adequate instruction of a defence solicitor who is appointed by the court? Where the defence solicitor is appointed for trial by the court, the accused has no right to dismiss the solicitor. That is a real issue.

In evidence to the Justice 2 Committee during stage 1, the Faculty of Advocates and the Law Society of Scotland—which represent the practitioners—expressed their concern that it is unclear what will happen when an accused flatly refuses to instruct them. I am not clear about where that will leave the defence agent and his or her important responsibility in respect of the client and, indeed, the court. Anybody acting in court in Scotland has a duty to the court as a whole. There is an issue there, and I am not sure whether we have quite got to the nub of it; in evidence to the committee, the Law Society of Scotland and the Faculty of Advocates expressed their concerns about that.

The Law Society suggested another approach, which was its idea about an amicus curiae. That idea was given brief consideration during stage 1, but it might have been useful to have more detail about the proposal so that we could compare and contrast. I dare say that the idea might resurrect itself during the later stages of the bill. I understand that it has been brought in in Ireland, although it has not existed for long enough to test what happens in practice. However, it would be interesting to know Ireland's rationale for choosing that option.

I welcome the fact that we now have a bill in front of us. However, if we look back over the history of the issue, it is clear that there has been a certain amount of foot dragging, or at least shoulder shrugging, down the years—I note that we are finally introducing this legislation only now that we have a Parliament with a high proportion of women. The shoulder shrugging relates to both the issues that are addressed by the bill.

It might be helpful to remind members of some of the key milestones over the years in respect of this issue. In September 1992, the European Court of Human Rights held that there was no absolute right for an accused to defend himself. That is why we can discuss the matter today. In August 1996, a woman in an English case was cross-examined for six days by the man who raped her. Her view was clearly that that was like being raped all over again. In November 1997 Jack Straw, the then Home Secretary, said that he was determined that rape victims should not have to go through that sort of experience.

**Lord James Douglas-Hamilton (Lothians) (Con):** Does Roseanna Cunningham accept that it is extremely unlikely that a Scottish judge would ever have allowed such an outrage to occur?

**Roseanna Cunningham:** It is difficult for me to answer that question. I understand what Lord James Douglas-Hamilton is trying to say, but such cross-examination does occur in Scottish courts, albeit not for that length of time. It is true that eyebrows were raised about why the judge did not step in considerably earlier in that case. However, it happened in a court; not a court in some far-off country about which we know little, but in an English court. Clearly, that caused a great deal of distress at the time.

In Scotland, in February 1999, Jacqueline Radin was cross-examined in court by her assailant. The then Scottish Office minister with responsibility for home affairs, Henry McLeish, ordered a review. In March 1999, John Anderson made his first appearance in court. He was accused of raping three women, but he was allowed out of prison to interview the mother of one of his alleged victims. Anderson then cross-examined the other two women in court. He walked free when the case against him collapsed because of the lack of corroborating evidence. Henry McLeish again called for a report, saying that the situation was unacceptable.

In July 1999, a bill in England and Wales to end cross-examination of rape victims by the accused received royal assent but, in January 2000, the Scottish Executive warned that a Holyrood bill to prevent cross-examination of alleged rape victims could contravene the ECHR. The then Deputy Minister for Justice, Angus MacKay, told the Parliament that he would report within 90 days on the issue of rape victims, but made no commitment to change the law. In June 2000, a written answer by Angus MacKay indicated that he had instructed civil servants to find ways in which to ensure that women are not cross-examined. On 20 June, a report by civil servants conceded that the ECHR was not an insurmountable obstacle.

Eventually, we have reached the position in which we are today, but there has been an incredibly long catalogue of such milestones over many years. I say again that it is instructive that it is only now that we have a Parliament with so many women that we are confronting a problem

that has faced society for a very long time. We have come this far, but I cannot help but notice that the time scale for change in Scotland seems to have been uncommonly slow.

On leading evidence in court of the sexual history and sexual character of the complainer, international examples of change have been available for much longer. Canada, New Zealand and many American and Australian states introduced safeguards in the 1970s. In 1976, safeguards were introduced for England and Wales. In 1979, Sheriff McPhail produced a report, but there was no action until 1982.

In 1985, nine years after the English bill to protect complainers in rape trials, the Scottish Law Commission's draft bill was passed by Westminster, with a few minor amendments. That legislation requires an application by the defence to introduce questioning or evidence about sexual history or the character of the complainer in certain circumstances. It also included instruction that the court must be satisfied

"that it would be contrary to the interests of justice to exclude the questioning or evidence".

Again, it took an extremely long time to bring even that limited protection into Scotland, and that last exception provided wide discretion to the judge.

There have been difficulties and failings in the application of the law. In 1992, a Scottish Office central research unit study, "Sexual History and Sexual Character Evidence in Scottish Sexual Offence Trials", was published. That study detailed serious problems. It struck me in particular that 70 per cent of all applications to question on sexual character or history were made just before cross-examination began and 22 per cent were made during cross-examination. Thus the complainer had no formal notice of the questioning in at least 92 per cent of the cases. That seems to me to be like a kind of legal sandbagging in court. No action was taken by the Government, either as the Scottish Office or as the Scottish Executive, to update the law after the publication of that study in 1992. It has taken until now to reach this stage.

Down the years, Scotland's justice system has failed victims of rape, and Governments in various guises have been exceedingly slow to respond. We must start to put that right—the bill is that start.

However, I want to sound a note of caution.

**Scott Barrie (Dunfermline West) (Lab):** Will the member give way?

**Roseanna Cunningham:** I am sorry, but I am in the final minute of my speech.

The proposed changes will affect not just rape cases; they will cover a wide variety of offences, which might include those committed by the common or garden flasher. There is no adequate explanation or justification for the bill's being drawn so widely. It would be interesting to hear the minister's comments on that.

The bill deals with two specific aspects of court procedure in sexual offences trials, one of which—self-representation by the accused—occurs in only a handful of cases, albeit high-profile cases. Addressing the two problems is important, but it should not blind us to the fact that much more needs to be done in respect of the crime of rape. The passage of the bill should not result in our becoming complacent.

The central problem of how to increase the reporting and conviction rate has not been addressed, nor has another unfortunate aspect of rape cases, which is that ultimately—whether we like it or not—juries acquit and juries are made up of ordinary people. There is an issue in society that needs to be confronted before we stand any chance of making a significant difference to how rape is dealt with by the criminal justice system.

15:11

**Bill Aitken (Glasgow) (Con):** In due course, the Conservatives might take issue with certain aspects of the bill, but we would be the first to concede that there are real difficulties in striking the appropriate balance between protecting the complainer and likely victim of crime on the one hand, and the rights of the accused on the other.

The Executive has felt the need to legislate for several reasons. There is the natural revulsion that we all share toward crimes of the type in question. There must also be concern about the high acquittal rate in rape trials. Against that background, the Executive was on balance correct to consider legislation. However, the issue is not in any respect clear cut and a number of aspects of the bill require further consideration. We might seek at the appropriate stage to amend the bill accordingly.

In some respects, the proposed legislation is different from previous bills that have been considered by Parliament. The most striking difference is the fact that, by the Executive's own admission, a significant number of those who were consulted either disagreed with the Executive's general policy or thought that there was no problem with the existing laws. There was a real polarisation of views among those who were consulted and among those from whom evidence was taken. One of the difficulties with any consultation process is that only those who have strong views one way or the other will normally seek to make their views known.

We do not know what the vast majority of people think. Women's support groups tend to support the

proposed legislation—that is not a criticism of such groups. Those who have experience of the working of the law tend to take the view that the existing system strikes the correct balance. I do not think that they speak from complacency or conservatism. Accordingly, it has been difficult to establish a proper approach to the proposed legislation—others share that view, too. It is not a case of the Executive behaving irresponsibly or insensitively; I do not doubt its good intentions. However, there is a danger that one or two aspects of the bill will impinge on natural justice.

The minister said that the bill can be dealt with under four separate headings. The first heading relates to the proposed prohibition of accused persons from conducting their own defence. It is a well-established legal and practical principle that any accused person who insists on acting as his or her own lawyer has a fool for a client. It is difficult to envisage why anyone—especially someone who has been charged with a serious crime of the type in question—should seek to defend themselves. Under that heading, as under any heading, we must ask whether there is a problem, and whether legislating will resolve that problem.

On the basis of only two indictable cases in the past 20 years, it cannot be said that there is a widespread difficulty if only numbers are considered. It is significant that in the two cases to which Roseanna Cunningham referred—which, coincidentally, involved the same accused and the same judge—the judge, Lord Bonomy, who is a robust upholder of the rights of victims, stated that the complainers could have expected a more rigorous cross-examination had counsel been involved and that neither complainer had been distressed.

On the other side of the coin is the English rape case that was referred to, in which the victim was subjected to a brutal and intrusive cross-examination that lasted several days. I find it astounding that that was tolerated by the trial judge and I am confident that a Scottish judge would not have tolerated it.

The only evidence in favour of the prohibition, which has also been mentioned in the debate, is the suggestion that the possibility of being confronted in the witness box by the accused would deter women in particular from reporting sexual offences. Although the evidence for that claim is not thorough, the argument is fairly compelling. There is a gut reaction against the prospect of a victim being confronted in court by the person who is guilty of the assault. That would be traumatic for any victim, but I accept fully that cases of the type we are considering are different because they often involve intimate circumstances. Bearing in mind that such a prohibition would in no way inhibit a proper defence, we feel that, on balance, the interests of the victim must come first. We will therefore support the Executive.

A corollary of the prohibition is the requirement on the court to appoint a solicitor when the accused fails to do so. Neither I nor my colleagues in the Justice 2 Committee are convinced that that requirement is likely to be problem free. For example, what will happen when a solicitor is unable to obtain coherent or reasonable instructions from an accused person and seeks leave of the court to withdraw? In many such cases, we are not dealing with rational and normal individuals—that must be taken into consideration. It is clear however, that it is—if we accept the section on prohibition—an essential power, and we will go along with it. However, some work on that will be required by the minister during stage 2.

I turn to notice of the defence of consent. Again, I question whether there is a particular problem for the defence or the Crown. Nowadays, the defence of consent is used in the vast majority of rape cases. Interesting evidence was introduced by the Faculty of Advocates, which explained why—from its perspective—there are now so many acquittals in such cases. That is a matter that the Justice 2 Committee or another body should examine further. However, for our purposes today it is important simply to recognise that most accused persons claim that the sexual intercourse that is the subject of the complaint was consensual.

It seems to be academic whether or not the provision on the defence of consent is included in the bill. The Crown would not want to find itself being wrong-footed by the defence of consent being introduced in court on the day of a trial. However, one would think that, on the basis of witness statements, a reasonably intelligent anticipation of what the accused might say could be arrived at. The minister stated previously that he considered notification of the defence of consent to be good practice, and that there was no problem about legislating for it. Why, therefore, do we have to legislate for it?

I must also say that I found some of the arguments from the legal profession witnesses rather difficult to follow. The law requires, in unrelated matters, that prior notice be made of special defences of incrimination, alibi and so on. That requirement has worked perfectly satisfactorily. I found part of the evidence from the Law Society of Scotland especially indicative of what happens when a lawyer defends someone who he knows is guilty. There must always be a question of identification. The suggestion that the notification provision would in some respects dilute the Crown's requirement to satisfy the court as to consent was—I thought—verging on the

opportunistic. Lawyers might find that provision to be an additional bureaucratic burden, but I do not see that it will pose a particular problem. Again, the provision does not impinge on natural justice. Accordingly, we can accept the provision in the bill.

Our main concern surrounds the proposed restrictions on evidence. Evidence of problems in that area is—to be frank—thin. The Justice 2 Committee was confronted by a considerable lack of evidence to back up the suggestion that complainers are subject to improper cross-examination. The academic research is based entirely on anecdotal evidence that was taken from complainers. The public are rightly excluded from attending rape trials while alleged victims are giving evidence. Therefore, there is a shortage of individuals who can give detached testimony about what happens.

The Crown Office and the Faculty of Advocates gave clear evidence to the effect that the problem is not a major concern. The evidence from the Crown Office was especially interesting. One former advocate depute stated that irrelevant, aggressive and intrusive cross-examination was a problem, but that he would not overemphasise that problem. The Faculty of Advocates stated that no such problem exists and that judges will intervene firmly when advocates embark on fishing expeditions.

**Iain Gray:** Mr Aitken makes a fair point about the research being difficult. Will he accept that one construction of what he has related is that when we ask complainers whether they feel the process in court was distressing and intrusive, the answer is yes, but when we ask those in the legal profession, the answer is no? Their perceptions might be different because the levels of distress that they suffered are different.

**Bill Aitken:** I am happy to concede that there is a difficulty, which is the polarisation to which I referred earlier in my speech. Everybody is working with the same difficulty. The only consistent evidence on that that the committee heard was about the difficulty of subtly destructive evidence being introduced, for example, about the clothing of a victim. The view of those who are most qualified to judge—those whose day-to-day activities in the courts allow them to see trials of this type in operation—appears to be that there is not a significant difficulty overall.

I urge caution regarding evidence on witnesses' character that may be introduced. It is sometimes necessary and proper for the defence to attack the character of a witness. In cases of this type, apart from the occasional bizarre circumstance, there are seldom eye-witnesses. The court is confronted with an issue of credibility. Bearing in mind the fact that an accused person in a Scottish criminal court is not required to prove anything, the issue is whether the court believes the complainer. It might be perfectly proper to attack the character of the complainer in order to demonstrate a lack of credibility in the Crown evidence. It would be proper to do so in other trials. Although the judge and the prosecutor must be proactive in preventing the introduction of red herrings, the right to attack the character of a witness should be maintained. I argue that that is a dangerous line of defence because the Crown could seek to attack the character of the accused. I acknowledge what the minister said about that earlier.

There is also a danger of the system becoming unnecessarily cumbersome. In court, things happen; evidence might come into play that was not previously thought likely. It is in everyone's best interests—especially those of the victim of a crime—that the court process be carried out expeditiously. If there are frequent adjournments to deal with applications to introduce evidence of a certain type, trials will last longer and will become even more fraught for witnesses.

The committee was in a position of some difficulty. The evidence was limited, but it was felt that there was a perception that cross-examinations could be intrusive and irrelevant. I question whether we should legislate on the basis of a perception. Should not we seek to inform the public more widely about the operation of our courts, rather than react in a potentially oppressive manner?

There is another important point of principle. Do we trust juries? We must consider that. We give them responsibility and we must rely on them.

The crime of rape excites very strong emotions in us all. It is a despicable offence, which in many cases has traumatic effects on the victim. However, I ask members to put themselves in the position of someone who is wrongly accused of rape. Should not they have an opportunity to present as full a defence as possible?

The Parliament should have no truck with legal dirty tricks, whereby defence counsels seek to influence juries by introducing irrelevant evidence. Judges are appointed to prevent them from doing so, but if we legislate to inhibit defence evidence beyond the fairly tight parameters that exist, we could impinge upon individuals' right to a fair trial. That aspect of the bill must be considered very closely.

Aside from our caveat on that aspect of the bill, we shall of course support the bill's onward progress today. However, at stage 2, we will seek to amend the sections that we consider are a threat and might prejudice fair trials.

15:25

**George Lyon (Argyll and Bute) (LD):** Before I begin, I welcome Baroness Michie of Gallanach to the VIP gallery. [*Applause.*]

The Justice 2 Committee report states:

"It is a general principle in Scots law that an accused person may defend themselves rather than appoint a solicitor, and may introduce any relevant evidence in their defence. Witnesses are protected by the duty on the courts to intervene when questioning is designed to elicit inadmissible evidence or is abusive."

The main provisions of the Sexual Offences (Procedure and Evidence) (Scotland) Bill will ensure that victims cannot be cross-examined by defendants in sexual offence cases and that, as a general rule, the court will not allow questioning on the victim's sexual history. In his evidence to the committee, the minister made it clear that the bill's overall aim is to

"remove fear on the part of complainers and increase their confidence that they will be treated fairly and with dignity"—[*Official Report*, *Justice 2 Committee*, 24 October 2001; c 532.]

in such cases. That statement is important, as it underlines that the whole thrust of the bill is to protect complainers in sexual offence cases from the fear of interrogation by the accused and from the fear that their sexual history will be paraded during a public trial when it has no relevance to the case.

The bill is designed to give confidence to women and to encourage them to come forward and make a complaint. Most of us would agree that the latest figures on rape convictions in Scotland give cause for concern; indeed, Roseanna Cunningham has already described them as a disgrace. Last year, of 591 reported cases, only 27 resulted in convictions. Is it any wonder either that women do not pursue their initial complaint or that, if they decide to go through the ordeal of giving evidence in a public court, the prosecution often fails to secure a conviction? It is clear that more must be done to improve the situation.

As Bill Aitken pointed out, in the consultation on the bill's general principles a significant number of consultees either did not support the Executive's general policy or felt that there was no need at all for change. Indeed, the opinion of judges and the legal profession in general seemed to be that better training in how to use the current law would be the right way of proceeding. However, women's groups and victims argued that the law had to be strengthened and they supported the principles that the Executive has set out in the bill.

Although the committee was concerned about those differences of opinion, it concluded that there was no fundamental disagreement over the legitimacy of protecting complainers in sexual offence trials. The committee supported the view expressed by victims and women's groups that the bill's wider aim is to change the social climate within which sexual offence trials take place by removing the threat of cross-examination by the accused and the possibility of broadcasting the witnesses' sexual history to the world. The committee accepted the Executive's justification of those broad aims and supported the bill's general principles.

I will deal with two main areas that previous speakers have mentioned: first, the prohibition of personal conduct of defence by alleged sex offenders; and, secondly, the restriction on evidence of sexual history or character. Evidence that was submitted to the committee raised a number of concerns about the prevention of cross-examination by the accused. The committee had to consider why special protection was justified for complainers in sexual offence trials. We accepted the views of the Scottish Human Rights Centre that, as the issues discussed in rape cases are of a very intimate nature, better protection of complainers is needed in such cases than in other criminal cases. We took the generally accepted view that many sexual assaults are not reported and that the measures would encourage complainers to come forward. It is important to emphasise that point, as it is one of the bill's wider aims.

The committee also considered whether the proposal was proportionate, as there appeared to be few known cases in Scotland of the accused conducting their own trial. Indeed, Bill Aitken mentioned that there have been only two. However, we again accepted the Executive's argument that this was a matter of principle and that the threat should be removed from potential complainers.

A number of alternative solutions have been suggested. The Law Society of Scotland—I think that Roseanna Cunningham mentioned this—suggested the appointment of an amicus curiae to act on behalf of the complainer in challenging the admissibility or relevance of lines of questioning. The Executive rejected that notion on the ground that it would not affect the issue of whether the complainer should be cross-examined by the accused at all. We accepted the Executive's position on that. However, the minister noted that the idea might have more merit generally when further legislation in this area is framed. I ask the Executive to examine at a later stage how effective the procedure has been in Ireland. I realise that the role of the amicus curiae is only just being introduced and that it will be some time before the effectiveness of that system can be evaluated, but the idea should be looked at before further measures are considered.

Concerns were expressed in relation to the ECHR, but the committee was reasonably satisfied on that subject. Nevertheless, a number of issues were raised. The committee found that the procedures in the bill, as drafted, for the appointment of solicitors for the defendant are wholly unworkable. I ask the minister to lodge amendments at stage 2 to deal with the issues that were raised in the committee's findings. The committee concluded that the ban on personal cross-examination is justified to protect complainers, that it is compatible with the right of the accused to a fair trial and that the arrangement can be made to work in practice, although the detail of the procedures for appointing a solicitor require further consideration at stage 2.

The other main measure in the bill is the restriction on evidence on the sexual history of victims. Under the new provisions, the circumstances in which evidence may be admitted are specified much more precisely than in current legislation. The committee had to consider several important questions. Could the law be made to work better without further legislation? If not, do the new provisions go far enough or do they go too far in protecting the rights of the complainer at the expense of those of the accused? Will the proposals work in practice? If the current law has not worked as expected, is there any reason to think that further legislation will work any better?

The committee accepted the Executive's argument that the current law is sufficiently elastic not to discourage strongly the use of sexual history and bad character in sexual offence cases and that there must be clearer guidelines for judges on such matters. The committee accepted the need for further legislation, on the basis of research that was carried out in 1992 by Dr Brown, Dr Burman and Dr Jamieson. That research showed that sexual history evidence was introduced in about 50 per cent of cases overall and in 15 per cent of cases under the current rules. In other words, in 15 per cent of cases, sexual history and character evidence was introduced by the back door, against the current rules. The committee accepted that the legislation needs to be strengthened.

Many witnesses welcomed the proposal for written applications to introduce character or sexual history evidence, which would mean that such evidence would be considered in a thorough, detailed and structured way that would appropriately balance the rights of the accused with those of the complainer. The committee accepted that the bill strikes the right balance between the rights of the accused and those of the complainer, but we ask the Executive to monitor how many appeals there are by the defence and how many succeed in the first two years after the bill has been implemented.

Other committee members will deal with any points that I have missed. The Scottish Liberal Democrats believe that the proposals will deliver the Executive's main aim, which is to remove fear on the part of complainers and to increase their confidence that they will be treated fairly and with dignity in sexual offence cases. The bill must encourage more women to come forward and make complaints without the fear of interrogation by the accused hanging over them and without the fear of their sexual history being paraded in court. We support the motion.

**The Deputy Presiding Officer (Patricia Ferguson):** We now move to open debate. Several members want to speak, so I ask those who do to keep their contributions to four minutes.

15:35

**Pauline McNeill (Glasgow Kelvin) (Lab):** I thank committee members and the committee clerks who worked hard on the report. I also thank the Parliamentary Bureau, which allowed extra time for the committee to consider further issues.

The bill is a bold move on the part of the Executive to shape provisions that could have a wide-reaching impact in protecting the rights of complainers and increasing the confidence of women when reporting sexual offences to the police. That will redress the balance in court.

Preventing an alleged victim and their witnesses from being cross-examined in person by the accused is a principle that I support as being necessary to redress the balance. The vast majority of witnesses to the committee agreed that the move would not be contrary to the ECHR, although that was the main subject for discussion.

The bill has been criticised for the fact that it deals with only a small number of cases in which the accused has personally questioned the complainer in court. However, there is consensus in the Parliament that the fact that only a small number of cases is involved does not mean that the provision is wrong in principle.

The way in which the Executive chose to deal with the issue of the court-appointed solicitor did not meet with majority support in the committee. However, after carefully examining all the other ways of dealing with the matter, the committee decided to support the Executive on that point. According to the Public Defence Solicitors Office, which has experience of court-appointed solicitors through its pilot scheme, clients usually accept eventually that being represented is in their interests.

The committee noted the concerns of the Law Society of Scotland about the dismissal of solicitors and the appointment of new ones, as the

bill is not clear on what is to happen in such cases. I believe that the Executive is right to be cautious about allowing an accused person to delay proceedings through repeatedly appointing and dismissing solicitors. Any amendment to the bill should be carefully drafted. However, it would be in the interests of the accused to have some flexibility of choice and we should consider amending the bill to address that point.

The question was asked why the provision on the personal conduct of defence would not apply to other serious offences, such as severe assault. The committee pressed a number of witnesses for an answer to that. We were satisfied that there was a distinction to be made between sexual offence cases and other serious criminal cases, given the intimate nature of sexual offences and the embarrassing lines of questioning that can be taken in sexual offence cases but not in other serious criminal trials involving severe injury or assault. Given that distinction, the Scottish Executive's proposal for having a solicitor appointed throughout the trial is the correct option.

The provision that I most welcome is the one dealing with restrictions on evidence. According to Dr Burman and Dr Jamieson, from Glasgow and Edinburgh universities, character evidence is widely used in rape cases to undermine the credibility of a rape victim and, often, that evidence is irrelevant. Having a tattoo, swearing and being a single mother were all used to imply that someone was of bad sexual character, was likely to consent to sex and was liable to be a liar. The requirement for written submissions and written determinations on the use of evidence will be crucial—I believe that to be the most important aspect of the bill.

The test by which the judge will decide whether an application to include sexual history evidence or evidence of bad character is to be accepted is whether the probative value of the evidence is significant enough to outweigh any risk to the proper administration of justice. The judge must therefore have due regard to the privacy and dignity of the complainer. That is a crucial step forward. Alison Di Rollo, from the Crown Office, told the committee that the legislation would be

"the first act of Parliament to recognise the victim's dignity and right to privacy."—[*Official Report*, *Justice 2 Committee*, 24 October 2001; c 520.]

That fact should be recognised by members of the Scottish Parliament this afternoon.

We heard evidence that medical reports were used as evidence of bad character, as people had attempted to claim that information gleaned from a gynaecological report or the victim's contraceptive history was somehow relevant. That is an example of the sort of evidence that is used to undermine women's cases in court. It should not be allowed.

I am pleased that the minister is going to address the equality issue, as the bill should not discriminate against gay men. The committee members were lukewarm on the issue of prior notice of defence of consent—we are not really bothered about whether that provision is in the bill and we saw no significant evidence on the matter one way or the other.

It is important to state that the committee members realise that, unless there is strong and proper monitoring of how the bill operates in practice, the bill's provisions will have no effect. We ask the minister to address that important point, which we have emphasised in our report because we agree with it whole-heartedly.

15:40

**Mrs Margaret Ewing (Moray) (SNP):** I join George Lyon in welcoming Baroness Michie of Gallanach to the VIP gallery. Although Ray Michie and I have been in different political parties all our lives, I regard her as a personal friend and pay tribute to her unstinting work on behalf of her constituents and in helping to establish this Parliament.

I am not a legal expert. We heard many technicalities discussed during the opening speeches. I am a recent recruit to the Justice 2 Committee and have been trying to catch up on the information that is relevant to the bill. I believe that it is important that we interpret and alter Scots law, but that we do so taking into account the confidence of the Scottish public. I believe that, as the bill progresses, the public perception of what we achieve is critical. Roseanna Cunningham touched on that when she said that we must encourage women to report rape cases. Unless we get the legislation right, I do not believe that women will be encouraged to come forward and report that most heinous of crimes. No loophole in bringing perpetrators to justice should be left at any stage and no stone should be left unturned to ensure that justice is not only done, but seen to be done. Public perception and confidence, which the deputy minister mentioned in his opening speech, are critical factors.

Stage 1 has given us lots of long, complicated briefings from various legal organisations that have many facilities and much access to information. No doubt that will continue at stage 2. However, I hope that equal emphasis will be placed on voluntary sector organisations and individuals who wish to find out how the bill might affect them.

My questions to the minister are brief. Where does the bill fit into the Executive's priorities? When does he believe that the Justice 2 Committee, given its substantial work load, will be

able to process the bill? Time scales will be important. I also echo the point that others—particularly Pauline McNeill—have made about the monitoring of the bill once it becomes law.

15:43

**Mrs Mary Mulligan (Linlithgow) (Lab):** The bill appears to have two aims. The direct aim is to change the way in which the legal system works in relation to sexual offences. The indirect aim is to change the social climate of sex offence trials.

Although the bill has received much support, I am concerned about the apparent split between the legal profession and others, particularly those who support victims and witnesses. I can understand that the legal professionals must take a balanced view on the protection of the rights of the accused and the complainer. However, I was disappointed that their approach to the bill was sometimes negative. They recognised that there are problems with the judicial system in relation to sexual offences, but had no new ideas on how to address those problems. Perhaps they feel that that is not their role, but I suggest that, in the new political environment that has come about with the birth of the Scottish Parliament, it is open to everyone to express his or her views on how to improve a given situation.

One of the main issues in the bill is the cross-examination of the complainer by the accused. As has been said, there have been only a few cases in which the accused have sought to represent themselves and so be able personally to cross-examine the complainer. However, the experience of those complainers has been so traumatic that such an experience should not be allowed to happen again. In the wider context, there can be little doubt that the fear of such a situation arising has been a deterrent to others who have been the victim of a sexual assault from reporting that offence.

It has been asked why the bill does not cover other crimes, particularly violent ones. I agree with the view of the witnesses from the Scottish Human Rights Centre, which Pauline McNeill mentioned. They said that the intimate nature of the crime should lead to its being treated differently.

It was also suggested that preventing the accused from cross-examining the complainer might not assist the complainer as much as intended, because the cross-examination from counsel can also be extremely unpleasant. I believe that the point about the intimate nature of the crime answers that suggestion. No matter how aggressive the counsel's cross-examination, it is not the same as having to face the accused.

The committee questioned whether the removal of the right of the accused to conduct his own defence would be compliant with the ECHR. The general view was that, on balance, it would be. The suggestion was made that the accused could conduct his own defence and would need to appoint a counsel only to cross-examine the complainer. However, I felt that that was cumbersome and that further thought would need to be given to the practicalities if it were to be taken further.

I listened to what the Law Society of Scotland said about the problems that would arise for its members, particularly when an accused did not co-operate with a court-appointed solicitor. The bill will have to be clearer on the procedures for such an appointment to ensure that the solicitor is not open to claims of unprofessional conduct. I accept that the accused must have some say in who represents them, but that will have to be tempered by the need to ensure that the trial is not delayed unnecessarily.

The other major part of the bill is the strengthening of existing law restricting evidence on the sexual history of the complainer. The Law Society of Scotland pointed out that there are restrictions at the moment and said:

"That is an issue of training and education."—[*Official Report*, *Justice 2 Committee*, 26 September 2001; c 426.]

If that is the case, why has the issue not been tackled before? Other witnesses said that sexual history and sexual character evidence deter victims from reporting crimes and going through the legal process. Given that, as Dr Burman and Dr Jamieson reported, the spirit of the current restrictions is often breached, I do not believe that training and education alone will make a difference—legislation is needed.

I am pleased that the Executive is proceeding with the bill. It is clear that the bill does not address all the concerns that have been raised about how we as a society deal with rape and sexual assault. Prejudicial attitudes towards women's sexuality cannot be addressed simply by changing the law. Moreover, other areas of law still need to be addressed; I hope that that will happen. The bill tackles specific difficulties, while maintaining a balance between the rights of the accused and the rights of the accuser. I hope that the Parliament will support it.

15:48

**Stewart Stevenson (Banff and Buchan) (SNP):** I start by thanking the convener of the Justice 2 Committee for her welcome when I joined the committee. I was not just joining her committee; I was joining a committee for the first time. She has been a model and I have followed her example on every possible occasion—

**Members:** Sook.

**Christine Grahame (South of Scotland) (SNP):** Sit down now.

**Stewart Stevenson:**—so all my faults are Pauline McNeill's as well.

I want to talk about the climate of fear among potential complainers—those who have been victims of rape. Bill Aitken gently suggested that the perception in society is not really part of the problem that should be solved by legislation. However, he later acknowledged that there is a perception that the legal system lets down complainers. That point is entirely valid.

We heard in evidence that there appeared to be ambiguities about whether judges or prosecutors should protect the way in which vulnerable witnesses are dealt with. Those ambiguities remain unresolved, but they give adequate justification for changing not only the law but the implementation of the law.

We heard evidence of improper cross-examination. In one example, a forensic witness was asked to hold up the garment that the complainer had been wearing so that forensic evidence could be seen in the court. The nature of the garment was thus shown to the jury and the cross-examiner sought to imply that the wearer was not a reliable witness.

Roseanna Cunningham laid out some of the difficulties for the legal profession of court-appointed solicitors. No injustice is inflicted on an accused who is denied the right to represent himself. Bill Aitken put it aptly: an accused who is his own solicitor has a fool for a solicitor. Familiarity with court procedure and language means that a professional can represent the accused better than anyone else can. The fact that John Anderson had success in court in representing himself does not exclude the fact that he may well have been better off with a professional solicitor.

Much has been made of the situation in which an accused refuses to co-operate with a solicitor. However, we should acknowledge that a failure of that kind is the accused's choice. If he is disadvantaged, it is because he has chosen to be disadvantaged. If he is disadvantaged by being incompatible with the solicitor who has been allocated to his case, again, that is his choice—he has chosen not to select a solicitor with whom he would be compatible. We are not removing the right of the accused to be defended; we are allowing him to make choices about his defence. One of those choices is that he can allow the court to appoint his solicitor.

Would an amicus curiae be an alternative, as George Lyon thinks? If that person is simply present to intervene when a complainer is examined in court, will that not change the way in which juries view the evidence of that complainer? Will it not give credence to the idea that the complainer has a justified complaint?

**George Lyon:** May I clarify what I said? I did not state that an amicus curiae was an alternative. I suggested that, before introducing any more measures, the minister might look into how the idea might work.

**Stewart Stevenson:** I thank George Lyon for that clarification, which I am prepared to accept. I was merely making the point that he would leave the option open, whereas I would close it now.

Let me give an example. If we protect only the complainer, the defendant could cross-examine a young daughter—perhaps of 16—of that complainer. That would be a surrogate for interviewing and impressing power on the complainer.

The existence of an amicus curiae changes the nature of the trial. It gives support to the complaint. We do not know in what way a jury is influenced, because no research has considered that. However, we can, I think, conclude that the jury's view of the evidence would be changed by the amicus curiae. We should not pursue the idea.

15:53

**Mrs Lyndsay McIntosh (Central Scotland) (Con):** Members from across the political divide will recollect my contributions on matters of domestic abuse and abuse of women in general—in particular, rape or clandestine injury. It goes without saying that I take the matter very seriously indeed. It disappoints me greatly that irrefutable evidence that the law needs to be changed was not forthcoming, as I had hoped it would be. Anecdotal suspicion that has been countered by fact is not what I wanted. I have no desire to be party to changes that would open the doors for challenges that allowed the guilty to go free on a technicality.

Although I recognise that this is an extremely sensitive area of debate, it is important that we consider the bill objectively. It is vital that victims of rape are treated with the greatest compassion and sensitivity. We believe that the current system provides adequate protection if the existing rules and regulations are followed properly—that is the key point. The evidence taken by the Justice 2 Committee supports that view. I will just have to reconcile myself with the disappointment.

Judges have a duty to ensure that procedures in court are adhered to and that complainers are properly protected during trials. During evidence presented to the Justice 2 Committee, Graham Bell from the Faculty of Advocates, who has had 20 years' experience of such cases, noted:

"judges respect the rules very much … They are very much aware of the importance of not allowing questioning regarding character or sexual misconduct, unless it can be shown to be relevant to the issues of the trial."—[*Official Report*, *Justice 2 Committee*, 3 October 2001; c 493.]

Our judges should be more than capable of assessing when defence counsel may be going on what could be called fishing expeditions. Defence counsel will find themselves in serious trouble if they have not sought the consent of the court before pursuing such lines of questioning.

Frank Mulholland, an experienced fiscal and advocate depute, estimated that in the 25 rape cases that he had conducted in the High Court, he had only twice needed to object to the defence questioning and the trial judges had accepted his objection. Judges were doing their job and ensuring that questioning was relevant.

**Johann Lamont (Glasgow Pollok) (Lab):** Will the member give way?

**Mrs McIntosh:** I have only a couple of minutes left and I am sure that Johann Lamont will make a speech of her own.

The cynics among us may say that we need to have more faith in the way our judicial system currently operates. Introducing further legislation may serve only to complicate proceedings. As I said, I am not up for opening any doors for appeals on technicalities.

I have spoken before in Parliament about my concerns regarding drug-assisted sexual assault. We should always be vigilant with regard to sexual assaults that occur after the consumption of too many drinks or drugs or a cocktail of both. Problems surrounding sexual offences have intensified, with more and more cases involving the use of drugs, especially the infamous date rape drug, Rohypnol, which was the subject of a members' business debate led by Pauline McNeill. Some of the details of that debate bear repetition.

In June 2000, Detective Chief Inspector Peter Sturman of Scotland Yard published a report surveying 120 drug rape complainants of both sexes. Of those surveyed, 70 per cent said that someone they knew had attacked them; of those, 25 per cent were the victims of attacks by friends and another 30 per cent were attacked by colleagues or fellow students. Strangers carried out only 7 per cent of the attacks. Those figures are even more pronounced in information provided by the Rape Crisis Federation, which found that 97 per cent of callers to rape crisis lines knew their assailant, but fewer than 7 per cent had reported the crime to the police. The incidence of women reporting sexual crime is undoubtedly an issue that needs to be considered.

As I said, we do not seek to make the process of going to court any more traumatic for victims than it already is. For me, the great difficulty is that the victim in a rape trial is seen as little more than a witness, like some bystander at an accident scene who has no personal involvement. Rape is personal. It is intimate, shocking and harrowing. However, if the law as it stands is applied properly, it is able to deal with such cases. That opinion is backed by the Faculty of Advocates.

In general, we support the bill, but we intend to examine some of its aspects more closely at stage 2.

15:58

**Maureen Macmillan (Highlands and Islands) (Lab):** I welcome the bill and I commend the Justice 2 Committee for its report. The bill marks real progress in reforming the impact of the legal process on victims of rape and sexual assault. I realise that it is not only women who experience sexual crimes, although they are in the majority. As has been said, sexual crimes often go unreported because many women perceive the ordeal of the trial to be almost as traumatic as the ordeal of the rape itself. The woman fears that she may be cross-examined by her attacker in person and that her sexual history—and indeed her non-sexual history—may be used to discredit her. Given that the number of convictions for rape is low, the woman may go through the ordeal to no avail.

The bill was not welcomed by the legal establishment. It was pointed out that the accused rarely opts for personal cross-examination and that to deny him the right to do so might infringe his human rights, so there was no reason for us to bother with the bill. We bothered because we think that victims have rights too, including the right not to be subjected to inhuman or degrading treatment in court. I believe that the legal establishment has been complacent.

The bill has found a formula that protects the rights of the accused and of the complainer and that does not prevent a fair trial. There may still be practicalities to work out, for example to protect solicitors, but the principle of a court-appointed solicitor seems to be generally accepted and I welcome that.

When personal cross-examination happens—no matter how rarely—it is widely reported in the media. That gives the impression that it is commonplace and so deters women from reporting rape. That is crucial. The issue is the deterrent effect of high-profile incidents, even if they happen only occasionally.

The same arguments apply to the proposals further to restrict the admissibility of evidence on past sexual behaviour. It was argued that the present rules should be sufficient to prevent

inappropriate questioning. Well, it seems that they are not. Sometimes the rules are interpreted loosely and they are not always applied. There may have been only two objections in 25 trials, but that is two too many. Stricter rules are necessary, coupled with the education and training for the judiciary that the Law Society of Scotland recommended, if we are to treat victims with dignity and respect. I do not see that that is incompatible with a fair trial.

The bill fits well with the developing policy on vulnerable witnesses. Rape and sexual assault are particularly distressing crimes because they are intimate, but society must realise that such crimes, as Roseanna Cunningham said, are about the abuse of power. That power can be exercised by the accused in the courtroom unless that is prevented by stricter court rules.

The bill will help more women to report rape but, unfortunately for society, there will still be many women who do not do so for other reasons, for example the reaction in their communities. During the summer, I spent time visiting procurators fiscal in small rural courts in the Highlands and Islands. One fiscal remarked on the high level of unreported sexual violence in his district. He said that the young men think it is their right, and the girls put up with it. Society accepts that behaviour. Juries will seldom convict for so-called date rape. It is difficult to prove when there is no extreme violence.

There is a culture in our country of abuse and domination of young women, which we are not addressing because we do not have the judicial tools to correct it. Rape was defined centuries ago, when society was much different. Is the definition, which includes a presumption of physical force, still relevant? We await a decision on that. We may have to consider defining levels of seriousness of rape for women to report rape by acquaintances and for juries to convict. I say that with great hesitation, because it is a huge and tricky issue, but it must be debated.

I whole-heartedly welcome the bill, but there is still some way to go before we can truly feel that we have a society in which sexual violence is not condoned and where a woman can say no and a man will take no for an answer.

16:02

**Mr Gil Paterson (Central Scotland) (SNP):** I have just returned from a seminar on counting the cost of violence against women, which had delegates from all over the world, so I especially welcome this Executive legislation, which will go some way to protecting vulnerable witnesses in the criminal justice system. The intent of the bill is to lessen the distress that is suffered by, and to improve the rights of, women complainers of sexual offences. That is commendable.

As has been mentioned—it is worth while repeating it—there were 591 reported cases of rape in Scotland in 1999, yet only 27 convictions of rape were obtained. While the reporting of sexual offences is rising, the attrition rate is falling. Any change to legislation that will further increase the reporting of sexual offences and improve the attrition rate has to be welcomed.

It is thought that 91 per cent of rapes go unreported, so the measures to restrict evidence are extremely welcome, because one of the reasons for sexual offences going unreported is the thought of having to relive the events in court and answer questions of a personal nature that have nothing to do with the offence. The thought of their personal lives being on trial further distresses victims and prevents many women from reporting crimes.

The change is also welcome because research has shown that defence lawyers and advocates have used the ability to introduce evidence relating to complainers' lifestyles to throw a smokescreen of immorality around the complainer, to confuse the jury and get their client off. The legislation will help to protect the dignity and privacy of the complainer, while preventing lawyers from muddying the issues.

I hope that the proposed new legislation will be the beginning and not the end as far as sexual offences are concerned. There is a long way to go before vulnerable people receive the protection and help that they need from our criminal justice system. As convener of the cross-party group on men's violence against women and children, I have had the opportunity to hear at first hand from organisations—some of whom are represented in the gallery—that are involved in supporting women who have suffered from sexual offences and other problems.

Following on from the bill, the Executive must consider urgently the definition of rape. An idea would be to follow the example set out by the "Setting the Boundaries" report in England and Wales, which gives a non-exhaustive, statutory definition of rape. That would make it clear to men what is acceptable and what is not. It would also stop any repeat of the ruling by Lord Abernethy. Sexual offences law must be based on the recognition of a woman's sexual autonomy and the fact that she has the right to say no or yes to sex without being judged or suffering abuse.

A review of the procedures used by the police and procurators fiscal is also needed. The procedures that are currently used have been developed to catch and convict attackers who are not known to their victims, but in most cases the attacker is known. Therefore, the framework for

investigation and conviction is of little use. Of all callers to rape crisis centres, 97 per cent know their attackers, but most of those cases never make it to court.

A review of how witnesses are treated in court is needed. Women who have been attacked should be treated as vulnerable witnesses and should not be forced to face their attacker in court. There is also a need for training for the judiciary and the legal profession so that they understand the trauma that women face when they enter a court.

We need an overarching review of the law and procedures used in sexual offence cases. It is no good going at the issue piecemeal, as that will only cause further problems and lessen the impact of any changes, even those made with good intentions. The proposed legislation is a start, but by no means must it be seen as the end.

16:07

**Johann Lamont (Glasgow Pollok) (Lab):** I welcome the opportunity to speak on the stage 1 report on the Sexual Offences (Procedure and Evidence) (Scotland) Bill. It is a matter of personal satisfaction to see that a concern and injustice that was highlighted in Scotland and in the Parliament is now being addressed in legislation.

It is testament to our much-vaunted openness and accessibility that we are debating the legislation. I see a welcome willingness to listen to voices other than that of the establishment and to take those voices seriously. I congratulate the Justice 2 Committee on a thoughtful and considered report. One of the Parliament's key roles is to listen to the experience of ordinary citizens and to address issues through reasonable and coherent legislation.

I particularly congratulate the Scottish Executive and the ministers involved in pursuing the bill. It might have felt a great deal easier to avoid the issue than to act. I welcome the fact that they have had the courage to progress the issue.

There has been a great deal of agitation about the bill, with some of the argument against it being conducted in unnecessarily hostile and aggressive ways. The message seems to be, "Our legal system is the best in the world, for goodness sake." Perhaps we should tell that to some of the people in my constituency who have gone through the system as victims or witnesses; they have something a great deal different to say.

It is interesting that Lyndsay McIntosh cited the heavy and weighty evidence of the legal profession, but dismissed as anecdotal information what witnesses and victims had to say. That is the imbalance that we seek to correct.

**Mrs McIntosh:** Will the member give way?

**Johann Lamont:** No.

Some have sought to develop a false caricature of the people who support the bill and of the motives that drive them. The debate has been characterised as being between the cool, rational opposition of those who know best—the professionals—and the wilder fringes of demented feminism, of which I am perhaps a representative. We have been accused of promoting and pushing a feminist agenda and of using the very limited experience of some individuals as a vehicle for promoting that agenda.

The issues that women's groups and organisations promote emerge not from ideology but from experience. Women did not argue for and create women's refuges because of ideology, but because they wanted to make women safe in their communities. Women did not set up rape crisis centres as a statement of intent, but to meet needs. Women's organisations and victims' groups call for change not to promote a feminist agenda, but to address a process and a system that can leave victims further victimised and which creates the possibility that the high-profile experience of those who have been cross-examined by alleged perpetrators of crime might deter victims of crime from reporting their experience, which increases undetected sexual crime in our communities. We can usefully address the broader issue of the experience of witnesses and victims in our legal system.

The response of some in the legal profession is disappointing, not least because a justice system in which people do not have faith is a major concern for us all, including—and perhaps especially—the legal profession. Bill Aitken talked about polarisation. The polarisation of views on what happens to victims of sexual crime in court stands as a challenge, not as an excuse to do nothing.

We do not seek to give sustenance to those who believe in rough justice and no protection for the accused. We seek a justice system that incorporates a balance of rights and which seems fair, reasonable and just, not to the lynch mob, but to fair, reasonable and just citizens. Members have said before that, in some of our communities, our commitment to the European convention on human rights seems to be dislocated from people's direct experiences of its irrationalities. We must find ways of pulling our citizens and communities together with the justice system.

We need an approach that builds confidence in the system and increases the likelihood of the system fulfilling its role in deterring sexual crime and punishing sexual crime when it is detected. I look forward to the bill being developed in committee. I welcome the fact that some people in the legal profession are addressing the issues

seriously and rationally. I welcome and support the Justice 2 Committee's stage 1 report on the bill. I trust that, with other members, we will develop a bill that offers witnesses and victims protection in the legal system.

16:12

**Kay Ullrich (West of Scotland) (SNP):** We must acknowledge that cases in which the accused has opted for the right to defend himself in person have been relatively few and far between. However, the impact of the publicity that is given to such cases has deterred victims from reporting crime.

As a former court social worker, I have first-hand experience of the matter. Victims of rape have told me, "I have been violated once. I won't risk being violated again, in public, by the court system." Sometimes, it was difficult to persuade already traumatised victims that they would have the court's protection, when all the evidence in the media seemed to tell them that they could become not the victim, but the accused.

Reliving the experience in court is daunting enough for the victim of a sexual offence without facing the prospect of that evidence being led by the perpetrator of the ghastly offence. We need only read the evidence that the Scottish Rape Crisis Network gave the Justice 2 Committee to find support for that view. The fact is—we have heard this already—that of all reported rapes, only about 7 per cent result in a conviction.

I was intrigued when I read the present law on the issue, including section 275 of the Criminal Procedure (Scotland) Act 1995. I recognise that the provisions in the act are worthy, but they can—as we say in the west of Scotland—have a truck driven through them.

The 1995 act states:

"the court shall not admit, or allow questioning … which shows or tends to show that the complainer … is not of good character in relation to sexual matters".

Just what does that mean? Who is to be the judge of

"good character in … sexual matters"?

It is well and good to say that a complainant is a prostitute or an associate of prostitutes, but once a jury is told that a complainant is a prostitute, the old myth resurfaces that, given their profession, prostitutes cannot be raped. That is like the idea that wives cannot be raped by their husbands.

The present law appears to defend the rights of the victim, but the reality is that the provisions in the 1995 act are iffy and subject to interpretation. Once thrown, mud sticks, particularly in a jury's mind. The present law does not require evidence or questioning to be relevant before it is admitted. The aim of an unscrupulous accused who conducts his own defence is quite simple—to blacken the character of the victim so as to prejudice the jury.

People who commit rape and sexual offences often try to minimise their crime or blame the victim for their offences. In my experience, that is the nature of the beast. Research carried out in the United States found that no less than 84 per cent of convicted rapists considered their actions not to be rape.

I am delighted that recognition has been given to varying the list of sexual offences, in particular in respect of stalking. In my experience, stalking is a sexual offence although, under Scots law, it is most often dealt with as a breach of the peace. I am aware that breach of the peace is a wide-ranging offence and that it carries a wide range of sentences, but—like it or not—the person in the street views it as a minor offence.

As members have heard, the SNP broadly welcomes the bill. Roseanna Cunningham outlined our concerns about potential problems with human rights legislation. If we pass the bill, we will take a huge step, as we will do away with a basic right under Scots law—the right of a person to defend himself. On balance, that is a step worth taking. We support the motion.

16:16

**Phil Gallie (South of Scotland) (Con):** The words "extremely" and "sensitive" have been used regularly today. That is understandable, given the serious nature of the issues that we are debating.

It is hard for non-victims to understand the feelings of victims of the crime of rape—the intrusion, the violation and the contamination that must stay in the minds of victims for many years. Perhaps the passage of time dulls the memory of the people who live alongside them, but that is not the case for the victims.

The serious nature of such crimes demands that those who are guilty be brought to justice. At the same time, we have to recognise that it is just as easy to convict wrongly as it is to acquit wrongly. We must get the balance right. Perhaps we should take on board the reasons why so many juries seem to acquit. Why is that the case? I suggest that it is because of the need for a privacy element in relation to such crimes.

Before I talk about the bill, I want to pick up on one horrendous statistic that has stuck in my mind following contact with the Zero Tolerance Trust. That is the fact that 18 per cent of young men feel that they do not necessarily have to have a positive indication from a female before a sex act

is carried out. That statistic is shocking. Perhaps something, somewhere in our society will allow us to get a message across to those young men.

I recognise the hesitancy of the legal fraternity, but I have a lot of sympathy with the points that were made by Mary Mulligan and Johann Lamont. It is one thing to make comments that all is well, but the acquittal rate and the small number of convictions make it easy to see that all is not well. If the legal fraternity feels that the Scottish Parliament and the Executive are going down the wrong track, it has a duty not just to criticise, but to come up with something positive.

I return to the example of John Anderson, who defended himself on two separate occasions. Bill Aitken referred to Lord Bonomy's comments on the case. I cannot see how any victim can be expected to stand up to being confronted by their alleged abuser. On that basis, I support the Executive's moves to introduce the restriction. In an intervention on the minister, I raised the issue of precognition. I welcome the minister's saying that he would take my point on board.

The Law Society of Scotland has proposed an alternative. I have another suggestion, which is for solicitors to represent victims' interests in court cases. In the past, when we have debated other issues, I have made that suggestion. It could be used to advantage in a number of ways in the Scottish judicial process, including in sexual abuse and rape cases.

I have no difficulties with giving notice of a defence of consent, but if that is a fair defence, it would seem strange to me if an individual had not raised it right at the start of the case.

Rape leaves a terrible stain on victims, but it also leaves a terrible stain on those who have been accused and acquitted of it. I applaud the fact that we give anonymity to the victims of rape when they go to court, but suggest that we consider giving anonymity to those who are charged. Once they are found guilty, there is no problem and their picture can be spread across every paper in the land, but the crime of rape is so horrendous that, until that point, people should not be stained in that way.

In a recent case in Ayrshire, six people were accused of sexual offences against children. The case collapsed and the accused individuals were left stained. They have not had a chance to demonstrate their innocence. Perhaps there will be an opportunity for the minister to inject something new into the bill to give such people some protection.

16:21

**Scott Barrie (Dunfermline West) (Lab):** It was suggested in evidence to the Justice 2 Committee that the bill that we are considering is not necessary. We heard in evidence that the powers already exist to protect alleged victims from overtly intrusive questioning. However, it is evident from the experience of people in the court system, including many women who have been through distressing court experiences, that that protection is very thin. Indeed, the committee heard evidence from legal practitioners that suggested that, although powers currently exist, advocate deputes and judges are unclear about whose job it is to enforce them.

Further, the evidence from many in the legal fraternity—I am sorry to be gender specific, but perhaps it is appropriate in this case—was very much that they were unconvinced that the volume of cases justified the restrictions on the accused that are being proposed. However, too many victims have had a harrowing experience of being questioned in the witness box, and not necessarily just by the alleged perpetrator. That is why the issue of restricting evidence regarding the sexual character and history of the complainer is so important. Other members have discussed that in detail this afternoon.

Although women stand to gain most from this bill, the case of men who have been raped has been largely ignored. I do not think that that point has been touched on. We have heard about the low percentage of women who proceed to trial in rape cases and the low conviction rate. If it is difficult for a woman who has been raped to report the crime to the police and go through a harrowing court experience, it is a lot more difficult for a man who has been in that situation. For that reason, the bill will extend to both sexes some protection in the court procedure. That is an important point to consider.

Roseanna Cunningham was right to berate successive Governments for failing to address the issues that are covered by the bill. However, I argue that much of the responsibility for that must be shouldered by many in Roseanna Cunningham's former profession; not for the first time, they have had to follow public opinion. It was my good friend Johann Lamont, who I do not think is a rabid feminist or whatever derogatory term she used to describe herself, who secured a members' debate on the subject 18 months ago. It was during that debate that the former Deputy Minister for Justice agreed to draw up an action plan. I am glad to see that the Executive has expedited that plan so quickly and introduced the bill that we are considering today.

Maureen Macmillan was right when she spoke about the need to change societal attitudes towards sexual offences. I accept that legislation in itself does not change people's opinions. However, every little helps. The protection that is

offered by the bill will do something about that. I look forward to stage 2 consideration of the bill. It is about time that we debated such subjects much more thoroughly. I am sure that there will be a speedy resolution to this issue.

**The Deputy Presiding Officer (George Reid):** I apologise to Kenny Gibson, who was not called. We come to wind-up speeches. I have to fit in an emergency question, so the time limits on speeches must be absolutely adhered to. I call George Lyon to wind up for the Liberal Democrats. You have a maximum of five minutes, Mr Lyon.

16:25

**George Lyon:** This has been a good and constructive debate and many points have been raised. There has been much agreement about the general aims of the bill, although concerns have been raised about a number of technical issues. Iain Gray recognised that some amendments would have to be introduced at stage 2.

Roseanna Cunningham highlighted the reason that we are discussing the bill today. The John Anderson case, which caused a huge public furore, happened in her constituency. That case acted as a catalyst. No one should take the view that, just because only a couple of such cases have arisen, there is not really a problem. I am the father of three teenage girls, and the thought of any of them being subjected to interrogation, cross-questioning and evidence in a court on a sexual assault case fills me with anger and foreboding. It would be totally and utterly abhorrent even to contemplate that. Goodness only knows how that young girl felt after the process was complete. There are good reasons why those issues have to be tackled.

Roseanna Cunningham raised a couple of other issues, including the possibility of having specialist fiscals to deal with rape cases. Perhaps the minister will say when he sums up whether the Executive has any views on that suggestion.

Several members asked what would happen if the accused refused to instruct a lawyer. That is a serious issue that must be addressed. I may not have understood Bill Aitken correctly, but he seemed to suggest that, because there were so few cases, there was little evidence of the need to tackle the issue.

**Bill Aitken:** I highlighted the fact that there were few cases in which that was a problem, but I ended by saying that, on balance, we would accept the Executive's proposals.

**George Lyon:** I recognise that. However, we were all concerned about the case that Roseanna Cunningham highlighted, and I do not think that it is good enough to say that, because there have been only two or three such cases, there is no need to change the law. The fact that there is a threat that that might happen to victims who come forward is the main thrust behind the bill, as the minister made clear in his evidence to the committee. Besides changing technical aspects of the law, the bill aims to reassure those who make complaints that they will not be treated as that 13-year-old girl was treated.

Pauline McNeill highlighted the need for strong and proper monitoring, as did Margaret Ewing. Mary Mulligan highlighted the traumatic experiences that have been suffered by complainers in such cases, which have been a spur to the introduction of the bill. Maureen Macmillan stressed that saying no should actually mean no. That is an important point. Gil Paterson highlighted the fact that, in the majority of sexual assaults, the attacker is known to the victim, and we should remember that.

Stewart Stevenson seems to have misunderstood what I said about the role of an amicus curiae. I stated quite clearly that the minister had noted that it might have some merit for more general issues. I was asking the minister to monitor what happens in Ireland to see whether there are any lessons to be learned.

Johann Lamont, in a passionate speech, made powerful arguments for why the legislation is needed. I am not willing to say whether she is on the wilder fringes of feminism but, needless to say, she made a powerful contribution. We could all see how much she had put into her speech and how much she believes in the importance of the issue and the need for the Parliament to address it.

I believe that the Executive proposals will deliver the main aims of the bill: to remove fear on the part of complainers and to increase their confidence that they will be treated fairly and with dignity. I hope that we shall see many more cases coming forward and that the complainers will see convictions being achieved.

16:29

**Lord James Douglas-Hamilton (Lothians) (Con):** We have heard a series of very good speeches. My colleague Bill Aitken highlighted some of our concerns—it is necessary to keep a balance between securing the ends of justice and ensuring fairness for the accused. There must be a presumption of innocence, even for those who are charged with rape.

Pauline McNeill, Kay Ullrich and Lyndsay McIntosh emphasised that the bill seeks to protect women who have been through a searing, traumatic, degrading and humiliating experience.

Such experiences often leave mental scars and a great deal of distress. Therefore, it is not surprising that women who have been subjected to rape or severe sexual assault should have a natural revulsion to cross-examination at length by their assailant. Indeed, it has been argued successfully that women might be much less likely to come forward to give evidence if they have to relive the harrowing violence of the attack.

In fairness to the Scottish legal system, it should be said that the case that gave rise to so much outrage was an English case. However, it is not unreasonable to prohibit the accused from cross-examining the victim. Bill Aitken pointed out that, if the accused has any sense, he will have his own lawyer, and the court can appoint a solicitor to act on behalf of the accused. If the accused is unable to give rational instructions, the court would no doubt be informed that he was unfit to plead and a special defence of insanity could be entered. The relevant section of the bill may require some clarification, as George Lyon and Mary Mulligan mentioned. However, I have sympathy with points that Stewart Stevenson made; he expressed the view well that the prohibition of the accused from cross-examining the victim would not materially prejudice the conduct of the defence where the facts were in dispute.

On the notice of defence of consent, I understand that fiscals already make it clear to victims that the chances are that the accused will claim that sexual intercourse took place by consent. That happens as a matter of course. I have been involved with the prosecution and the defence in a large number of rape cases and I do not think that a woman could possibly give consent for half a dozen or more men to have intercourse with her one after the other in immediate succession. It is regrettable that such gang rapes, which are usually associated with excessive alcohol, have taken place. The High Court is right to deal with such cases with severity. The lodging of the special defence of consent may impose a bureaucratic burden on lawyers, but I see no objection in principle to that special defence being available.

On whether the lawyer of the accused is entitled to raise issues that delve into the victim's sexual history, any line of cross-examination must be strictly relevant. Careful scrutiny must be given to the relevant section of the bill, as there could be different interpretations of what is considered relevant. If a man carries out a terrible sexual attack on a woman whom he does not know, the question whether she was a prostitute is not necessarily relevant. The wording of the section must be examined closely. Judges tend to be extremely careful to prevent fishing expeditions by the defence, in which the defence counsel acts like a drowning man clutching at straws.

I have listened to the evidence in many rape cases and it has been not simply shocking and distressing, but traumatic and humiliating. Horrible bruises, lacerations and painful physical and mental wounds are often inflicted. We must protect women from unreasonable trauma, but we must do so in a way that is not unfair to the accused. We must therefore be careful to devise appropriate wording in respect of inhibiting evidence that is elicited by the defence.

Perhaps the aspect that has caused most controversy in the debate is why so many who are charged with rape are acquitted. I think that there are two reasons. First, I suspect that juries are reluctant to convict in some cases that started as date cases in which there was a boyfriend and girlfriend relationship at the outset. Secondly, I suspect that more women are coming forward more readily after the alleged crimes have taken place.

We should not only have a longing for justice, but keep in mind fairness to the accused. With that in mind, we will seek to amend the bill, but support its onward progress.

16:35

**Christine Grahame (South of Scotland) (SNP):** The SNP welcomes the general intent of the bill, which is, as the minister said, to remove from complainers the fear factor of appearing in court and being faced with cross-examination by the accused. The small percentage of rape cases that are proved from the number of reports that are lodged every year is shameful, and that does not take into account the many people who do not report rapes. The evidence from the Scottish Rape Crisis Network showed that the prospect of cross-examination deters people from reporting rapes. I also note what Lord James Douglas-Hamilton said about the reluctance of juries to convict, which was referred to by Graham Bell in his weighty evidence to the Justice 2 Committee.

I want to make some comments on the bill, not to undermine its principles, but to strengthen them. I draw the minister's attention to concerns that were expressed in the evidence and in the Justice 2 Committee's report. It is unfortunate that only five evidence-taking sessions were held. The bill is extremely important and it makes important changes to Scots law, but evidence was again crammed into a short time span.

Section 1 of the bill is wide. Members have focused, quite rightly, on the serious sexual offence of rape, but that is not the only offence to which section 1 refers. For example, section 1(2)(e) refers to "indecent assault" and section 1(2)(f) to "indecent behaviour", an example of which was given by Roseanna Cunningham—the

common or garden flasher. Indecent assault can range from an action such as brushing across a woman's breasts to—at the other end of the scale—a serious assault on a woman with some kind of device or implement. The range of offences is huge and I want that issue to be addressed when the bill is considered further.

I am concerned about the test for prohibition, which is fear, distress and intimidation; as Roseanna Cunningham rightly said, that amounts to power. For example, if an elderly lady is seriously assaulted and put in fear of her life, there might be no sexual element, but under section 1(4) the accused could conduct his defence. That is another issue to be considered.

The problem with the operation of pre-trial disclosure is that it takes place pre-trial. Graham Bell said in his evidence that pre-trial disclosure could cause problems, not for the prosecution but for the prosecution of a case. He said that the concern would be that

"the bill would require notice in writing to be given so that the issue could be determined before the trial began and before the jury was empanelled."

He went on to say:

"My fear is that if we make a provision such as that which is proposed in the bill, every defence counsel will frame an application—dotting the i's and crossing the t's—just in case the situation arises."—[*Official Report, Justice 2 Committee*, 3 October 2001; c 494-95.]

That does not help the legislation and it must be considered. The committee said, in paragraph 68 of its report:

"We consider that this aspect of the bill needs further close scrutiny".

I think that that view is correct.

I also note Roseanna Cunningham's comments on sandbagging.

We must achieve balance by giving fair notice to the complainer of what might be coming their way. In relation to behaviour when victims of sexual assaults are being cross-examined, I endorse what Pauline McNeill said. However, I can think of an example in which one might want to lead evidence having not made written application: the complainer denies in evidence a previous sexual relationship with the accused, but evidence from a third party to the effect that the complainer has had a previous sexual relationship with the accused credibly refutes the complainer's statement. In such a situation, it should be open to the accused's legal representative to lead evidence about what the complainer has just said, because it has been refuted. How would one go about doing that when one has not made written application? I realise that an existing provision refers to "on cause shown", but it still seems to me that we must examine the matter of written applications. I say that in the interest of making good law.

I got a bit muddled about previous convictions, so I look forward to hearing an explanation. As we all know, there is the presumption of innocence and there is the test of guilt being proved beyond reasonable doubt. Which kind of convictions would be led? If someone had a previous conviction for flashing and they were on trial for flashing again, could that be led? I seek clarification on that.

As for the ban on self-representation, I can envisage problems when a solicitor or advocate is imposed. For example, how does the appointed solicitor or advocate proceed if the accused refuses to instruct? The bill states that they must

"act in the best interests of the accused."

How on earth could that be determined? What if the solicitor proceeded and the accused claimed afterwards that the solicitor did not act in his best interests? Could a civil claim be brought against the advocate or solicitor?

Before we reach stage 2, I would like to know more about the provision of an amicus curiae, because I did not know about that before. There could be problems in operating the provision whereby a solicitor or advocate who is appointed cannot be dismissed. Solicitors or advocates acting in those circumstances could have difficulties.

The Justice 2 Committee had difficulties about whether the notice of defence of consent was necessary in the bill. I cannot see how it can be necessary to include that in the bill, when it must be in the terms of the charge that there has not been consent. The accused has a right not to defend himself; there is a right to silence. There might be confusion in this case, because the accused is being asked to put something forward. Is it the same as a plea of self-defence or alibi? I do not know. That is another question that I would like to be answered.

I put those reservations on the record so that we can address them at stage 2, make good law and secure the fair but necessary balance between removing deliberate intimidation of a complainer by the accused in court, and adhering to the principles of being innocent until proven guilty, putting the onus on the Crown to prove guilt beyond reasonable doubt. I raise those points in order that the legislation will be secure.

16:42

**Iain Gray:** I thank all the members who have contributed to what has been a valuable debate. I am glad of the support that many members have expressed for the bill. I am impressed—if not terrified—by the detailed nature of some of the

comments, not least those by Christine Grahame. I fear that responding to some of those points will have to wait until stage 2, given the time constraints if nothing else.

We have talked a lot about balance today—there is a bit of a balance in getting the privilege of opening and closing a stage 1 debate for the Executive. It has given me the opportunity to orate for about 20 minutes, which is unusual in the Parliament. Unfortunately, I have to make about an hour's worth of elaboration, acknowledgement and promises of amendment, which means that I am unlikely to deliver a rhetorical performance that will get me into the speech of the year contest—especially as I also have a cold.

This subject has powerful emotion at its core. I may be running the risk of matching Stewart Stevenson for cross-party sycophancy, but I thought that Roseanna Cunningham got it eloquently right in her opening speech. She talked about the importance of balance: not only the balance of rights, but the balance of power within the courtroom in dealing with a crime that is, she is right to say, about the unacceptable exercise and abuse of power.

I am pleased to have had the support of the Tories for the general principles of the bill. However, following the speeches by Bill Aitken and Lyndsay McIntosh, I wonder how much of the bill they foresee being left if they are successful in amending the bill to the extent that they promised. That is a debate for another day. It is worth saying which day that will be, as Margaret Ewing asked about the timetable for the progress of the legislation. We expect stage 2 to begin around 12 December. Beyond that, the timetable is to some extent in the hands of the committee. There is no delay in moving forward.

I will return to the brief exchange that I had with Bill Aitken about the polarisation of views on the need for change, because several members have quite rightly referred to that matter. The point was very marked. Mr Aitken drew attention to the fact that, in research that asked complainers whether the law protected them during these kinds of trials, the answer received was an overwhelming no. He then quite correctly pointed out that if we ask practitioners in the legal profession—as the committee did—whether the law protects those complainers, the answer is an overwhelming yes.

The key point is that both those groups have experience of this kind of trial in our courts, because the researchers spoke to complainers, not the general public. However, the experience clearly feels very different to each group. Given that polarisation, we simply have to choose. Do we respond to the experience of victims of rape or to the experience of practitioners of law? Unashamedly, I think that we must choose to respond to the victims of rape.

**Bill Aitken:** Does the minister accept that the research to which he refers is now nine years old and that the evidence given by the Faculty of Advocates and others is contemporary and expresses a more up-to-date position?

**Iain Gray:** Bill Aitken raises an entirely fair point, to which—if he bears with me—I will return when I address the issue of monitoring.

As I said, we have to choose between the victims of rape and the practitioners of law. Johann Lamont explained much better than I can why we must respond as we are doing. We mean no offence to the legal profession, but that is our choice and indeed our purpose today.

That said, we have to get the detail right; as Christine Grahame pointed out, we have to make law that is "good law". I will address some points, not all of which were raised in the debate. I start with one that was raised by Bill Aitken, Roseanna Cunningham and Pauline McNeill. In making our decision, we would have found it helpful to have had more—and more up-to-date—information. I agree that we could not even say how often a defendant had chosen to represent themselves; we know only of the cases that appeared in the press. As a result, we intend to undertake research to ensure that, if the bill is passed, its impact on sexual offence trials will be monitored.

**Roseanna Cunningham:** Will the minister also remember that many of the decisions about choosing to self-represent occur part way through a trial? Although I appreciate that it might be difficult to monitor that matter, he should remember that such decisions are not made only at the start of a trial.

**Iain Gray:** That is a fair point. As we have to make the research as valuable as possible, we will undertake baseline research to update the previous Brown, Burman and Jamieson study on the impact of current sexual history provisions so that we have a baseline to start from. We will then monitor how the new provisions take effect. However, as members will understand, doing so will take some time.

Members have also pointed out that, in requiring the accused to be legally represented for the whole of a trial, we have gone further than is strictly needed to protect the complainer. I tried to explain that we have done that partly because of procedures in Scottish trials, which mean that evidence is disclosed in the course of the trial. That means that a solicitor who had to take over representation in the middle of a trial would, at the very least, need to have shadowed the whole trial to be aware of the evidence. Our option made better sense and indeed, as several members have pointed out, might provide better-quality

representation for the accused. Stewart Stevenson also pointed to a further benefit involving other witnesses and he is probably right.

The bill states that when a solicitor is appointed by the court, he or she has to get instructions from the accused. We must recognise that, occasionally, an accused may refuse to co-operate. Where a solicitor cannot obtain instructions or receives inadequate or perverse instructions, his or her duty is only to act in the best interests of the accused. It is likely that, in that position and with regard to professional ethics, the solicitor will be able to perform only a very limited role. However, that will have demonstrably been the result of the accused's own action. As Pauline McNeill helpfully pointed out, we now have experience of similar circumstances through the Public Defence Solicitors Office pilot scheme

It is true that the bill gives the accused no right to dismiss a solicitor who has been appointed by a court. By the time the court appoints a solicitor, it will already have received a number of warnings. We believe that the court should be in control of the appointment process and that it should have the power to discharge the solicitor during the trial if, for example, there is a clear clash of personalities or if the accused has approached the court and given an acceptable reason for that to happen. We intend to lodge an amendment at stage 2 to make the court's power clear.

The Law Society of Scotland put forward a proposal that several members have referred to—the idea of an amicus curiae. Our key reason for not pursuing that idea is straightforward: it does not deal with the basic issue of personal confrontation between complainer and accused. That is what we seek to make impossible through the bill. However, the proposal may warrant further discussion and I expect that it will be discussed when we consider wider issues concerning the protection of vulnerable witnesses. I do not support the idea—I have concerns about it—but time will be found to discuss it further, as some members have asked for that.

Members have asked why the bill is drawn so widely. There has to be a specific list, so that it is clear whether the provisions of the bill apply. Some of the minor offences that are given as examples, such as flashing, would normally be charged as a breach of the peace and would not automatically be covered by the bill. However, I agree that there is still debate to be had on the contents of the list, especially regarding homosexual offences—as I acknowledged—which is a similar issue.

I appreciate the fact that, of the three effects of the bill, the one about which members are most lukewarm is prior notice defence. It takes us back to the question of balancing the experience of those whose experience is intense but limited and that of those who have wide experience. Almost all trials of this kind may involve a defence of consent. Bill Aitken may know that. The procurator fiscal may, as a matter of course, tell victims that they are likely to face such an accusation. I see no reason why we should not make sure that the victims know what they will have to face.

Let me be clear. We cannot protect a victim from a defence of consent: that is not the purpose of the bill. Similarly, we are not preventing the accused from defending himself; we are only insisting that he does so through instructing a lawyer. We are not outlawing evidence of character or sexual history but regulating its use more stringently, so that it is allowed only when it should properly be used. Nothing that we do today will make facing a trial as a victim of rape anything other than a distressing, traumatic nightmare, but we can ensure that victims know what they will have to face and that they will never face direct cross-examination by their attacker. With the backing of the Parliament, that is what we will do.

## Sexual Offences (Procedure and Evidence) (Scotland) Bill: Financial Resolution

16:53

**The Deputy Presiding Officer (Mr George Reid):** I ask Peter Peacock to move motion S1M-2143, on the financial resolution in respect of the Sexual Offences (Procedure and Evidence) (Scotland) Bill.

*Motion moved,*

That the Parliament, for the purposes of any Act of the Scottish Parliament resulting from the Sexual Offences (Procedure and Evidence) (Scotland) Bill, agrees to any increase in expenditure payable out of the Scottish Consolidated Fund in consequence of the Act.—[*Peter Peacock*.]

## Parliamentary Bureau Motions

16:53

**The Deputy Presiding Officer (Mr George Reid):** I ask Euan Robson to move motions S1M-2410 and S1M-2467, on the designation of lead committees.

*Motions moved,*

That the Parliament agrees that the Health and Community Care Committee is designated as lead committee in consideration of the Tobacco Advertising and Promotion (Scotland) Bill and that the Enterprise and Lifelong Learning Committee be secondary committee.

That the Parliament agrees the following designations of Lead Committee—

Justice 1 Committee to consider the Diligence against Earnings (Variation) (Scotland) Regulations 2001, (SSI 2001/408); and

Justice 1 Committee to consider the Pensions Appeal Tribunals (Scotland) (Amendment) Rules 2001, (SSI 2001/410)—[*Euan Robson*.]

# Atlantic Telecom

**The Deputy Presiding Officer (Mr George Reid):** We now move to the emergency question that the Presiding Officer accepted this morning.

**Pauline McNeill (Glasgow Kelvin) (Lab):** To ask the Scottish Executive what discussions it has held with Her Majesty's Government concerning the impact on Scottish businesses of the receivership of the telecommunications company, Atlantic Telecom.

16:54

**The Minister for Enterprise and Lifelong Learning (Ms Wendy Alexander):** I have been and remain in contact with the Office of Telecommunications, the Department of Trade and Industry and British Telecommunications to discuss potential solutions to this serious situation. As a result of my suggestions to Oftel and the DTI, Oftel has agreed to press BT to add further information to its general message directing callers to directory inquiries and to encourage directory inquiries services to be updated as quickly as possible.

**The Deputy Presiding Officer:** I shall allow a limited number of supplementary questions.

**Pauline McNeill:** The minister will be aware that many domestic users and Scottish businesses, many in my constituency, are due to have their telephones cut off this Sunday. That will have a devastating effect on business because many businesses rely heavily on their telephone number being known. I was therefore pleased to hear the minister's answer this afternoon and I ask that representations continue to be made to Oftel and the DTI to ensure that this never happens again. What can the minister say to reassure us that it will not happen again?

**Ms Alexander:** Earlier today, I met the Scottish Chambers of Commerce and the business representatives of the campaign to stop the closure of Atlantic Telecom to hear their concerns and I plan to meet the receivers, PricewaterhouseCoopers, tomorrow to discuss the various options. There is a growing appreciation in the industry that we need to have long-term arrangements to deal with the circumstance in which an operator goes under, similar to the Association of British Travel Agents scheme that operates in the travel industry and with which members will be familiar. We will make representations for the setting up of longer-term insurance arrangements to ensure that the situation does not arise again. However, that does not preclude action in this case.

**The Deputy Presiding Officer:** I remind members that regulation is a reserved matter whereas the impact of the situation is a devolved matter and I ask them to frame their questions accordingly.

**Brian Adam (North-East Scotland) (SNP):** I wish to declare an interest as the Aberdeen and Dundee offices of the North-East Scotland SNP MSPs have Atlantic Telecom systems.

Obviously, the effects of the Atlantic Telecom collapse on customers and staff in Scotland have been nothing short of disastrous. Is the minister aware that any telephone number that was issued by Atlantic Telecom will close down this weekend, even if the customer has already transferred to another provider? Does the minister agree that telephone numbers that were assigned to Atlantic Telecom were accepted by customers on the basis that they were transferable? Will she press the DTI, Oftel and the telecommunications industry to honour that promise?

**Ms Alexander:** That matter is under discussion at the moment. BT has made it clear that enabling people to maintain their current telephone numbers would be a complex exercise, would cost in excess of £1 million and would take 40 to 50 days to complete. Public subsidy to BT on that scale would almost certainly break European state aids criteria. There are other forms of public subsidy that might be able to help businesses that have been affected, but the difficulty is that bankruptcy and insolvency legislation lays down incredibly strict rules about the money that comes in during the period of administration having to benefit the creditors.

There is a longer-term issue about the portability of telephone numbers, which Oftel should deal with, and a short-term issue about finding a way in which to give aid to the affected businesses within the tight regulations that we find ourselves bound by.

**Miss Annabel Goldie (West of Scotland) (Con):** Atlantic Telecom went into administration on 12 October. I would like the minister to inform the chamber when her department first had discussions with the administrators about the potential problem. Why has BT been singled out as providing the only possible prospect of rescue? It might be appropriate to consider a consortium of rescuers. Surely there is scope for the negotiation of some acceptable interim custodial arrangement to enable the provision of an essential service to continue.

**Ms Alexander:** I hope to pursue two issues with the administrator tomorrow. Other operators have said that they could provide a call-forwarding service. I instructed my officials to talk to the companies that have written in the past 24 hours. I

have also asked that the receiver explore whether those other operators could also provide a care-and-maintenance service for an interim period that might allow the numbers to be retained. That exercise is being carried out by my department, the DTI and the administrators. I hope to know more after tomorrow's meeting.

The moment that the issue was brought to my attention, I immediately instructed my officials to write to the DTI and, through it, to Oftel. I am not aware of when the first discussions took place between the administrators and the officials but I would be happy to write to the member with that information.

**Elaine Thomson (Aberdeen North) (Lab):** As the minister knows, Atlantic Telecom was headquartered in Aberdeen. Not only does its liquidation affect 1,000 businesses in the north-east in the way that Pauline McNeill detailed, but there have been about 900 direct job losses throughout the United Kingdom, many of them in Aberdeen.

**The Deputy Presiding Officer:** Please ask a question.

**Elaine Thomson:** The loss of Atlantic Telecom has been particularly disappointing for Aberdeen in its move to diversify its economy.

**The Deputy Presiding Officer:** Ask a question, please.

**Elaine Thomson:** I am just coming to my question. Will the minister assure me that she will support local initiatives that are aimed at broadening the economic base of Aberdeen in the light of the loss of Atlantic Telecom?

**Ms Alexander:** In the newspapers there have been some wildly inaccurate figures for knock-on job losses. We are determined to do everything that we can to ensure that knock-on job losses do not occur as a result of the situation. That is why important meetings are taking place today and tomorrow to try to ensure that a call-forwarding mechanism or care-and-maintenance arrangements are possible.

On direct job losses, the Scottish Executive's partnership action for continuing employment rapid response arrangements will be available to those who have lost their jobs directly through the liquidation of Atlantic Telecom.

# Decision Time

17:01

**The Deputy Presiding Officer (Mr George Reid):** There are four questions to be put as a result of today's business.

The first question is, that motion S1M-2459, in the name of Jim Wallace, on the general principles of the Sexual Offences (Procedure and Evidence) (Scotland) Bill, be agreed to.

*Motion agreed to.*

That the Parliament agrees to the general principles of the Sexual Offences (Procedure and Evidence) (Scotland) Bill.

**The Deputy Presiding Officer:** The second question is, that motion S1M-2143, in the name of Angus MacKay, on the financial resolution in respect of the Sexual Offences (Procedure and Evidence) (Scotland) Bill, be agreed to.

*Motion agreed to.*

That the Parliament, for the purposes of any Act of the Scottish Parliament resulting from the Sexual Offences (Procedure and Evidence) (Scotland) Bill, agrees to any increase in expenditure payable out of the Scottish Consolidated Fund in consequence of the Act.

**The Deputy Presiding Officer:** The third question is, that motion S1M-2410, in the name of Tom McCabe, on the designation of lead committees, be agreed to.

*Motion agreed to.*

That the Parliament agrees that the Health and Community Care Committee is designated as lead committee in consideration of the Tobacco Advertising and Promotion (Scotland) Bill and that the Enterprise and Lifelong Learning Committee be secondary committee.

**The Deputy Presiding Officer:** The final question is, that motion S1M-2467, in the name of Tom McCabe, on designations of lead committee, be agreed to.

*Motion agreed to.*

That the Parliament agrees the following designations of Lead Committee—

Justice 1 Committee to consider the Diligence against Earnings (Variation) (Scotland) Regulations 2001, (SSI 2001/408); and

Justice 1 Committee to consider the Pensions Appeal Tribunals (Scotland) (Amendment) Rules 2001, (SSI 2001/410)

# Opencast Mining (Lothians)

**The Deputy Presiding Officer (Mr George Reid):** The final item of business is a members' business debate on motion S1M-2081, in the name of John Home Robertson, on regulation of opencast mining in the Lothians.

*Motion debated,*

That the Parliament endorses the terms of the Lothian Structure Plan in relation to opencast mining, as agreed by East Lothian, Midlothian and West Lothian Councils following local consultation and a public inquiry; notes the overwhelming public opposition to opencasting in inappropriate areas which would have detrimental environmental and social effects and where opencast proposals would blight valuable prospects for long-term economic development, and expresses extreme concern at the decision of the Scottish Executive to impose amendments to the structure plan which would designate substantial parts of the three counties as areas of search for opencast coal.

17:03

**Mr John Home Robertson (East Lothian) (Lab):** I am grateful for the opportunity to debate the motion and raise serious concerns on behalf of thousands in East Lothian, West Lothian and Midlothian about the decision of the Scottish Executive to impose an amendment to the Lothian structure plan that designates virtually the entire Lothian coalfield area as an area of search for opencast mining. In my constituency, that means that a massive area around the villages of Macmerry, Ormiston, Elphinstone and Pencaitland could be under threat. Drilling rigs have already been seen in fields in that area.

The minister will recall that all the Lothian constituency MSPs wrote to him on 20 June to support the agreed terms of the structure plan and to urge him not to make unwarranted concessions to opencast interests. I know that Mary Mulligan and Bristow Muldoon want to speak in the debate. I welcome the fact that all the Lothian local authorities and all political parties—including the Tories in East Lothian—support the case for reasonable restrictions and controls to protect the economies and environments of local communities against further threats of inappropriate opencast operations.

I have always accepted that there are places where opencast mining is acceptable and even beneficial to the local economy and the national interest. There has been a large opencast site at Blindwells in East Lothian for more than 20 years. The Oxwellmains limestone quarry at the Dunbar cement works and three aggregate quarries are also in my constituency. We are not being unreasonable. East Lothian Council is not prone to nimbyism—if I can use that term.

It has to be said that opencast mining was less unattractive when it helped to sustain jobs in Scotland's deep mines, but there are no deep mines left in the Lothian area. Cockenzie power station has not been dependent on local coal supplies for many years.

The fundamental problem is that opencast sites employ comparatively few people so that economic advantages are, at best, marginal. However, their disadvantages, in the form of heavy traffic, noise, dust and serious disruption of the environment and landscape can be very serious indeed. Those factors can blight whole communities and, perhaps worse, can make the area unattractive to other industries that could sustain far better long-term employment for a far great number of people.

The Labour Government was elected with an undertaking to do away with the presumption in favour of opencast mining, which had made it very difficult for communities to resist planning applications for opencast sites. That planning guidance had made it all too easy for opencast companies to ride roughshod over public opinion and over concerns about environmental, social and economic damage. We kept our promise to amend that pernicious national planning policy guideline and that action has been welcomed universally.

I move on to the structure plan. The Lothian local authorities took account of all relevant considerations in their consultations about the new structure plan. They sought to identify areas in which opencasting was acceptable or desirable and to make it clear and explicit that other areas were not appropriate for opencast mining. The draft structure plan went right through the long process of consultations and public inquiries. The line that East Lothian Council, Midlothian Council and West Lothian Council had proposed for areas for opencast mining was accepted and supported at every stage.

However, something very strange happened at the final hurdle. It emerged that opencast industry lobbyists might have bypassed the public consultation process by taking a short cut to officials of the Scottish Executive to expand the areas available for opencast mining. In reply to a parliamentary question on the subject, the department explained on 18 October:

"Executive officials … met with COALPRO on 23 February and 20 April 2001 … The members of COALPRO who attended included individuals from Scottish Coal, I and H Brown, ATH Resources and J Fenton and Sons (Contractors) Ltd."—[*Official Report*, *Written Answers*, 18 October 2001; p 323.]

While Executive officials were holding discussions with the opencast industry, it seems that other officials might have been advising the minister not

to meet elected MSPs and councillors.

**The Deputy Minister for Transport and Planning (Lewis Macdonald):** I want to follow on from that point. John Home Robertson will recognise that the parliamentary answer that he quoted made explicit the distinction—he might well wish to develop that point. There is a clear distinction between the officials involved in advising on the alteration and those officials involved in the review of strategic planning, which is a quite different matter.

**Mr Home Robertson:** I do not want to make too much of that, but it is a little worrying when the industry has access to the department and when elected councillors and MSPs ask for meetings with officials and ministers on broadly the same subject and problems arise. I hope that, in reply to the debate, the minister will help to redress the balance.

I cannot overemphasise the importance of establishing a proper framework of controls over opencast mining, which I fear might be lacking in the present situation. Even a risk of opencasting can blight completely the economic and social development of an area. The threat of traffic, noise and disruption of the landscape is bad news for the local housing market and valuable high-tech or science-based—

**Mr Gil Paterson (Central Scotland) (SNP):** Will the member give way?

**Mr Home Robertson:** I am sorry, but I will run out of time if I am not careful. I know that several members want to take part in the debate. I must apologise.

There is a risk that valuable high-tech or science-based enterprises could be jeopardised. In the area that Lewis Macdonald has just designated as a search area for opencast coal in East Lothian, two major bioscience companies are genuinely alarmed by the implications for their businesses.

We must not forget the hassle, cost and uncertainty for community groups and local authorities when they are faced by serial applications from opencast operators followed by protracted public planning inquiries. Four applications have been made for sites near Tranent since 1995. We now find ourselves in the middle of yet another public inquiry. I submit that it would make a lot more sense to designate areas that are suitable for opencasting and to lift the threat of doing so from other neighbourhoods.

I understand that it may not now be possible for the Scottish Executive to revoke the decision to impose this potentially disastrous amendment on the Lothian structure plan, but I must put it to the minister that it would be intolerable to leave large areas, such as the west of East Lothian, under an indefinite threat of opencast mining. It appears that the only way of retrieving this situation may be to enable our local councils to amend their local plans to identify areas that are unsuitable for opencast mining.

This is important and urgent. I must appeal to the minister to take steps to enable East Lothian Council, Midlothian Council and West Lothian Council—and perhaps councils in other parts of Scotland—to adopt fast-track procedures to introduce appropriate amendments to their local plans.

I am grateful for the opportunity to raise this important subject. I look forward to hearing the views of my parliamentary neighbours and colleagues in all parties. Above all, I hope that the minister will give us a positive response and lift this threat from a large number of my constituents.

**The Deputy Presiding Officer:** I cannot extend this debate, but all speakers will be called if contributions are kept under four minutes.

17:11

**Fiona Hyslop (Lothians) (SNP):** I thank John Home Robertson for instigating this debate. The debate is essential not only for East Lothian, but for Midlothian and West Lothian as well.

I have two areas of concern. The first is simply the lack of democracy in what has happened in recent months. Clearly, all the councils in Lothian have taken a responsible attitude. No one is saying that there should be no opencasting at all. Rationally, reasonably and with a great deal of consultation, the councils put forward and agreed proposals, in the joint structure plan, that they would take on their responsibilities and accept opencasting for certain sites. Polkemmet in West Lothian is a classic example. In order to get remediation and to tackle, for example, the smoking bing, we knew that we needed to reclaim that land. However, for ministers, at the last minute, to overturn things by making the amendment was a real insult to the principle of local accountability and democracy. We need to know what happened to make the Executive turn round and reject what had been a cross-party and cross-council consensus in Lothian.

John Home Robertson is absolutely right: it is not only that certain sites will have opencasting, it is that other sites will be under threat. In recent months, we have had debates in this chamber on urban regeneration, and I have made the case that we have to open up central Scotland—and the west of West Lothian in particular—for opportunities in, for example, transport and housing. That cannot be done if a threat of opencasting hangs over those areas.

Fauldhouse is a village at the back of beyond. It feels forgotten, and it is forgotten when it comes to regeneration plans. Opencasting, quarrying and dumping would mean that that village would be lost, surrounded on all sides by dumps and mining activity. Are we prepared to leave Fauldhouse village in that position without speaking out and championing its cause? However, there is a strong case to be made for a specific presumption in favour of opencasting when councils are able to identify areas that can and should be available for it.

I do not know what happened in the past few months, or what happened in June, to make the Scottish Executive overturn an understanding and overturn democracy. What does all this mean for this Parliament and its relationship with the people of Scotland? I understand that moves are afoot to extend the centralisation of control and planning for the building of houses, so that local communities cannot have an input. I wonder whether that is part of a regular drawing up of local authority powers to the Executive. I hope that the minister will address that issue in his remarks.

What factors are open to the local community in areas such as Woodbank outside Armadale, where applications for opencasting have been rejected by the council, have gone to the Scottish Executive on appeal and that appeal has been rejected? Having fought off such an application once, does the community know whether it might come back again? It is extremely worrying from an economic point of view. We do not necessarily need to extend opencasting from an employment or energy perspective. We must take a responsible attitude that says yes to some opencast mining but ensures that the local community has input into that.

I hope that the minister can give us some reassurances on two counts: the impact of opencasting and the detrimental effect that it can have on communities, and, more important, the democratic deficit that has been laid open by the decision. Let us hope that this is not the end of the event.

17:16

**Mr Murray Tosh (South of Scotland) (Con):** John Home Robertson and Fiona Hyslop have taken a balanced approach, emphasising that opencast coal mining is appropriate and even beneficial in certain circumstances. It is worth bearing that balance in mind. There are energy reasons why we might think that opencast coal is positive in certain circumstances. It sustains employment, perhaps more enthusiastically in East Ayrshire and South Lanarkshire than in East Lothian. It is possible to argue that responsible operators will conduct themselves sensitively and will protect and, in some circumstances, enhance the local environment. It can also be argued that local authorities using planning conditions and agreements may be able to mitigate any adverse impacts.

**Dr Richard Simpson (Ochil) (Lab):** I wonder whether Murray Tosh's constituents have similar concerns to those of some of my constituents, for example, that the regulation and bonding systems for restitution after the working of the coal are inadequate and that they are often avoided by various means. We need an effective system of prior deposition of bonds that cannot be interfered with. At least that will allow those communities where appropriate working is occurring a guarantee that their environment will be restored. That is not happening at the present.

**Mr Tosh:** I understand that point. The next point I want to make is that it is essential that the Executive signals today whether the work that it is undertaking on planning agreements—refining and strengthening the system of planning agreements—will give the opportunity for such agreements, including restoration bonds and lorry routes, to be adequately defined and properly enforceable. Those are the circumstances we can define that will allow us to live with opencast coal.

I do not think that John Home Robertson would disagree with anything that I have said so far, but I appreciate that his concerns about East Lothian are more specific. I agree with many of those points. I would like the minister to clarify what is meant when the structure plan lays down an area of search and says that the local plan can refine it. Does that mean that East Lothian Council or the other local authorities would be able to alter the suggested areas of search? I suggest that that is particularly important in East Lothian's case, because the point that John Home Robertson made about enterprises such as Inveresk Research being right in the defined area gives rise to concerns about the quality of the environment for a very important local employer.

We should ask why, given that the regional structure plan team defined and measured the areas in specific terms, the Executive has used different areas in defining the areas for search. In East Lothian, some of the areas that have been identified appear to be areas that were assessed as being of high landscape value.

That raises a further question about why there are areas of search at all. Does the area of search imply some degree of presumption in favour of opencast? Is the Executive committed to some kind of quantitative or spatial imperative that says that it wants a given amount of coal from a given area, that it will take it from the sites that might be worked and that there is a trade-off between the environment and the economic advantages?

Those things are not clear. If it is the case that all sites are to be assessed on their merits, we would benefit from having that stated. After all, one site in East Lothian—Smeaton Shaw—has been identified outside the area of search. If it is a question of assessing sites on their merits, we need clearer guidance from ministers on the trade-off between the environment and other implications.

It is important that we keep this issue in balance, but is clear from the local community that there is a desire for the area of search to be reduced, a desire to protect important industrial sites and a desire to protect the local authority from the hassle of continuous planning hearings. There is a need to clarify the issue of the acceptability and efficacy of planning agreements and conditions in future. The Executive has to do a lot of communicating with the local authority.

Many issues will arise in this debate to which the Deputy Minister for Transport and Planning will not have time to respond. I hope that there will be a written response on anything that he is not able to clear up in the course of his concluding remarks.

17:21

**Bristow Muldoon (Livingston) (Lab):** I welcome this debate on my colleague John Home Robertson's motion, which expresses extreme concern about the recent decision of the Scottish Executive to make extensive amendments to the Lothian structure plan as it applies to opencast mining. I recognise the role that has been played by the local authorities in the Lothians, and by the petitioners who submitted petition PE346, in drawing this issue to the attention of Parliament and ensuring that it is debated.

As Fiona Hyslop and John Home Robertson have identified, the local authorities in the Lothians have tried to take a balanced approach to opencast mining. They have conducted an analysis and identified areas that are suitable for opencasting, such as the large Polkemmet site in West Lothian, which was mentioned by Fiona Hyslop. However, the local authorities have also taken into account other coal-bearing areas where there are no substantial community or environmental benefits in allowing opencasting to take place. That analysis allowed the local authorities to frame the proposals that they put to the Executive. Also, the proposals had been subject to extensive public consultation.

The local authorities believe that the decision of the Executive to require wide-ranging areas of search to be introduced in the structure plan undermines the precautionary principle that underpinned their work, undermines local accountability and undermines local democracy. I wish the minister to address that issue when he responds to the debate. Specifically, I want him to say why he took the decision to override the proposals that were submitted by the local authorities.

Many of the communities in West Lothian that are faced with the potential developments that previous speakers referred to are concerned about the prospect of a blight on their communities. Many of those communities are communities on the western edge of West Lothian that have not benefited from the economic regeneration of the past 15 years in the way that Livingston, Broxburn and Linlithgow have. They want to benefit from the renewed prosperity of West Lothian, and their concern is that the potential developments place a further handicap on their ability to attract new investments and jobs.

In addition to the question that I have already posed to the minister, I want him to address two concerns that have been raised by the communities and local authorities. First, the local authorities recognise that the minister cannot revisit the structure plan. However, they are still concerned about the strength of national planning policy guideline 16. They are keen to meet the minister to discuss their concerns about NPPG 16, with a view to revisiting it. Secondly, when the minister meets the local authorities or corresponds with members on this issue, what reassurances can he give us that we can pass on to our constituents so that they understand that the Executive is not in favour of the opencast industry, but in favour of opencast developments only where there is a community or environmental benefit?

17:24

**John Farquhar Munro (Ross, Skye and Inverness West) (LD):** John Home Robertson's motion is a little ambiguous, if not a little confusing. On the one hand, it seems to support the views of East Lothian Council, West Lothian Council and Midlothian Council that opencast coal mining would be permitted in designated areas within their jurisdictions. That is quite appropriate and is their collective responsibility—I have no argument against that.

The motion goes on to suggest that opencast operations should not be permitted

"in inappropriate areas which would have detrimental environmental and social effects and where opencast proposals would blight valuable prospects for long-term economic development".

Again, I have no problem with that, but strict regulations and effective planning controls are already in place to restrict and control all industrial, commercial and private developments wherever

they are situated. Some would suggest that those controls are far too restrictive—that is a matter for debate.

As I understand it, the particular problem in the Lothians is that the area designated by the joint councils does not and did not have any coal deposits to extract. Members can imagine the difficulties that that presented to those who had an interest in developing the area. That is why the Scottish Executive has decided to extend the search area for coal. The situation will be viewed and regulated against much tighter planning controls to comply with national policy guidelines. That will ensure that only responsible and appropriate developments are approved, which will take care of any concerns that people might have about inappropriate developments; any such developments will be controlled and regulated rigidly. On top of that, there is the possibility of a section 28 agreement, which is a regular feature of planning approvals, whereby a financial bond is extracted so that, at the end of the development, the land is reinstated to a satisfactory standard.

**Mr Paterson:** Does John Farquhar Munro know about the normal practice after opencast? In Greengairs, a village surrounded by opencast, the next venture will be landfill and all the health problems that go along with that.

**John Farquhar Munro:** That might be a problem in certain areas but I am sure that it is not a run-of-the-mill situation in the areas that we are talking about.

**Fiona Hyslop:** I am trying to work out whether the member is being deliberately provocative. We take great exception to many of the statements that he has made. Communities in areas such as Fauldhouse, which I mentioned, are concerned about the possibility that opencast mining will be followed by landfill. I am sorry to say that John Farquhar Munro's experience does not reflect the experience of people in the Lothians.

**John Farquhar Munro:** I am not sure about the situation with landfill, but I know that environmentalists are very strict on such developments. I am sure that there are sufficient regulations to govern any activity in former opencast mines, whether it be landfill or another development.

The hard facts of the matter are that, for the foreseeable future, Scotland will require coal for its thermal power stations. That must come from somewhere, which means that at least some opencast mining will be necessary—there is no doubt about that. The great danger is that we will export the problem to other countries with lower environmental standards, with disastrous results.

That is why I am pleased to support the Executive's position, to ensure that we have a viable opencast coal industry that is strictly regulated. That will allow us to create a strong economy in the areas for which the developments are proposed and to maintain their viability.

17:29

**Robin Harper (Lothians) (Green):** The landscape of central Scotland, particularly of the Lothians, has been attacked successively by shale mining, coal mining, expanded low-density townships, roads, quarries and dumps. Does the Executive have an overall concept of carrying capacity for the central belt? Irrespective of individual applications, does the Executive have a notion of when it will say, "That's enough opencast mining"?

Figures from 1997 show that Scotland had 40 per cent of opencast mining in the UK and the figure was increasing. In Scotland, 87 per cent of applications for opencast mining were accepted, whereas in England and Wales, only 11 per cent were accepted. I would welcome hearing whether the Executive views with equanimity the extraordinary difference between the levels of acceptance of opencast mining in Scotland and in England and Wales.

**Lewis Macdonald:** Robin Harper quoted figures from 1997. Does he accept that that was before the introduction of our present planning policy?

**Robin Harper:** I accept that, but I would like to know whether the Executive's planning policy has affected those trends.

The issue is one of environmental justice. Almost without exception, it is small rural communities that are affected by opencast and other such developments. Those communities find it difficult to defend themselves against such developments and do not have a right of appeal against decisions. Will the Executive, in the fullness of time, introduce legislation for a third-party right of appeal?

I cannot help but make the observation that if we had given more attention to developing renewables in the past 20 years, the pressure for opencast mining might not have developed in the first place.

17:32

**Mrs Mary Mulligan (Linlithgow) (Lab):** First, I will make three quick points. I can speak only for West Lothian Council, but I assure John Farquhar Munro that it would not have identified a site that did not contain coal. It is clear that Polkemmet contains coal.

The bonds that were adopted in the past did not work and did not protect sites. Companies have

preferred to go into receivership than pay to restore the land that they have devastated.

Landfill has generally followed opencast mining and has proved equally difficult to regulate. That has blighted communities even more.

On the strategic plan, I accept to an extent what the Executive says about acknowledging where coal deposits rest, but I wonder how local authorities can deal with the local and specific implications of those sites when they feel strongly that their initial representations on the strategic plan were ignored. How much weight will local authorities' views be given in future?

Has not the strategic plan given opencast companies much more advantage? During the summer, a member of the opencast industry said in the industry's journal that it was easier to come to Scotland, because its planning legislation was lax and it was much easier to develop opencast in Scotland than it was in England. We must deal with that issue if we are to respond to the points that local communities raise.

Local communities have problems when many applications are made. We ask people who give their time freely and voluntarily to pit themselves against professionals. Opencast companies have planning consultants, Queen's counsel, public relations experts and lobbyists. You name it, they have it. The local communities are at a huge disadvantage in counteracting that. The Scottish Executive and the Scottish Parliament must go some way towards redressing the balance.

The planning process has not been as responsive to local communities as it should have been. I welcome the announcement by the Minister for Transport and Planning, Sarah Boyack, that there will be further consultation on the planning process. That is not before time.

The only saving grace for local people is that, if they get the support of their council, an application may end up at a planning inquiry. Fiona Hyslop referred to a planning inquiry at Wester Torrance, south of Blackridge. I am pleased to say that last week it came to a positive conclusion, in that it was turned down. One of my constituents, Bill Allison, who is unfortunately no longer with us, as he died in the summer, spent two weeks of his time last May at the inquiry, trying to defend the local community. Two weeks might not seem a long time, but it was the second local public inquiry that Mr Allison had had to attend because the Executive reopened the question of allowing opencast at Wester Torrance. It is unacceptable to expect that kind of response from local communities.

It is important to have thorough monitoring of opencast sites once they are in operation. The Scottish Environment Protection Agency tries hard, but it is difficult for it to monitor opencast mines on a daily basis. That means that those mines are not managed in the best possible manner. The proliferation of sites and the number of opencast applications can lead to developments not going ahead at the identified site, but at one that is less acceptable. In West Lothian, Polkemmet is an identified site, but if another site gets permission, the Polkemmet site might fall by the wayside. That is not the way to manage the situation.

I welcome the fact that the minister met people from Fauldhouse in my constituency. I hope that he took on board the points that they made. Nobody will come to an area that is blighted by opencast nor will the developments provide the kinds of job that local people in those areas are entitled to expect. Local people put up with mining in their areas because it provided jobs. As has been said, opencast mining provides few jobs. We must redress the balance of the argument on opencast. We must start to listen to our local communities.

17:37

**Mr Adam Ingram (South of Scotland) (SNP):** I endorse everything that was said by Mary Mulligan. I also add my congratulations to John Home Robertson on securing the debate. I support the motion.

A fortnight or so ago, I was giving evidence to a local public inquiry in East Ayrshire on an opencast coal subject plan. East Ayrshire is the part of Scotland that has been more affected than any other by opencast mines, often to the detriment of local communities. I return to the point that was made earlier, that landfill follows opencast mines as night follows day. I do not know where John Farquhar Munro gets his information, but he should check his sources.

I was, in East Ayrshire, especially concerned that the coal subject plan should be shaped so as to reduce the impact of opencast mining on the environment and to protect the amenity of local residents and communities from the adverse effects of opencast operations—we heard earlier about the adverse effects. In arguing that, I thought that I was arguing with the grain of the Executive's national planning policy guidelines, in particular with NPPG 16—after all, there are few more environmentally destructive activities than opencast mining. I prefer to use the term strip mining, because it describes more accurately what happens to the land during the extraction process.

To be frank, opencast mining is not an industry that I care to promote. If alternative economic opportunities are available to local communities, I favour a general presumption against opencast operations.

Local authorities in East Lothian have established clearly that opencast coal mining is appropriate in only a few areas. They have rightly resisted designating wider areas for opencast mining, because that could inhibit new investment or the expansion of industries that range from high-tech to low-tech industries, including tourism.

In that context, the decision by Scottish ministers to modify the Lothian structure plan can be regarded only as perverse and I cannot envisage that national interests will be served by that exercise of ministerial powers. Scotland demands less coal than is being extracted. I reckon that we need about 3 million tonnes per annum, which is mainly for the Longannet and Cockenzie power stations. More than half of Longannet's needs are met from the last deep mine in Scotland, which is at Longannet. However, according to recent figures, Scottish opencast coal production exceeded 7 million tonnes in 2000. That is almost 50 per cent of total UK production. Why is the minister riding roughshod over public opinion in the Lothians and elsewhere in Scotland and promoting opencast coal mining when there is no legitimate justification for doing so?

17:41

**The Deputy Minister for Transport and Planning (Lewis Macdonald):** I congratulate John Home Robertson on securing this evening's debate and for giving me the opportunity to explain the matters that he has raised and perhaps develop some discussion around them.

There is no doubt about the depth of feeling on opencast mining in his and other constituencies. I reassure members that I share the view that has been expressed that opencast coal developments should not be allowed to proceed if they will cause unacceptable damage to local communities or to the environment. That is the policy of my party and it is, and will continue to be, the policy of Scottish ministers.

My party's view, when we came to power in the United Kingdom in 1997, was that for too long communities and the environment had not been adequately protected from the adverse effects of opencasting. That is why we made a clear commitment to replace the guidance that we inherited with new and much tougher planning policies. In March 1999, Scottish Office ministers introduced national planning policy guideline 16 as a statement of national planning policy and as a guide to local authorities on implementation of the policy. It is not the job of the planning system, planning policy or planners to manage or predict demand for coal. There is no plan for them to take on that role.

The planning policy guideline sets a robust framework that puts the protection of communities and the environment at the heart of the decision-making process. It states clearly that

"proposals which pose a potential risk to the amenity of communities or to the local environment generally will not be acceptable"

and sets clear tests against which proposals must be considered. First, it asks whether a proposal is environmentally acceptable. Secondly, if a proposal is not environmentally acceptable, it asks whether there are local or community benefits that sufficiently outweigh any material risk of disturbance or damage. Only proposals that pass one or other of those tests should be approved by a planning authority. The only exceptions that can be considered are those in which opencasting can repair existing degradation or environmental damage, or can help in the recovery of derelict land.

**Robin Harper:** Is the minister saying that if a proposal fails one test and passes another it can still go ahead?

**Lewis Macdonald:** Yes. The guideline says clearly that environmental damage will not be accepted unless it is outweighed by benefits to the communities that are involved. That is a measurable test of what is in the public interest. That policy position is understood.

**Bristow Muldoon:** Can the minister give us an example of potential community benefit where there is environmental damage?

**Lewis Macdonald:** Those things cannot readily be separated. The fact that the two tests are set together is a significant barrier to overcome for any proposal. One of the local authority's duties in judging the policy and in seeking to implement it is to require an environmental impact assessment and judge for itself what the balance of consideration should be. Even if operators come up with proposals that pass the tests, they will still require to go to the planning authority to obtain planning permission. They must then abide by the environmental standards that the planning authority sets.

I look forward to meeting the Lothian authorities collectively, as Bristow Muldoon suggested I should. When I do that, I will be happy to discuss the contents of the policy. However, my starting point for that discussion will be that a policy that has been in place for only two years requires more time to test its effectiveness before we consider revising it.

**Mr Home Robertson:** The minister is right to say that local authorities will judge applications on the bases that he outlined. However, does he understand that the designation of a large area as an area of search carries an implicit invitation to explore and to attempt to develop that area, which

blights such areas? That is the point that I wish he would address.

**Lewis Macdonald:** I am conscious of that matter and will address it.

I will respond to the point about trends. Since the policy was introduced, the trend has significantly changed. Of the 18 applications that were the subject of a study over the first two years of the policy, 10 were refused, which represented two thirds of the tonnage of coal in question. There is a clear change in the trend.

As has been said, the structural plan alteration that was carried through on 19 July is now operative. The reasons for the modifications have been explained to the authorities in question and I shall return to them. However, it is important that everyone is clear that legislation requires that decisions on planning cases should be final, and that they should be subject to challenge only in the courts. That long-standing principle must be upheld.

**Fiona Hyslop:** Will Lewis Macdonald give way?

**Lewis Macdonald:** I wish now to turn to the reasons for the modifications—I will be happy to take an intervention should members require any further clarification. When NPPG 16 was published, we issued a direction requiring planning authorities to review their development plans and to bring them into line with the revised guidance. The first part of that process was to identify in structure plans the broad areas of search where future work might be acceptable. As has been described, it is the usual practice at that stage to begin with the areas of accessible coal that have been identified by the British Geological Survey. That is the starting point.

Those areas should then be considered in two stages by two sets of criteria and conclusions should be reached about where individual applications will be considered. Stage 1 is the structure plan, where the appropriate criteria are strategic—for example, those concerning national land designation, green belt designation and areas of future housing growth. That stage should not define precisely where opencast mining proposals might be considered, but should identify only broad areas of search that do not have specific boundaries and where coal-bearing land is not constrained by strategic considerations.

**Mr Tosh:** Could we extend the green belt parallel a little further? Local plans take the concept of green belt, narrow it down, define it and specify it. Is the minister saying that East Lothian Council would be able to redefine the broad area and exempt the industrial sites, the landscaped sites and the vulnerable villages?

**Lewis Macdonald:** I am saying that the process of defining the boundaries of the areas of search is for the next stage in the process. That stage is the responsibility of local authorities, which must at that point define the appropriate areas of search with specific reference to local settlements and green belt. The answer is broadly yes, but in the terms that I have outlined.

Our difficulty with the structure plan alteration that was put forward was that it appeared to compress the structure plan stage and the local plan stage into a single process and to take into account specific local considerations, which we did not feel was appropriate at that stage. In some areas, that included defining specific sites rather than broad areas of search.

Members who have taken an interest in the review of strategic planning will know that I believe that we need to streamline and improve the system. Future strategic plans should identify specific sites and should work on that basis. However, we are obliged to work with the planning system that we have, not the planning system that we want. It is a statutory planning requirement that there be a two-stage process, with strategic and local stages. It is important to make that point.

The next stage of the process is for the relevant planning authority to define the broad areas in more detail in local plans that deal with local issues. It is not appropriate for me to get into a debate about which sites in the Lothians are suitable for opencasting. Indeed, as a decision maker in the planning system, it would be quite inappropriate for me to do that. It is a matter for the relevant planning authority. However, we expect planning authorities to take a tough line on implementing NPPG 16. They should reflect that planning policy in their local plans. As Murray Tosh suggested, the nature of the business will lead to smaller areas of search.

I apologise for the fact that I do not have enough time to respond to all the points that have been made. Mary Mulligan, Robin Harper and others asked about public participation. We are consulting on that and I encourage all interested members to respond in that consultation. The onus is on councils to bring forward local plan alteration proposals as soon as possible. They can do so in a way that allows public consultation. There can be public inquiries as part of that process, although there were no public inquiries as part of the structure plan alterations process. A public local inquiry must be held if there are unresolved objections to finalised planning proposals.

John Home Robertson asked what we could do to fast-track the process. We will deal with that as a priority. A local inquiry would need to be chaired by a reporter. I can also give an assurance that

the Scottish Executive's inquiry reporters unit will treat Lothian local plan alterations as a high priority. That will help greatly to move matters forward.

The law requires councils to set out appropriate reasons if they wish to expedite the process and reduce the number of weeks for consultation from 70 to 26. Again, I cannot prejudge a decision, but I encourage councils to think hard about taking that course.

Once the local plan alterations are in place, NPPG 16 can be given full effect in the context of the development plan structure. At that stage and for the first time, its impact as a material consideration can be fully taken into account and fully assessed.

That will demonstrate that there has been the right balance of policy to prevent unacceptable damage to local communities or the environment. Planning authorities should act on the basis of that national planning policy, as Scottish ministers will continue to do.

*Meeting closed at 17:52.*

Members who would like a printed copy of the *Official Report* to be forwarded to them should give notice at the Document Supply Centre.

No proofs of the *Official Report* can be supplied. Members who want to suggest corrections for the archive edition should mark them clearly in the daily edition, and send it to the Official Report, 375 High Street, Edinburgh EH99 1SP. Suggested corrections in any other form cannot be accepted.

The deadline for corrections to this edition is:

**Wednesday 28 November 2001**

Members who want reprints of their speeches (within one month of the date of publication) may obtain request forms and further details from the Central Distribution Office, the Document Supply Centre or the Official Report.

PRICES AND SUBSCRIPTION RATES

DAILY EDITIONS

*Single copies: £5*
*Meetings of the Parliament annual subscriptions: £350.00*

The archive edition of the *Official Report* of meetings of the Parliament, written answers and public meetings of committees will be published on CD-ROM.

WHAT'S HAPPENING IN THE SCOTTISH PARLIAMENT, compiled by the Scottish Parliament Information Centre, contains details of past and forthcoming business and of the work of committees and gives general information on legislation and other parliamentary activity.

*Single copies: £3.75*
*Special issue price: £5*
*Annual subscriptions: £150.00*

WRITTEN ANSWERS TO PARLIAMENTARY QUESTIONS weekly compilation

*Single copies: £3.75*
*Annual subscriptions: £150.00*

Standing orders will be accepted at the Document Supply Centre.

Published in Edinburgh by The Stationery Office Limited and available from:

**The Stationery Office Bookshop**
**71 Lothian Road**
**Edinburgh EH3 9AZ**
**0131 228 4181 Fax 0131 622 7017**

**The Stationery Office Bookshops at:**
123 Kingsway, London WC2B 6PQ
Tel 020 7242 6393 Fax 020 7242 6394
68-69 Bull Street, Birmingham B4 6AD
Tel 0121 236 9696 Fax 0121 236 9699
33 Wine Street, Bristol BS1 2BQ
Tel 01179 264306 Fax 01179 294515
9-21 Princess Street, Manchester M60 8AS
Tel 0161 834 7201 Fax 0161 833 0634
16 Arthur Street, Belfast BT1 4GD
Tel 028 9023 8451 Fax 028 9023 5401
The Stationery Office Oriel Bookshop,
18-19 High Street, Cardiff CF12BZ
Tel 029 2039 5548 Fax 029 2038 4347

**The Stationery Office Scottish Parliament Documentation Helpline may be able to assist with additional information on publications of or about the Scottish Parliament, their availability and cost:**

**Telephone orders and inquiries**
**0870 606 5566**

**Fax orders**
**0870 606 5588**

**The Scottish Parliament Shop**
**George IV Bridge**
**EH99 1SP**
**Telephone orders 0131 348 5412**

sp.info@scottish.parliament.uk

www.scottish.parliament.uk

**Accredited Agents**
(see Yellow Pages)

and through good booksellers

Printed in Scotland by The Stationery Office Limited

ISBN 0 338 000003 ISSN 1467-0178