The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

JUSTICE COMMITTEE

Tuesday 8 March 2016

Session 4

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JUSTICE COMMITTEE
9th Meeting 2016, Session 4

CONVENER

*Christine Grahame (Midlothian South, Tweeddale and Lauderdale) (SNP)

DEPUTY CONVENER

*Elaine Murray (Dumfriesshire) (Lab)

COMMITTEE MEMBERS

*Christian Allard (North East Scotland) (SNP)
*Roderick Campbell (North East Fife) (SNP)
*John Finnie (Highlands and Islands) (Ind)
Margaret McDougall (West Scotland) (Lab)
*Alison McInnes (North East Scotland) (LD)
*Margaret Mitchell (Central Scotland) (Con)
*Gil Paterson (Clydebank and Milngavie) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Stephen Brand (Law Society of Scotland)
Jennifer Gallagher (Family Law Association Scotland)
Louise Johnson (Scottish Women's Aid)
June Loudoun (Grandparents Apart UK)
Kirsty Malcolm
Michael Matheson (Cabinet Secretary for Justice)
Ian Maxwell (Families Need Fathers)

CLERK TO THE COMMITTEE

Peter McGrath

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Justice Committee

Tuesday 8 March 2016

[The Convener opened the meeting at 10:01]

Decision on Taking Business in Private

The Convener (Christine Grahame): Good morning. Please settle down.

I welcome everyone to the Justice Committee's ninth meeting in 2016 and ask all present to switch off mobile phones and other electronic devices. We have received apologies from Margaret McDougall.

Agenda item 1 is a decision on taking business in private. Do members agree to take in private item 5, which is consideration of recent correspondence, and item 6, which is consideration of the committee's draft legacy report?

Members *indicated agreement.*

Family Law (Scotland) Act 2006

10:01

The Convener: Agenda item 2 is a round-table evidence-taking session on the Family Law (Scotland) Act 2006, with a particular focus on two issues: cohabitation and parental responsibilities and rights. I regret to say that the Children and Young People's Commissioner Scotland, Tam Baillie, cannot attend the meeting for personal reasons.

I know that some of you have been at our round-table sessions before, but others have not. If you want to speak, please indicate as much to me; I will put you on my very special yellow sticky list, and I will call you. If I miss you, my clerk or the deputy convener will notice and tell me, so please do not worry—we will get to you. In fact, I might well give you notice that you are going to be called. This will be more of an interactive evidence session, with committee members keeping schtum most of the time—which is a novelty in itself.

We will start with introductions. I am the committee convener.

Elaine Murray (Dumfriesshire) (Lab): I am the deputy convener of the committee.

Stephen Brand (Law Society of Scotland): I am from the Law Society of Scotland.

Margaret Mitchell (Central Scotland) (Con): I am a committee member.

Jennifer Gallagher (Family Law Association Scotland): I am from the Family Law Association Scotland.

Roderick Campbell (North East Fife) (SNP): I am the MSP for North East Fife and a committee member.

Kirsty Malcolm: I am an advocate.

Gil Paterson (Clydebank and Milngavie) (SNP): I am the MSP for Clydebank and Milngavie and a committee member.

Christian Allard (North East Scotland) (SNP): I am a North East Scotland MSP and a committee member.

June Loudoun (Grandparents Apart UK): I am from Grandparents Apart UK.

John Finnie (Highlands and Islands) (Ind): Madainn mhath. Good morning. I am a Highlands and Islands MSP and a committee member.

Ian Maxwell (Families Need Fathers): I am from Families Need Fathers Scotland.

Alison McInnes (North East Scotland) (LD): I am a North East Scotland MSP and a committee member.

Louise Johnson (Scottish Women's Aid): I am from Scottish Women's Aid.

The Convener: As the committee members have all mentioned their constituencies, I think that I should point out that I am the MSP for Midlothian South, Tweeddale and Lauderdale. What about you, Ms Murray?

Elaine Murray: I am the MSP for Dumfriesshire.

Margaret Mitchell: And I am a Central Scotland MSP.

The Convener: There you are—I felt a grievance brewing. [*Interruption*.] Behave yourselves, committee. As our witnesses will see, we are coming to the end of the session and members are a bit demob happy. You will also have noticed that, when you spoke, your microphone light came on automatically. You do not need to press any buttons.

Who would like to start off this morning's session? Is everything absolutely wonderful with family law in Scotland? I take it that it is, because no one has indicated that they want to say that there is anything wrong with it. Is that correct?

Louise Johnson: It depends what part of the law you want to start with. Our submission focuses on contact with regard to subsections (7A) to (7E) of section 11 the Children (Scotland) Act 1995, as inserted by section 24 of the 2006 act, and shared parenting.

Our concern, which we have voiced in our submission, is that despite the best efforts of the Parliament, the then Scottish Executive and the committee, which recognised the need for reform in relation to domestic abuse, the amended section 11 of the 1995 act is not working. However, there is nothing intrinsically wrong with the law. As far as we can see, it is about attitudinal practice, as there are ingrained views that domestic abuse is a dispute as opposed to what it really is, which is a safety issue that affects the welfare and protection of children.

We are clear that anything that we say on the shared parenting agenda relates to domestic abuse. Child contact issues where domestic abuse is not an issue are not really in our provenance, as it were. We are obviously concentrating on shared parenting. We are concerned that any move towards shared parenting would be a shift away from consideration of the principles around the welfare of children under the child-centred approach. Under that approach, the welfare of the child must be the paramount consideration, account must be taken of the child's views and the court should make no order unless doing so would be better than not doing so.

We are concerned that blanket proposals for shared parenting would ignore the child's rights under the 1995 act and the United Nations Convention on the Rights of the Child. We are also concerned that that approach would not take into account domestic abuse and the well-recorded evidence that post-separation contact and post-separation domestic abuse are enormous issues for the women, children and young people who experience domestic abuse and a huge safety concern for children and young people.

The Convener: Does anyone want to comment on that?

Stephen Brand: The Law Society of Scotland is delighted that this meeting is taking place, because family law is an issue that it identified in its priorities document for the next session of Parliament.

One of the issues that Louise Johnson mentioned perhaps relates to how the law is interpreted and works in practice—the issue may be more how the law is interpreted rather than the substance of the law itself. I am both a practising solicitor and on the Scottish Civil Justice Council's family law committee, which is chaired by Lord Brailsford. That committee is conscious that getting children's views is a difficult subject. We are actively looking at ways in which children's views can be heard and gathered, and at the F9 document with a view to changing it.

The Convener: What is that document?

Stephen Brand: It is a document that goes out to children who are mature enough to express a view—usually from about the age of 11 or 12. If their parents are seeking an order from the court, the sheriff is bound to consider the children's views. It is a question of how we gather the children's views, which can be important. A document is sent out—

The Convener: How do we ensure that that form is filled in independently by the child, without the influence of, for example, the parent who has them at home?

Stephen Brand: That is the whole issue. It is very difficult to do that. If a child lives with one parent, the suspicion is that that parent influences the responses in the document. It is a question of how we go about getting children's views. There are lots of issues around that.

The Convener: Does anybody else want to come in?

Ian Maxwell: I am also on the family law committee of the Scottish Civil Justice Council, so I am well aware of the work that it is doing. There

is a good opportunity to address the issue, and there have probably been submissions from all the people round the table to it.

Form F9 is not a wonderful method of getting children's views. Families Need Fathers Scotland recognises the importance of children's views but we also consider that, particularly in high-conflict contact disputes after separation, there is a real need to protect children from being asked to choose between parents. The worst possible thing is for children to be asked, "Which parent do you want to live with?" Our other concern—I think that Stephen Brand referred to this—is around children who are under the strong influence of one parent. Even when their views are given, they are not necessarily reliable.

We would point to a research paper that was produced by a specialist in England who dealt with a lot of child contact cases and talked to a lot of children who had been involved in such disputes. Some children completely refused to have anything to do with the other parent—both fathers and mothers get rejected in that way. However, once the children were talked to by an independent person in a safe environment away from the caring parent, a very high proportion of them changed their views and returned to wanting to see a parent with whom they had previously had a strong, loving relationship.

There are various pitfalls in ascertaining children's views, particularly in the context of contact disputes.

Kirsty Malcolm: There is, effectively, wholesale reform going on of the various forms that are in use in both the Court of Session and the sheriff court. That involves form F9—there is an equivalent form in the Court of Session—which the Faculty of Advocates recognises as being wholly inadequate.

First and foremost, we need to assess whether the child wants to give a view. We then need to set up the most appropriate way to obtain that view, and the rather blunt instrument that is form F9 does not achieve that outcome. That is why its reform is being considered by committees elsewhere.

The views that are coming back from the initial consultation on the review that is being undertaken are very positive. There will be a two-step process, rather than just a form being issued, with the child being asked, "Do you want to express a view—yes or no?" The approach will allow the child to express whether they want to give a view, because not all children want to get involved, and it will focus on the best mechanisms for taking that view. That picks up on Ian Maxwell's point that taking a child out of a difficult environment will quite often be the only safe way to ensure that a proper view, without influence, is taken.

The Convener: It would be helpful if you could explain whether, if that form is filled in, that means that the sheriff or the judge need not speak to the young person. I do not know whether we still have welfare hearings. Is the form just an indicator, rather than being, let us say, an affidavit? I am just asking what its status is.

Stephen Brand: The form is filled in and sent to the sheriff, who then decides what he wishes to do with it. However, there are also issues of confidentiality. The sheriff is sometimes unsure whether to express those views to the parties, and, of course, sometimes the child wants their views to be kept confidential. There is a whole range of issues that are quite tricky.

The Convener: You are all nodding, despite being people who I thought might have different views. You are agreeing that that is a bad thing—it is counterproductive or misleading.

Louise Johnson: Form F9 is very bald and non-child friendly. The questions are not expressed in the type of language or in a way that is understood to be good when asking children questions. Children should not be asked straight questions such as, "Do you want to do this?"; questioning them should be about exploring the nature and quality of their relationships and what their concerns are, rather than just having them say yes or no.

Children, even in domestic abuse situations, are very conflicted. They would possibly like to see their dad, but they do not want him to be abusive to them or their mother—they want to be safe. Putting a lot of stress on children to give a yes-or-no view is not appropriate, and questioning children should be carried out by those who are trained in it. Asking questions of children is a particular skill and there are nuances. There is nothing wrong with taking an independent view.

Interestingly, there is research from England and Wales on taking the views of children. In domestic abuse situations—I have to be very clear that I am talking about domestic abuse—when children said that they wanted contact, it was granted even when domestic abuse was present. However, if children said they did not want contact, and domestic abuse was present, it was granted anyway. There is the weighting of the views—

The Convener: Where was that research?

Louise Johnson: That was in England and Wales.

The Convener: Right, so it was not in Scotland.

Louise Johnson: We have—unfortunately—a lot of anecdotal evidence; that is the whole problem with section 11(7) of the 1995 act and how domestic abuse is taken into account in the court's analysis of the welfare principle and the best interests of the child. Research from Scotland that has been carried out by the Children and Young People's Commissioner reflects the same position.

10:15

The Convener: I will take Mrs Loudoun next. Is it Mrs or Ms?

June Loudoun: It is Mrs.

When we attended meetings in 2005 and 2006 on the Family Law (Scotland) Bill, Children 1st did a presentation about family group conferencing, and we were told that it had a success rate of more than 90 per cent. Why can something along those lines not be used to help to find a solution for children in these situations?

The Convener: Will you develop that point about family group conferencing? Who would be the family, for a start?

June Loudoun: It would be any family member who had contact with the children before the parents separated, and we could include a school or nursery teacher, someone from a sports group that the child attended or anyone else who was involved in the child's life and could see how they interacted with their parents and family, and who perhaps picked up on their behaviour problems. Why cannot everybody get together to discuss the situation and find a solution?

The Convener: I am looking at the lawyers. How would that work in practice? What would the court process be? These disputes are court disputes—that is why the courts are there. Is that a practical suggestion?

Kirsty Malcolm: The courts have various mechanisms that they can use to take children's views. One involves the sheriff or the judge speaking to the child, but that is the least common route to be adopted these days. Another is the use of reporters on which a raft of new rules have come in, which we hope will facilitate an improvement in the quality of the reporting that is undertaken.

Reporters are appointed through the court to meet the children and the family. They do not meet as a group, but the reporter will meet with each parent and the people who are involved with the child. Sometimes they will speak to teachers or to social workers if there has been social work involvement. They speak to people across the board and pull together a report, which is then presented as independent evidence to the sheriff or the judge, who can use it to help to formulate a view.

That is a not an area of practice that I work in regularly, so I am probably not the best person to speak to about how it works in practice, but that is a mechanism that I am familiar with.

The Convener: I am looking at Mr Brand.

Stephen Brand: In theory, it should work quite well. The problem is that sheriffs vary in their interest in family law. Its application by sheriffs is tricky because some are not interested at all and just want to get through their case load, while others take a lot more interest in it.

Most family law solicitors would prefer a degree of specialisation so that such cases come before sheriffs who are particularly interested and, indeed, trained in family law. We get a big variety of decisions, partly because the sheriffs have such—

The Convener: I practised in family law a long time ago—17 years ago—and at that time there were specialist sheriffs who kept going with cases. Has that withered on the vine?

Stephen Brand: Edinburgh and Glasgow have specialist family sheriffs, but unfortunately in most areas outwith the main cities a wide variety of sheriffs are involved and they will not keep the same case from hearing to hearing.

The Convener: Mr Maxwell wants to comment.

Ian Maxwell: A number of the submissions mention the adversarial nature of family law proceedings, particularly when they reach the proof stage in the family courts, and suggest that we move away from that. We have already adopted the child welfare hearing in the Scottish courts, which is a far more collaborative process.

There is a fundamental difference, in that the family court is looking at the future. Often, the court is trying to resolve a dispute or a crime that has happened in the past. In a family case, we look at what is going to happen with the children in relation to their parents in the future, and we do that in a constructive way.

I agree that family group conferencing is great, but once people have reached the court stage, it is more difficult to get everybody round the table in a collaborative forum. We would point to jurisdictions in other parts of the world that have adopted quite a radical change to the conduct of all court proceedings in family cases. We should really be trying to support parents to make things work, as well as resolving their disputes.

The Convener: I beg your pardon—I am trying to get us to focus more. I absolutely understand that there is a range of views round the table. However, as you are aware, we have been looking

at issues relating to section 23 of the 2006 act, which deals with the rights of unmarried fathers. We are looking at the rights and responsibilities of parties, and at domestic abuse—which has been touched on—as a factor in decisions on contact and residency orders. I would really like to go back and focus on those issues. The academics whom we had before us—calling them "the academics" is a bit rude, but you know what I mean; they were professors—raised those issues, to an extent.

Ian Maxwell: One point that I am particularly keen to make is that, although the 2006 act made great progress in recognising parental rights and responsibilities for unmarried fathers, there are—as we pointed out in our submission—two major problems that will persist until 2022, by when all the children who were born before 2006 will have grown up. One problem is that a father who has children who were born before 2006, when the law changed, and children who were born after 2006, in effect has a mixture of having parental rights for the younger children and none for the older ones. We know, for instance, of fathers who have been given care of their children by the social work department because the mother was unable to care for them, but the social work department has said that it cannot help him to sort out the legal stuff.

We also raised the cross-border issue—the law changed more than a year earlier in England and Wales. These days, families often move between Scotland and England. If a family moves to Scotland, the parental rights that the father has in England disappear when the family crosses the border. We feel that the 2006 legislation is greatly lacking, in that the provision was not made retrospective and did not cover all fathers. Instead, it applied from May 2006.

The Convener: The bogey word in law is "retrospective". I would like the panel to comment on making law retrospective. There may be a case for that in the example that Mr Maxwell has just given us.

Stephen Brand: I agree with that. It is a bit crazy to have a situation in which the father has parental rights for one child but not for the other, just because of the dates on which they were born. However, I am not sure how we would get round that.

The Convener: Should we make we make the provision retrospective or make it apply only in certain cases and not generally? I do not know. I am thankful that I am not drafting the legislation. Does Kirsty Malcolm have a comment on that?

Kirsty Malcolm: I suspect that this is the lawyer in me, but I do not think that it would be useful to make the legislation retrospective. There are mechanisms available to parents who find themselves in such situations. What is available is not perfect, but one could apply for an order in relation to parental rights and responsibilities; there are mechanisms in the 1995 act for agreement to give a parent parental rights and responsibilities. One assumes, however, that Ian Maxwell may be talking about situations of conflict, in which agreement may not be possible. However, in such circumstances there would still be scope for a straightforward application to have granted parental rights and responsibilities.

The Convener: Ian Maxwell also raised the cross-border issue.

Kirsty Malcolm: I am not terribly sure that I understood Ian Maxwell's point.

The Convener: Would you like to make your point again?

Ian Maxwell: The law changed earlier in England, so there could be an unmarried father who is content that he has his parental rights and responsibilities, but the family moves to Scotland and splits up, and he would no longer have them, if we consider his position under the Scottish courts system, because the date in Scotland is later. We have found that that is sometimes simply not brought up in court and the court assumes that it is okay. However, in some court cases, the parental rights have disappeared when the family has moved across the border.

Kirsty Malcolm: As a matter of law, that is not correct. A parent who has parental rights and responsibilities under the law of any country will normally be given automatic recognition across borders. It should not make any difference whether that border is between England and Scotland or between Europe and Scotland.

Ian Maxwell: We have come across fathers who have raised in court the question of parental rights and responsibilities. Rather than granting the father those rights—as is perfectly possible under the 2006 legislation—sheriffs have instead given them a mandate that gave them all the powers, but not the piece of paper. That was maybe a mistake on their part. Going to court to get such things sorted out is expensive, time consuming and causes further conflict in the family.

The Convener: Did you indicate that you wanted to speak, Ms Gallagher?

Jennifer Gallagher: I did not do so before—I did just then.

The Convener: I do not feel so bad now—Ms Mitchell was making it look as though I had ignored you—[*Interruption*.] No, no, no. I am not wanting you, Margaret—not yet. [*Laughter*.]

Jennifer Gallagher: I have often dealt with cases in which a father has parental rights and responsibilities for some but not all the children in the family. In practice, we have, as Ms Malcolm has suggested, simply made the application to the court for parental rights and responsibilities, which does not seem to present any significant issues.

I take Mr Maxwell's point that going to court is an expensive process. The availability of legal aid, for example, causes practical problems for a lot of fathers in getting access to the courts. However, once a person gets there, I do not think that there are any issues with the aid.

The Convener: Legal aid is a thorny issue, because it deters people if they are just above the limit for assistance.

Stephen Brand: The issue, however, for unmarried fathers is that the mother can register their child's birth unilaterally, without any discussion with the father. She can also name the child. Those two things can cause problems. Should there be something in the law that allows the mother to do that only if there is no objection from the father, and should the law—if necessary, if there is an issue about paternity—provide for DNA to be taken? I know that there was a discussion about that in a previous Justice Committee meeting. Those issues might need to be looked at.

The Convener: Yes—Professor Norrie was pushed on that issue. He had his back to the wall, and he agreed that there should be compulsory DNA testing, but he then tried to step back from that position, which is difficult to do, once you have said something like that.

Are you talking about a compulsory DNA test, so that not all the levers are in the mother's hands, unless cause is shown why that should not happen?

Stephen Brand: Yes, indeed.

The Convener: Let us say that there should be a presumption.

Stephen Brand: Yes.

Louise Johnson: I want to reflect the position that we voiced on the bill before it became the 1995 act. We were concerned about the extension of, or the granting of, parental rights without any concomitant protection for children where child contact or parental rights and responsibilities are an issue. That is why section 11 of the 1995 act was later amended. However, it is still not working—the issues that we raised way back in 2006 remain. I am not aware of an enormous problem with swathes of unmarried fathers across the board being refused being allowed to register the birth with the mother. It is my understanding that a name cannot be put on the birth certificate unless there is consent to do that; the mother could not go and unilaterally register the father unless he was there.

Stephen Brand: That is true.

Louise Johnson: I am sure that people have disputes about children's names regardless of the situation.

DNA testing came up in a petition in 2014. The Law Society of Scotland supported the reform that broadens the tools. It mentioned the DNA testing, but with that being subject to the best interests of the child test—

The Convener: There should be a presumption perhaps, as I said, or a test of best interests.

Louise Johnson: We would have concerns about a child's article 8 rights, and the interference with a child's person if a forced DNA test had to be taken. Unfortunately, something like that could be used by people who were determined to continue to abuse children—I am talking about domestic abuse—after separation.

The Convener: What is your position on compulsory testing? That is what I am trying to understand.

Louise Johnson: We would not support compulsory DNA testing. We would be concerned about the interests of the child and there would have to be clear safeguards to ensure that the welfare of the child, and the circumstances in which the test was taken, if it was done at all—

The Convener: Do you envisage a presumption subject to the various caveats that you have put in?

10:30

Louise Johnson: The law is not keen on presumptions. We wanted a presumption in the bill against the granting of contact where domestic abuse is an issue, and the minister at the time was very clear about that when he said—

The Convener: I feel it coming—you have the paperwork.

Louise Johnson: The minister said about the presumption that we wanted that

"we also share the Justice 1 Committee's concerns about the dangers inherent in introducing presumptions into this aspect of family law."

We wanted a rebuttable presumption in relation to contact and the minister said that

"a rebuttable presumption would in fact interfere with current shrieval procedures."

The law is not keen on rebuttable presumptions.

The Convener: I wish now that I had not used the word "presumption".

June Loudoun: I would like to pick up on a point that Stephen Brand made about naming children. On separation, if a party moves on they can change the child's name without the father's permission, and that needs to be looked at, in some cases.

The Convener: You do not need to do anything in Scotland—you can just start calling the child by a different name.

Roderick Campbell: The Law Society's submission talks about the rights of siblings. How important an issue does the panel think that is?

Stephen Brand: Do you mean how important are the rights of siblings?

Roderick Campbell: Yes—in terms of applying for an order for contact.

Stephen Brand: If, for example, a 14-year-old wants to see their 10-year-old brother, it is not possible at the moment to do that through the courts. Perhaps that, too, should be looked at.

The Convener: I am looking around for other members who want to comment. This is Margaret Mitchell's cue—you must have something to ask.

Margaret Mitchell: I will pick up on Ian Maxwell's point. I will ask about pushing for mediation and alternative dispute resolution. It seems that we have talked about that for ever in civil law, but have never actually got it going. What would we need to do to facilitate that so that situations do not reach the position in which the parents are at loggerheads with each other and the child is the last person who is thought of in the equation?

Ian Maxwell: In some cases, there is compulsory mediation at that stage, and I understand that there are concerns about that, but we have recently seen the Scottish Legal Aid Board introducing far firmer provisions to try to ensure that both parties have tried mediation before they go to the family court.

Similarly, we often come across sheriffs who ask parties whether they have tried mediation before they start a child-contact action. Many of the mediation services are run by voluntary organisations that depend on year-to-year funding, often in tight circumstances, so we would certainly support a call for more financial support for mediation.

We see a growth in lawyer mediation, but it seems to us that it is more growth in enthusiasm for lawyer mediation than in the practice of it. One of the barriers is obviously cost. In some cases, the Scottish Legal Aid Board will fund lawyer mediation and in other cases it will not. We want swift solutions to family disputes, rather than great long waits to get into court. We would also like to see more family sheriffs and more specialisation, because plenty of the people who come to us say that they see half a dozen sheriffs in the course of their case, which is a complete waste of everybody's time if each time round people are dealing with a different person who does not have the same viewpoint as the previous sheriff.

I should also praise some family sheriffs. We come across some sheriffs who take control of cases and act using the authority of the sheriff and, in some cases, try to counter the bad behaviour of one or both parents. It is a complicated issue and a difficult problem to resolve, and legislation is not always the answer. A lot lies in the hands of individual sheriffs and how they handle cases. We see some very good practice, but there are also some problems in the system.

Jennifer Gallagher: I agree with that. In practice, when sheriffs are experienced family practitioners, they have had an interest in that area before they go on the bench, so you find that the quality of the decision making is far better.

The Convener: I find that very depressing. Pretty well 17 years ago, when I practised and was specialising in this area, I thought that we were well on our way. The Family Law Association was being established and a sheriff who continued throughout a case was considered to be much more useful to all parties than a completely fresh sheriff coming in and rustling through the paperwork.

I find it quite depressing that all this time has passed and that we seem, at best, to have stood still. I practised in Edinburgh; Stephen Brand said that the situation is okay in Edinburgh and Glasgow, but not elsewhere. I understand why: it is because the sheriffs also deal with criminal cases on the same day. That is very depressing.

Mediation is an issue that I dealt with a decade ago, but we seem to have got stuck. How do we unblock all that? There is shrieval training and timetabling so that sheriffs are trained and can follow cases through, but what about mediation? How do we move mediation on from that blockage?

Stephen Brand: It is very difficult to say. I think that Ian Maxwell hit on a number of things. The mediation services that we have are not properly funded, and there are some areas in Scotland that have very few mediation services. Funding is important.

I have been a solicitor and mediator for about 20 years. I think that Mr Maxwell is correct to say that there has been increased uptake among solicitors

so that there are now more solicitor mediators. However, the volume of work is still fairly limited.

The Convener: How successful is mediation?

Stephen Brand: It can be very successful. That is the irony.

The point about mediation is that it should be voluntary. Compulsory mediation in which the court sends people to mediation is not so successful. However, if people are prepared to sit down and discuss things, that is fine.

It may be, in part, about education. People are talking about the fact that clients are more aware of mediation and are asking more than they were asking 10 years ago, but I still think that an exercise could be done to try and educate the public further about different methods of resolving disputes. There is also collaborative law, which is a hybrid.

Margaret Mitchell: Everyone around the table seems to agree that mediation would be a good way forward, but if common sense is not prevailing, should we look at funding it as a preventative spend? Should we also collect data on where mediation has been used successfully? If we had that evidence and treated the funding as preventative spend, it seems to me that the door would be more open than it has been in the past.

The Convener: Before I come to Louise Johnson, I want to come to June Loudon. I do not know whether grandparents are embraced in the process. Sometimes grandparents are bad and can cause problems in such cases, but sometimes they are the victims, so the situation is not clear cut.

Do you think that grandparents should be involved in mediation, if possible?

Stephen Brand: They can be.

June Loudoun: Some places do intergenerational mediation, but a lot do not because they do not have the knowledge to do so.

In some dispute situations, grandparents can be the only stability that children have. If the grandparents are the children's only support system, the fact that they can be easily pushed to the side with no support to help to resolve the matter can only harm the child.

There needs to be more mediation, family support and general family education about how to resolve conflict and how to appreciate another person's opinion—getting round the table and helping people to communicate again. Sometimes a silly thing can set off a big argument and if you do not talk about it for too long it gets blown out of all proportion. A little bit of mediation between family members might be all that it would take to resolve that.

The Convener: Under section 11 of the 1995 act, anyone with an interest can apply for contact. Do grandparents do that? Is it successful?

June Loudoun: We have had a little bit more success over the past two or three years, but it is still pot luck. It depends on which area people are in, the court and the sheriff. We have, however, been hearing more about successful outcomes.

The Government is promoting the idea that grandparents are important in the family unit, but it has not put on paper that they are important and are part of the family unit. Grandparents can be easily discarded and pushed to the side without any comeback.

Louise Johnson: I sound a caveat about the use of mediation specifically in relation to domestic abuse. The problem again is conflict. Domestic abuse is often tagged as "conflict" as opposed to what it is, which is misuse of the exercise of power and control. Mediation is definitely not recommended where domestic abuse is an issue, because mediation relies very much on equality and a standing of equal power between the parties. One person can have more power and be able to sway things not for the best interests of the other person or the child, unfortunately.

Also, do not forget that children's voices are not heard in mediation. That is another issue. Some women have to mediate every day just to get through life with abuse, so putting them in that situation would not be in their or the child's best interests.

We would absolutely endorse shrieval training so that sheriffs are aware of what constitutes domestic abuse and what constitutes conflict. The problem is that abuse that has been carried out is not considered in post-separation child contact. If abuse has happened, it will continue. Evidence, research and experience across the board show that that will happen, but that is just not being considered.

We would also endorse training for lawyers. There are some exceptionally good lawyers, but unfortunately some just do not get domestic abuse, and regard it as being warring parties and mothers being hostile because they will not agree to contact. That is very destructive for children, whose views are not taken into account, and it is dangerous.

We would certainly support awareness-raising training for solicitors and the bench, and for specialised family sheriffs.

The Convener: I want to bring in John Finnie and then Christian Allard, and to move on to cohabitation rights as opposed to the rights that come with marriage certificates. Christian Allard

put his hand up after John Finnie. I am getting a French look.

Christian Allard: My question is on what is being discussed.

The Convener: So it is a supplementary. What is John Finnie's question about?

John Finnie: It is about another category.

The Convener: Right. You see that he is a gentleman.

Christian Allard: I heard what was just said about children's voices not being heard in mediation. That is very important. We have talked about being child centred. How can there be mediation if the children are not involved? If there is a way to involve children in mediation, I would like to hear views on that.

Stephen Brand: That is not prohibited. Children can be part of mediation but, generally, the idea is that the parents try to resolve the issues for the children in mediation.

Christian Allard: So they are excluded most of the time.

Stephen Brand: Yes—usually.

The Convener: The process is voluntary. I take the point that somebody might feel that they have to—

Christian Allard: That goes against the idea of having child-centred legislation. If children are excluded from mediation for most of the time, is that the right way to go about it?

Stephen Brand: If an older child is involved, the parents will always be aware of what that child wants.

Jennifer Gallagher: I, too, am a solicitor mediator. I agree with Stephen Brand that, if a couple goes into mediation, the process is voluntary. The mediator very much tries to focus the parents on thinking about their children, what is best for their children and making decisions for their family on that basis. The children may not physically be in the mediation room, but they will certainly be very much at the centre of the process.

The Convener: Have you ever had a grandparent at a mediation meeting?

Jennifer Gallagher: Not personally, but I am aware of situations where they have been involved.

Stephen Brand: Again, I have not personally had a grandparent at such meetings, but I am aware of such situations.

The Convener: So is it common or uncommon?

Stephen Brand: It is not common.

The Convener: I just wanted to know.

10:45

John Finnie: That being the case, I think that I know the answer to my next question, which was about the category of kinship carer. There can be financial responsibility attached to that. Is the legislation sufficiently flexible to pick up kinship carers, or does that issue need to be looked at?

Stephen Brand: I think that it probably needs to be looked at.

The Convener: Can you be a bit more specific? When my boiler does not work, I know that it needs to be looked at, but I also know that there is something technically wrong with it.

Jennifer Gallagher: In my experience of dealing with kinship carers, the social work department has encouraged the person looking after the child to apply for a residence order or for parental rights. There are many issues to do with funding for that and how people practically go about all of this. Sometimes the social work department will fund applications, but legal aid can also be applied for.

The Convener: Excuse me, but did you say that the social work department funds applications to the court?

Jennifer Gallagher: It will do.

The Convener: Is that common?

Jennifer Gallagher: Reasonably common.

The Convener: I did not know that. Do you have another question, John?

John Finnie: I will leave it at that, convener.

The Convener: That was interesting. I did not realise that social work would fund that sort of thing.

I want to move on to cohabitation and the question whether marriage has seen its day. Well, mine has, but that was a long time ago. Who wants to talk about cohabitation? After all, society now is very different from society 30 or 40 years ago. Do you have any views on that, and are you prepared to put them on public record?

Stephen Brand: The 2006 act was very good in that it tried to cover situations in which people had lived together for a long period of time without appreciating that they had no rights—in other words, the often misunderstood concept of marriage by cohabitation with habit and repute. In that sense, the act was quite radical—indeed, England still has no equivalent—but the difficulty was that there was not a lot of publicity about it. Even now, much of the population probably still

does not quite understand that they might have rights. The people who come into our offices after a relationship has broken down tend to be those who have houses and are worried about their rights in that respect rather than those who simply want to know about the potential for a claim. There still needs to be some education about the extent of cohabitation rights.

Moreover, any new law is difficult to interpret. When this legislation came in, all the lawyer scratched their heads and asked, "What are we going to do?", and the position is probably the same 10 years down the line. There are all sorts of questions such as whether we should be more specific about how the rights are applied, who they apply to and so on, but first of all, I think that, to a certain extent, we need to educate the public about their rights and how they can apply for relief if a relationship breaks down. It is not just about situations in which a house is involved.

Jennifer Gallagher: I agree. Members of the public do not really fully understand the framework in Scotland. As I have made clear in my submission, many online family law resources are not specific to Scotland, and people do not appreciate that Scotland has its own framework.

The Convener: People can do their own will, which is another great danger.

Jennifer Gallagher: Indeed. It is important that people understand their rights and what is available.

The Convener: But is that all it is? What is available at the moment is one issue, but do the things that are available go far enough? I come back to my question whether marriage had seen its day.

Stephen Brand: It is a fundamental question. Should we treat people who cohabit the same as people who are married? That is a political matter—

The Convener: I beg your pardon, but it is a legal question. Cohabiting is very common now and, as you have said, people do not understand that they do not have certain rights in financial settlements and so on. Given that there has been this big cultural change, should we tell people, "Well, if you can establish that you have cohabited properly, you will have these rights in financial settlements," and so on, or would that be wrong? Can you, with your lawyer's hat on, give me an answer?

Stephen Brand: I am not sure that people who are cohabiting would be comfortable with all the rights and responsibilities that would flow with being considered as if they were married. People who get married take a conscious decision to do so and they understand better that rights and responsibilities come with a marriage whereas they could fall into cohabiting and not realise that.

The Convener: Some of us fall into marriage.

Stephen Brand: Yes, but the decision to marry is much more conscious.

The Convener: I know what you are saying.

Jennifer Gallagher: That is right. When looking at financial provision on divorce, it is quite easy to pinpoint when the obligation starts because you have the date of marriage. As Mr Brand said, people can gradually drift into cohabitation. From the lawyer's perspective, if somebody who comes in to see you has the same rights as a married couple—if the law was changed in that way—it would be difficult to pinpoint the point at which the obligations started. Do you want to have a concept of cohabitation property in the same way as you have a concept of matrimonial property? If so, the question that would follow is how exactly that is defined, and that would need a considerable amount of work.

The Convener: Yes, I understand the difficulties.

Kirsty Malcolm: I disagree slightly with what has been said so far about the knowledge of the public. When the legislation first came in in 2006, there was a distinct absence of knowledge about the introduction of the rights and people were still under the illusion that they could be a common-law husband or wife. That has moved on and the public are much more aware that there are rights available to them as cohabitants and former cohabitants under the legislation. In the past few years, there certainly seems to have been much greater uptake of the provisions in the 2006 act, particularly section 28, which relates to a cohabitation that ends during the cohabitants' lifetime.

I do not think that marriage has had its day. As a matter of law, it is perfectly appropriate to have a distinction between people who choose to cohabit and those who choose to marry. Mr Brand's point is absolutely right. A conscious decision is made at some stage to marry and people generally recognise what that commitment means in both a personal and a legal sense; they know that there will be property impacts on them in due course if the marriage comes to an end.

People can drift into cohabitation, but people also make a conscious decision not to marry because they do want to have the same sorts of property rights imposed on them, as they might see it, as they would if they were a married couple.

Roderick Campbell: Let us accept for the purposes of argument that the financial rights of cohabitants will be different from the rights of married people. Notwithstanding that, we have

had representations from solicitors that they cannot advise clients properly on the impact of section 28. Professor Mair said that section 28

"is poorly drafted, it is complicated and it is difficult to understand".—[*Official Report*, *Justice Committee*, 23 February 2016; c 8.]

Kirsty Malcolm's written submission suggests that she does not think that section 28 could be improved and says:

"Whilst heavily criticised, it is difficult to see what might take the place of section 28".

Can we expand the debate on whether section 28 is fit for purpose?

Kirsty Malcolm: Again, this is my personal view based on experience in practice. There is a recognised provision for financial provision on divorce in the Family Law (Scotland) Act 1985. That is very clear and it has been in operation for a long time now. It took 15 or 20 years for the interpretation of that legislation to bottom out and it has pretty much done so now through case law, although one or two areas are still untested.

The Convener: What are those untested areas?

Kirsty Malcolm: There are issues in relation to share options—how they would be valued, and how they would be taken into consideration—and there is still an on-going debate in relation to pension rights that is being litigated at the moment and is about to go to the Supreme Court. That is about the interpretation of regulations to deal with pensions and pension rights. There are those relatively minor areas but, in general terms, the 1985 act has been bottomed out and everyone knows how to advise on it and where to go with it.

I do not dispute that the 2006 act is a difficult framework to work with. Professor Mair's comment that it is ill drafted is a bit harsh. It is not easy to work with, but if one takes a structured approach, as the act tries to set out, and works with that, one can get to an answer.

As an alternative, I do not agree that we should fall back on exactly the same provisions as are in the 1985 act for married couples. The issues that apply to two people who live together as opposed to marrying can be very different, in their own minds as well as in practical terms.

There is no doubt that the test of whether one party has been economically advantaged or disadvantaged is a wide and open test. Drilling down, however, will reveal distinct areas where there is a need to counterbalance a person's financial or non-financial contributions within the context of that relationship. The biggest difficulty is the quantification of claims in section 28 proceedings. The courts have taken very different views of what should be taken into consideration. Again, a clearer line is now developing. It has perhaps taken a bit longer than it did under the 1985 act.

I do not see that an alternative along the lines of section 9 of the 1985 act, where distinct principles have been put in place, would work with the model of cohabitation. In effect, there is one principle in relation to cohabitation, and that is taking account of where one party or the other has been economically advantaged or disadvantaged. My understanding of the approach that was taken when the legislation was under consideration was that it was not possible to go much further with regard to cohabiting couples, because they do not make the same sort of commitments as married couples do. I do not see how that legislation could be altered or expanded in any way to reflect the need to maintain some sort of difference.

Roderick Campbell: I would be interested to hear what other people have to say on that point.

The Convener: As the convener, I was going to ask Mr Brand.

Stephen Brand: I agree with a lot of what Ms Malcolm said. Some solicitors would prefer much stronger or clearer guidelines as to how to advise clients, and there is no doubt that the issues are very difficult. The solicitor has to use his or her brain and explore the whole situation to see whether there is an economic advantage or disadvantage. There are cases in which it is quite clear that that is the case. I can think of one or two that I am dealing with at the moment in which there has clearly been an economic disadvantage to one party to the other's advantage. A lot of those cases eventually settle because there is a risk of going to court. Court is very expensive, and, although it is then less clear as to which guidelines should be used, people will compromise because they are afraid of the cost of going to court.

The legislation could be changed, but whether it would then be improved I do not know. I agree with Ms Malcolm's general views.

The Convener: Am I wrong in presuming that the result of section 28 proceedings is usually an order for a capital sum, although it can be paid by instalments? It excludes lots of other things.

Stephen Brand: Yes. It would be better for the courts to have the power to make property transfer orders. As I said earlier, a lot of people who come to a solicitor do so because houses are involved. It would be useful for the courts to be able to require a property transfer order. There are other issues, such as the time limits, which have also been criticised.

The Convener: Do you want to say something about those?

11:00

Stephen Brand: The concern was that family lawyers generally had to worry about time limits, and time limits of six months for a section 29 claim and a year for a section 28 claim made things quite tight. There was also an issue about when the date of separation was, because that in itself can frequently be a cause of arguments. When does that date of separation crystallise and when does the one year start from?

Six months is definitely too short a period for intestacy claims. For the one-year period, it would probably be good to have a failsafe whereby an action could be raised on cause shown. One of the submissions suggested that, and I agree with that. That is probably quite a good provision to put in.

The Convener: We will perhaps come back to that.

Gil Paterson: I will try to get at that point. We know that some people who cohabit are in a relationship for longer than some people who marry are, yet people who marry have all the time in the world to decide when to get their claim in, and the financial bargaining will take place at that time, whereas someone who cohabits has only a year to get everything in order, after which the matter is time barred. If someone who is in a relationship passes away—it might have been a good relationship in which there was no conflict of any kind and in which the partners spent equally—it seems that the surviving partner has only six months to act. I understand the marriage bit, but this is more technical in a way and is nothing to do with marriage. Will you comment further on that?

Kirsty Malcolm: The time limit issue has vexed a lot of people in practice. I do not agree that the one-year period is too short, but I do not disagree that a six-month period for claims after death is too short. I made the point in my submission that, for a claim under section 29 when one of the cohabitants has died, six months is a very short time, particularly when people are grieving. In practice, more often than not, in those situations an application is made to the court and is then put on hold pending discussion. Quite often, those cases do not go any further because they are resolved once the details of an estate have been ingathered, but that does not necessarily happen within six months.

I understand that the time limits were put in place primarily to avoid stale claims. The situation is slightly different from that in which people are married because, once someone is married, on-going obligations are imposed by law in relation to maintaining a party and so on, and there is a communal property that has to be divided at, or with reference to, a specific point in time.

That framework does not exist for cohabitants, so there has to be a period within which claims must be brought. If the process were left open ended, somebody could turn up two or three years down the line after the end of a relationship and say that they felt hard done by and that they needed X, Y and Z, when the evidence to establish or rebut their claim would not necessarily be easy to pull together. There has to be a distinction, and I see that as part of the distinction between the ending of a marriage and the ending of a cohabiting relationship.

Nevertheless, for claims on death, there ought to be the possibility of extending the time limit on cause shown. That existed in the Family Law (Scotland) Bill as it was originally drafted, but it disappeared somewhere during the parliamentary stages—I do not understand how it disappeared; it just did. Odd situations can arise as a matter of law, which can terminate somebody's claim or make it impossible for them to claim within the six-month period because another issue has to be resolved. Such a situation arises, for example, when somebody has written a will but that will is challenged and the party who might have been left money in it as a cohabitant finds themselves, six months later, time barred from making a claim under the 2006 act.

A rather more complicated situation that can arise relates to children who have not been provided for in a will. A Latin maxim kicks in there. I think that that is subject to review as part of the succession review. An affected child has to seek a declarator that the will should be set aside, and that procedure takes much longer than six months. In such exceptional circumstances, the six-month period could be extended but, again, it would be on cause shown.

The Convener: I understand.

Gil Paterson: I think that Ms Malcolm has clarified the position. I can well imagine that some people do not know about the six-month rule or have forgotten it. Is there a provision in law that enables a case to be heard and to proceed if eight or nine months have passed?

Kirsty Malcolm: At present, no. I am saying that such a provision could be introduced to allow an extension of the six-month period on cause shown.

Gil Paterson: That clarifies the position.

Elaine Murray: I was going to ask about the time limit, but that has been well explored.

We have had evidence from stakeholders that the courts have interpreted section 28 of the 2006 act as allowing a court order only for the payment of capital sums.

The Convener: I asked about that. You must have missed it.

Elaine Murray: Okay.

The Convener: However, you might want to add something.

Elaine Murray: I was going to ask whether, irrespective of the fact that it may be undesirable for cohabitation to equate to marriage in terms of all the rights, a wider range of court orders should be available than section 28 provides for.

The Convener: Mr Brand is nodding.

Stephen Brand: Yes. The ability to transfer property would be useful.

The Convener: Will you give us an idea of the orders that would make sense? What, specifically, would you like to see?

Jennifer Gallagher: An order that allowed transfer of the family home, as is available in a divorce case, would be useful. That cannot be granted, but it would be helpful in many cases.

Kirsty Malcolm: I would go further. Under section 29, there is scope for the transfer of property in a wider sense. The facility for that to happen in relation to claims under section 28 would be of benefit.

I have been involved in a number of cases where the couple concerned had built up a substantial property portfolio between them and, at a time of recession, when property prices had plummeted, they were facing the unenviable situation of possibly having to realise everything to sort matters out because they did not have scope to get orders to transfer the properties between themselves. Equally, there can be situations where both people have put money into a life policy or something of that nature. In relation to couples who are divorcing, transfer orders are available for moveable property. It might be appropriate to extend that to cohabitants, which would extend this beyond heritage. Under section 29, a property transfer order is available. Something similar under section 28 would widen the scope for resolving such disputes.

Elaine Murray: So you had not asked about that, convener. [*Laughter*.]

The Convener: You are quite right. You just rebuke me. I do not mind—I am tough.

Roderick Campbell: One of the thrusts of the submissions is that there is a lack of publicity for judgments that sheriffs give on the application of section 28. What are the panel's views on that? How might that be improved?

The Convener: That has reduced everybody to silence.

Kirsty Malcolm: I think that I raised that point.

The Convener: You committed it to writing and Rod Campbell has scrutinised it.

Kirsty Malcolm: Yes. The situation is disappointing. I have been involved with publishers on the matter. I have been fortunate in that a lot of people have passed to me judgments that they have obtained in relation to section 28 and section 29 applications that have not been published on the Scottish Courts and Tribunals Service website. That has given me an insight into how certain aspects are working that is not readily available to the wider profession.

I am aware that a far greater number of section 28 applications have been decided on by courts, but nobody knows about them. If we are to develop the law in accordance with other legislation and if practitioners are to properly understand the approach that a court might or might not take, the decisions that sheriffs are making need to be publicised.

I do not know what rules apply and what dictates where sheriffs put their judgments on the Scottish Courts and Tribunal Service's scotcourts website. Some sheriffs are possibly reticent to publish judgments because they are not terribly certain about the approaches that they have taken to section 28. It can only help those in the shrieval profession if there is more publicity about the judgments that are being reached. Everybody will benefit from that, but I do not know how we move that on or persuade sheriffs to put their judgments on the internet.

The Convener: Do sheriffs decide that?

Kirsty Malcolm: Somebody once said to me that sheriffs do not have a choice and that they are supposed to always publish, but there is no way that they do that.

The Convener: Nobody knows—there is the conundrum. We will find out. Sheriffs will know that we have raised the issue. Secret sheriffs.

Ian Maxwell: This point is connected to section 28 and the spectrum of family cases. In Scotland, we have a great lack of knowledge about what happens with family cases in court. We have a problem with our statistics in that only the primary crave is recorded, so anything that is not the primary crave is missed. We do not have routine publication of sheriffs' judgments and we will not get routine publication of Sheriff Appeal Court judgments; we have routine publication only at the Court of Session level.

I appreciate that such things are not always within the remit of the committee or the Parliament, but there should be a move towards publishing all judgments—family judgments obviously get anonymised. That would give us far

more information on what is happening in courts throughout the land. At the moment, sheriffs principal are the prime decision makers on whether things are published. If an individual sheriff feels that a case in which they have been involved is notable, they will put it forward, but there is no system for ensuring that important cases get published.

The Convener: The Scottish Parliament information centre could clarify for the committee the rules that pertain to the publication of shrieval judgments.

I will stop the questions there, because we are time constricted—we have a stage 2 coming. We will write a report on issues for the next committee. I will go round all the witnesses, although you do not have to say anything. I ask you to be brief—that is the key word. I do not mean you, Ms Johnson; you are a wonderful speaker.

Louise Johnson: You are peering at me.

The Convener: I am—I did not handle that very well.

I ask each witness to make a single point that you would like us to focus on. It can summarise what you have said or even be a point that you have not addressed yet.

Louise Johnson: There is nothing fundamentally wrong with sections 11(7A) to 11(7E) of the Children (Scotland) Act 1995. What is needed is shrieval training and more understanding of how the law works in relation to domestic abuse and what its impact is. Training is also required for legal professionals and, actually, for anyone involved in the process who gives a view on whether domestic abuse is an issue.

Ian Maxwell: I disagree with Louise Johnson, as there is a need for a fundamental look at family law. We are 20 years on from the main legislation and, although it was progressive for its time, society has changed. I would look for things such as shared parenting to be more acknowledged in and supported by the legal system. I hope that, in its legacy report for the committee in the next parliamentary session, the committee will suggest looking at revising family law in a fairly fundamental way.

The Convener: That would really be for the Government. The next committee will be the recipients of our report.

June Loudoun: We believe that there is an anomaly in family law with regard to grandparents. A child can legally make a claim on their grandparents' estate if their parents predecease their grandparents, but they have no legal right of contact or a right to claim their grandparents' love and support during their lifetime.

Kirsty Malcolm: My comment relates to the different statuses. I think that we have established a status where we recognise marriage and we now have a good recognition of cohabitation as something that devolves legal rights. There is still work to be done, and expanding our understanding of the decisions that are being made is key to that.

Jennifer Gallagher: Section 28 of the 2006 act should probably be looked at again to see whether there are ways in which it can be made clearer for the people who use it in practice. The FLA members who responded gave the clear view that it is difficult to quantify such claims for clients. That should be looked at, by asking whether amendments can be made to the legislation that would better focus how we go about doing that.

Stephen Brand: I wish for a move towards specialist sheriffs who are dedicated towards dealing with family matters—even towards a family court with mediators and social workers. That is the direction that the law should take, but that is a much bigger issue. Generally, there should be more publicity about cohabitants' rights.

The Convener: I thank you all very much for your evidence. As I said, we will draft a report for the next committee, and you have raised important issues that I hope will be taken up by the next Government, whoever forms it.

11:16

Meeting suspended.

11:23

On resuming—

Abusive Behaviour and Sexual Harm (Scotland) Bill: Stage 2

The Convener: Under agenda item 3, we continue with stage 2 proceedings on the Abusive Behaviour and Sexual Harm (Scotland) Bill, which we began last week. Members should have a copy of the bill, the marshalled list and the groupings of amendments for today's consideration. We will start at section 10, and we will complete stage 2 today.

I welcome to the meeting Michael Matheson, the Cabinet Secretary for Justice, and his officials.

Section 10—Making of order on dealing with person for offence

The Convener: Amendment 19, in the name of the cabinet secretary, is grouped with amendments 24 to 33 and 49.

The Cabinet Secretary for Justice (Michael Matheson): The amendments in this group adjust the part of the bill that deals with sexual harm prevention orders and sexual risk orders to acknowledge that relevant criminal offences can result from acts of omission as well as acts of commission.

Amendment 19 does that by inserting in section 10(1)(c) the words "or made the omission" after

"the person has done the act".

That is necessary to make it clear that the circumstances in which a court can make a sexual harm prevention order on sentencing a person can include circumstances in which a person is found unfit to stand trial but the court determines that the person has omitted to do something and that omission would constitute an offence.

Amendments 24 to 26 adjust section 12 as necessary to provide for acts of omission. Amendment 27 makes a similar change in relation to section 13. Amendments 28 to 33 make the necessary adjustments to section 14, and amendment 49 amends section 33 to acknowledge that sexual risk orders and interim sexual risk orders may be breached by omission.

I move amendment 19.

The Convener: In my haste, I forgot to say good morning to the cabinet secretary; I should never forget to be polite to him.

It seems that no one else wishes to comment.

Amendment 19 agreed to.

The Convener: Amendment 20, in the name of the cabinet secretary, is grouped with amendments 22, 38 to 40, 51 and 52.

Michael Matheson: Amendments 20, 22, 38 to 40, 51 and 52 make minor drafting changes that are necessary to clarify for the reader of the bill the linkages between various sections of the bill and the orders to which they refer, and to improve how the various orders are defined.

Amendments 20 and 22 link the making of sexual harm prevention orders under sections 10 and 11 with the provisions on the content and duration of those orders that are provided in section 15. Similarly, amendment 40 links the making of sexual risk orders under section 26 with the provisions on the content and duration of those orders that are provided in section 27.

Amendments 38, 39, 51 and 52 bring greater precision to the definitions of the orders and interim orders that are provided in sections 24 and 34 respectively.

I move amendment 20.

Amendment 20 agreed to.

The Convener: Amendment 21, in the name of the cabinet secretary, is grouped with amendments 23, 34 to 36 and 41 to 44.

Michael Matheson: Amendments 21, 23, 34 to 36 and 41 to 44 will ensure that, before sexual harm prevention orders and sexual risk orders are made, the potential subject and, as appropriate, the police and the prosecutor can make written or oral representations to the court. They will also ensure that the subject and the chief constable can make such representations before such an order is varied, renewed or discharged. That recommendation was made in the committee's stage 1 report, and the convener indicated in her speech in the stage 1 debate that she would welcome action from the Government in this area to put the matter beyond doubt at stage 2.

We are clear that there should be an entitlement to make such representations, whether orally or in written form, and we believe that the amendments in the group put the matter beyond doubt.

I move amendment 21.

The Convener: The committee welcomes that in the context of the right to representation under the European convention on human rights.

Amendment 21 agreed to.

Section 10, as amended, agreed to.

Section 11—Making of order against qualifying offender on application to sheriff

Amendments 22 and 23 moved—[Michael Matheson]—and agreed to.

Section 11, as amended, agreed to.

Section 12—Qualifying offender: conviction etc in Scotland

Amendments 24 to 26 moved—[Michael Matheson]—and agreed to.

Section 12, as amended, agreed to.

Section 13—Qualifying offender: conviction etc elsewhere in United Kingdom

Amendment 27 moved—[Michael Matheson]—and agreed to.

Section 13, as amended, agreed to.

Section 14—Qualifying offender: conviction etc outside United Kingdom

Amendments 28 to 33 moved—[Michael Matheson]—and agreed to.

Section 14, as amended, agreed to.

Sections 15 to 18 agreed to.

Section 19—Variation, renewal and discharge

Amendments 34 to 36 moved—[Michael Matheson]—and agreed to.

Section 19, as amended, agreed to.

Section 20—Interim orders

The Convener: Amendment 37, in the name of the cabinet secretary, is grouped with amendments 45 to 47.

11:30

Michael Matheson: Amendments 37 and 45 to 47 relate to interim sexual harm prevention and interim sexual risk orders. Amendments 37 and 47 are minor technical drafting amendments that are designed to ensure that the phrase "may be made" is directly linked to the subject of the actions that are set out in sections 20(7)(b) and 30(7)(b) respectively.

The more substantial amendments 45 and 46 provide that, when making an interim sexual risk order, the sheriff must be satisfied not only with regard to the need for making such an order but that there is a prima facie case that the person has done an act of a sexual nature that is being relied on in relation to a connected application for a full sexual risk order under section 20(6)(2). The test for such a prima facie case is already familiar to the courts in relation to interim interdicts and other interim civil orders. Amendments 45 and 46 align interim sexual risk orders with the risk of sexual harm orders that they replace.

I move amendment 37.

Roderick Campbell: Good morning, cabinet secretary. Why is the bill not being amended to provide a prima facie test for interim sexual harm prevention orders?

Michael Matheson: Sexual harm prevention orders are made after the person in question has been convicted of the offence. That is different from the situation with sexual risk orders, and there is therefore no need for such a qualification.

Amendment 37 agreed to.

Section 20, as amended, agreed to.

Sections 21 to 23 agreed to.

Section 24—Interpretation of Chapter

Amendments 38 and 39 moved—[Michael Matheson]—and agreed to.

Section 24, as amended, agreed to.

Section 25 agreed to.

Section 26—Making of order

Amendments 40 and 41 moved—[Michael Matheson]—and agreed to.

Section 26, as amended, agreed to.

Sections 27 and 28 agreed to.

Section 29—Variation, renewal and discharge

Amendments 42 to 44 moved—[Michael Matheson]—and agreed to.

Section 29, as amended, agreed to.

Section 30—Interim orders

Amendments 45 to 47 moved—[Michael Matheson]—and agreed to.

Section 30, as amended, agreed to.

Section 31 agreed to.

After section 31

The Convener: Amendment 48, in the name of the cabinet secretary, is in a group on its own.

Michael Matheson: Amendment 48 provides for a new section in the bill that requires the court to intimate to the subject of a sexual risk order when such an order is made, varied, renewed or discharged. The amendment's purpose is to

provide an equivalent to section 22 in relation to sexual harm prevention orders. Serving a copy of the order assists in the formal record-keeping of the subject's awareness of the order's status, which can, among other things, help in any future proceedings relating to a breach of the order.

I move amendment 48.

Amendment 48 agreed to.

Section 32 agreed to.

Section 33—Application of notification requirements on breach of order

Amendment 49 moved—[Michael Matheson]—and agreed to.

The Convener: Amendment 50, in the name of the cabinet secretary, is in a group on its own.

Michael Matheson: Amendment 50 deals with what happens to existing offender notification requirements imposed under the Sexual Offences Act 2003 when a person breaches a sexual risk order. Such breaches keep alive any notification requirements that would otherwise expire but, in the bill as introduced, it was not clear how long a notification period would continue in place. Amendment 50 clarifies that it will continue in place until the expiry of the sexual risk order.

I move amendment 50.

Amendment 50 agreed to.

Section 33, as amended, agreed to.

Section 34—Interpretation of Chapter

Amendments 51 and 52 moved—[Michael Matheson]—and agreed to.

Section 34, as amended, agreed to.

Section 35—Breach of orders equivalent to orders in Chapters 3 and 4: offence

The Convener: Amendment 53, in the name of the cabinet secretary, is grouped with amendments 54 to 60.

Michael Matheson: Amendments 53 to 60 are mostly of a technical nature and describe more clearly how the various equivalent orders that are made elsewhere in the United Kingdom will be enforced in Scotland if they are breached in Scotland, as set down in section 35.

Amendments 53 to 56 replace references to orders in England and Wales and Northern Ireland with all-encompassing reference to orders

"from elsewhere in the United Kingdom".

Amendments 57 to 59 clarify that various references in section 35(5) to orders under the Sexual Offences Act 2003 do not relate to such orders made in Scotland.

Amendment 60 adds two types of orders that a small number of people continue to be subject to in England and Wales despite the relevant legislation having been repealed.

I move amendment 53.

Amendment 53 agreed to.

Amendments 54 to 60 moved—[Michael Matheson]—and agreed to.

Section 35, as amended, agreed to.

Sections 36 and 37 agreed to.

Section 38—Saving and transitional provision

The Convener: Amendment 61, in the name of the cabinet secretary, is grouped with amendments 62 to 66.

Michael Matheson: Amendments 61 to 65 are largely technical in nature, and generally improve and better explain the saving and transitional provisions in section 38 that are necessary to maintain Scotland's existing civil order regime until such times as the new orders come on stream.

Amendment 61 removes a definition of "new order" and adds an interim order under the old regime to the definition of "existing order", so that they continue to have effect during the transition to the new regime.

Amendment 63 provides a new definition of "corresponding new order" that better explains which of the existing civil orders correspond with, and have their equivalent in, the new set of orders. Amendment 62 makes use of that new definition in section 38(3)(b).

Amendment 64 expands the definition of

"relevant sections of this Act"

in section 38(4) to include sections relevant to interim sexual offences prevention orders and interim risk of sexual harm orders in consequence of amendment 61.

Amendment 65 removes a definition that is no longer required as a result of the other amendments to section 38.

Amendment 66 is a consequential amendment that brings the new civil orders that are created by this bill into part 5 of the Police Act 1997. As a result, details of sexual harm prevention orders and sexual risk orders may be disclosed on certain enhanced disclosures so that a person's suitability to engage with children or protected adults in certain limited contexts can be assessed. For example, prospective adoptive parents would be subject to that sort of enhanced disclosure, as

would people applying for a guardianship order in relation to an adult with incapacity. That replicates the provision for enhanced disclosure that already exists in relation to the orders that this bill replaces.

I move amendment 61.

Amendment 61 agreed to.

Amendments 62 to 65 moved—[Michael Matheson]—and agreed to.

Section 38, as amended, agreed to.

Sections 39 to 41 agreed to.

Schedule 2—Minor and consequential modifications

Amendment 66 moved—[Michael Matheson]—and agreed to.

Schedule 2, as amended, agreed to.

Sections 42 to 44 agreed to.

Long title

Amendment 2 moved—[Margaret Mitchell].

The Convener: The question is, that amendment 2 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Mitchell, Margaret (Central Scotland) (Con)

Against

Allard, Christian (North East Scotland) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Finnie, John (Highlands and Islands) (Ind)
McInnes, Alison (North East Scotland) (LD)
Murray, Elaine (Dumfriesshire) (Lab)
Paterson, Gil (Clydebank and Milngavie) (SNP)

The Convener: The result of the division is: For 2, Against 6, Abstentions 0.

Amendment 2 disagreed to.

Long title agreed to.

The Convener: That ends stage 2 consideration of the Abusive Behaviour and Sexual Harm (Scotland) Bill. Thank you very much, cabinet secretary. We went through that at breakneck speed.

Subordinate Legislation

Police Pensions (Miscellaneous Amendments) (Scotland) Regulations 2016 (SSI 2016/75)

11:41

The Convener: We move straight on, as there is a long day ahead. Agenda item 4 is subordinate legislation. The committee will consider four negative instruments.

The Police Pensions (Miscellaneous Amendments) (Scotland) Regulations 2016 give a scheme member who has entered into a same-sex marriage equivalent survivor benefits to those that are available to scheme members in a civil partnership. The Delegated Powers and Law Reform Committee agreed to draw the regulations to the attention of the Parliament for reasons that members already know. There was an error. The Government acknowledged that error and undertook to address it in a future amending instrument.

As members have no comments on the regulations, are they content to make no recommendation in relation to them?

Members *indicated agreement.*

Firefighters' Compensation and Pension Schemes (Scotland) Amendment Order 2016 (SSI 2016/77)

The Convener: The second instrument is the Firefighters' Compensation and Pension Schemes (Scotland) Amendment Order 2016. The order amends the compensation scheme order to allow a person who is entitled to a pension or gratuity under that order to retain it following remarriage or the forming of a civil partnership. The Delegated Powers and Law Reform Committee did not draw the order to the attention of the Parliament on any grounds within its remit.

Do members have any comments? The order is an excellent move, as it seems that there was an injustice. Are members content to make no recommendation in relation to it?

Members *indicated agreement.*

Firefighters' Pension Scheme (Scotland) Amendment Regulations 2016 (SSI 2016/78)

The Convener: The third instrument is the Firefighters' Pension Scheme (Scotland) Amendment Regulations 2016. The regulations make provision for new entitlements to shared parental pay. Again, the Delegated Powers and

Law Reform Committee did not draw the regulations to the attention of the Parliament on any grounds within its remit.

Do members have any comments on the regulations? Again, the move seems very reasonable. Are members content to make no recommendation in relation to the regulations?

Members *indicated agreement.*

Firemen's Pension Scheme (Amendment) (Scotland) Order 2016 (SSI 2016/79)

The Convener: The fourth and final instrument is the Firemen's Pension Scheme (Amendment) (Scotland) Order 2016. The order allows a person who is entitled to a pension under the Firemen's Pension Scheme Order 1992 and also to a pension under the Firefighters' Compensation Scheme (Scotland) Order 2006 to retain the former pension following remarriage or the forming of a civil partnership. Again, the Delegated Powers and Law Reform Committee did not draw the order to the attention of the Parliament on any grounds within its remit. Do members have any comments on the order?

John Finnie: I have a very brief comment. It is disappointing that, in 2016, we are still being very gender specific. We have heard comment on this before, but it is worth saying again that we should be using the word "firefighters".

The Convener: I think that that is simply a technical matter, because the previous order was the Firemen's Pension Scheme Order 1992. Thereafter, "firefighters" are referred to. I think that it is simply a matter of our being unable to change existing legislation in that manner, but I take your point. I noticed that.

Elaine Murray: The fact that we now use the word "firefighters" instead of "firemen" shows the progress that has been made since 1992.

The Convener: We have made progress. It is international women's day, and your point has been made.

Apart from that, are members content to make no recommendation in relation to the order?

Members *indicated agreement.*

The Convener: That concludes our consideration of our public business. We now move into private session.

11:44

Meeting continued in private until 12:04.

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