OFFICIAL REPORT
AITHISG OIFIGEIL

Justice Committee

Tuesday 6 March 2018

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 6 March 2018

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JUSTICE COMMITTEE
8th Meeting 2018, Session 5

CONVENER

*Margaret Mitchell (Central Scotland) (Con)

DEPUTY CONVENER

*Rona Mackay (Strathkelvin and Bearsden) (SNP)

COMMITTEE MEMBERS

*George Adam (Paisley) (SNP)
*Maurice Corry (West Scotland) (Con)
*John Finnie (Highlands and Islands) (Green)
*Mairi Gougeon (Angus North and Mearns) (SNP)
*Daniel Johnson (Edinburgh Southern) (Lab)
*Liam Kerr (North East Scotland) (Con)
*Fulton MacGregor (Coatbridge and Chryston) (SNP)
*Ben Macpherson (Edinburgh Northern and Leith) (SNP)
*Liam McArthur (Orkney Islands) (LD)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Rosanne Cubitt (Relationships Scotland)
Isabella Ennis (Family Law Arbitration Group Scotland)
Annabelle Ewing (Minister for Community Safety and Legal Affairs)
Gordon Lindhurst (Lothian) (Con)
Nicos Scholarios (CALM Scotland)
Dr Marsha Scott (Scottish Women's Aid)

CLERK TO THE COMMITTEE

Peter McGrath

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Justice Committee

Tuesday 6 March 2018

[The Convener opened the meeting at 10:00]

Decision on Taking Business in Private

The Convener (Margaret Mitchell): Good morning and welcome to the Justice Committee's eighth meeting in 2018. We have received no apologies.

The first item is to make a decision on taking business in private. Do members agree to consider our forward work programme in private?

Members *indicated agreement.*

Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill: Stage 2

10:00

The Convener: The second item on the agenda is the continuation of stage 2 of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill. I refer members to the bill, the marshalled list and the groupings of amendments.

I welcome back to the committee Annabelle Ewing, the Minister for Community Safety and Legal Affairs, and her officials.

After section 8

The Convener: The first group of amendments is on the pursuer's liability for court fees in personal injury claims. Amendment 11, in the name of Daniel Johnson, is grouped with amendments 64 and 16.

Daniel Johnson (Edinburgh Southern) (Lab): The purpose of amendment 11 is to reconsider the pay-as-you-go model for court fees. It is an issue that has been raised by trade unions and other bodies as a not insignificant hurdle in bringing forward court actions. Amendment 11, in my name, seeks to allow fees to be paid at the end of the court action, rather than have them paid during its course. In a successful action, the fees would be a lot easier to settle once damages have been awarded.

In broad terms, amendment 11 is very much in line with amendment 64, which has been lodged by John Finnie, although his amendment goes further. I urge members to support both the amendments.

Some comments contrary to the amendments have been made by the Scottish Courts and Tribunals Service, which argues that the pay-as-you-go model encourages early settlement and that debt recovery would carry a cost. However, the argument that the pay-as-you-go model encourages early settlement is not particularly strong, given that the bill as a whole seeks to lower the barriers to people bringing court cases. Amendment 11 proposes something that is in line with that aim.

The nature of court actions is that people bring them forward via solicitors. The very fact that there would be an intermediary would simplify the recovery of debts, as courts would be pursuing solicitors firms and, similarly, solicitors firms will be very mindful about people's ability to pay court fees as they go. A person paying at the end of a service that has been undertaken and that they have procured does not mean that they stop

looking at whether they can afford it. Regardless of whether it is a court action or work that they are having done to their house, people will always have to be mindful of the bill that they are likely to face at the end. Simply paying at the end does not necessarily have a significant impact on that.

To recap, I say that the primary reason for amendment 11 is to lower the barriers to people bringing court actions. As I have said, the provision is being sought by several groups, including trade unions, to aid their work.

I move amendment 11.

John Finnie (Highlands and Islands) (Green): I align myself with everything that Daniel Johnson said. The issue is a concern for trade unions. The SCTS's suggestion about debt recovery is a wee bit off the mark: the nature of the engagement in the process means that debt recovery is extremely unlikely to be an issue. Indeed, I imagine it would be said that the parties involved had not acted in good faith if that were the case, and that it would have wider implications.

I initially had an amendment that was similar to Daniel Johnson's amendment 11, but I have been told that my amendment 64 is what is required to bottom out the issue. I support amendment 11 and encourage members to support my amendment 64.

The Minister for Community Safety and Legal Affairs (Annabelle Ewing): The main intention of amendment 11 appears to be to make court fees payable at the end of a case rather than, as is the case under the present system, as an action proceeds through the courts. Amendment 11 would apply only to personal injury proceedings. However, in practice, personal injury claimants usually do not pay up-front fees because they benefit from a success fee agreement. Part 1 of the bill encourages that practice and makes it more likely that personal injury claimants will not pay any up-front fees at all, including court fees. Thus, it could be argued that the real beneficiaries of amendment 11 could well be law firms and claims management companies.

A consultation on court fees closed recently: the Government's response to it was published last week, with impact assessments. I am sure that members will find it to be of interest because it sets out how the Government proposes to protect access to justice while retaining the current pay-as-you-go model of court fees in general terms. I have just signed new fees instruments for the period April 2018 to March 2021, which have now been laid for scrutiny by the Justice Committee and the Delegated Powers and Law Reform Committee.

The Scottish Government supports the current pay-as-you-go model because it encourages people to resolve their disputes outside the courts; it encourages settlement and it ensures that people value the resources of the court and use them wisely. The model also reinforces the level of financial risk if a party loses a case, it discourages unreasonable behaviour and it deters weak or vexatious claims.

The pay-as-you-go model actively supports those outcomes specifically because fees are charged in small increments as cases progress through each of the key steps in the legal process. The effect is to make the parties stop to consider whether it is appropriate for them to continue. Ultimately, under either pay as you go or payment of a bill at the end of the case, the losing party will normally pay the fees of both parties and the winner will be reimbursed or not billed. The two models affect the timing, but they do not change the eventual outcome.

It is worth pointing out again that under the proposals in section 6 for success fee agreements in personal injury actions, it will be the solicitor rather than the client who will be liable for all outlays that are incurred in provision of the relevant services to the client, including—of course—court fees. The client will therefore not pay for court fees in such cases, which are among the most commonly litigated in Scotland. There is therefore no barrier, under the bill, to access to justice for personal injury actions, because the individual pursuer will not pay fees up front.

Moreover, the solicitor, for his or her part, will recover the court fees as part of the expenses that are recovered from the opponent at the conclusion of the case, assuming that it is successful. Under the bill's provisions on qualified one-way costs shifting, the client cannot become liable for their opponent's court fees even if they lose their case.

It is worth pointing out that there are generous exemptions to the requirement for parties to pay court fees, which means that many vulnerable and disadvantaged groups of people do not pay court fees. The consultation analysis to which I referred a moment ago confirms that the Scottish Government will extend the exemptions regime to include recipients of Scottish welfare funds and people—often women—who are seeking civil protection orders, as was suggested by Scottish Women's Aid. In addition, the income threshold below which fees are not to be paid will be increased.

It is also worth noting the recent Supreme Court judgment—of which I am sure members are aware—concerning fees in employment tribunals. In striking down the fees because they were exorbitant and acted as a barrier to justice, the

Supreme Court went on to say something that I think is worth quoting. It said:

"Fees paid by litigants can, in principle, reasonably be considered to be a justifiable way of making resources available for the justice system and so securing access to justice."

It must also be stressed that billing for court fees at the end of cases would place an immense burden on the Scottish Courts and Tribunals Service, and the long-standing arrangements for payment of court fees on the pay-as-you-go principle would have to be completely revised and reformed, with consequent expense and disruption to business.

Furthermore, the Scottish Courts and Tribunals Service must attempt to recover court fees that are due on behalf of the taxpayer and there will, inevitably, be a measure of loss through irrecoverable debt. If court fees were not paid on a pay-as-you-go basis, the SCTS, and therefore the Scottish taxpayer, would have to pay them and the debt might not be recovered in all cases. There would therefore be a high cost to the Scottish Courts and Tribunals Service and the taxpayer, and the efficient conduct of business in Scotland's courts would be disrupted if the long-standing arrangements for court fees were to be fundamentally altered to make court fees payable at the end of cases, rather than on an on-going basis.

Liam McArthur (Orkney Islands) (LD): Will the minister take an intervention?

Annabelle Ewing: Certainly, I will.

Liam McArthur: I appreciate the clarification that the minister has given.

On the clawback provision, you have already suggested that the fees would be payable at each stage by the solicitor, who would then, in turn, recover them from the litigant. It seems unlikely that there would be considerable difficulty in clawing back from solicitors firms fees that are due to the courts. The problem would be for solicitors in recovering the fees, rather than for the Scottish Courts and Tribunals Service. Is that a fair reflection of the actual problem in chasing down debt?

Annabelle Ewing: I will turn that slightly on its head and look at it from the perspective of the motivation for amendments 11, 64 and 16, which is concern about access to justice. We all share that concern.

The most likely scenario for personal injury actions is that they will be done under success fee arrangements. In such circumstances—as Liam McArthur pointed out—the solicitor takes the hit in that they take on the obligation to pay up-front fees, including court fees. In terms of the barriers to justice that there have been concerns about, it is difficult to see how that will impede a person who is pursuing a personal injury action.

On Liam McArthur's point about recovery, court fees are currently paid on a pay-as-you-go basis, which helps to resource the work of the Scottish Courts and Tribunals Service, as it said in its letter to the committee. If we take away that on-going resource, we will have a problem. At the end of the day, seeking to recover might look easy on paper, but it might prove not to be practicable in every single case, for whatever reason.

The pay-as-you go system means that the money is going into the court service. If we were to take that away, we would take away a big part of the Scottish Courts and Tribunals Service's budget. That point is made in the relevant documentation about the fees instruments that the committee will consider shortly. The instruments look at the potential negative impact and possible shortfall for the operation of the Scottish Courts and Tribunals Service, which could run to £30 million-plus over the piece. That is a not insignificant budget item.

I understand the motivation for the amendments in the group, but bear in mind that the amendments are intended to cover personal injury actions and such cases will most likely benefit from success fee agreements. Therefore it is the solicitor that will, as part of the package, take on the onus of paying all fees, including court fees.

On the budgetary implications, if there were to be a gap in the budget of the Scottish Courts and Tribunals Service, it would ask central Government to fill it. Under the current financial budgetary constraints, if the service were to look for money from the justice portfolio to fill that gap, something else in the justice budget would have to give: there is not an infinite amount of money available.

Members have referred to the letter that the Scottish Courts and Tribunals Service sent to the committee about the impact that it, as the organisation that operates the system, says that such a move would have, and the fear of the unintended consequences of the amendments in the group.

On the procedural aspect, the service recommended use of secondary legislation on management of fees in order to retain the current flexibility and accessibility to a wider audience.

For those reasons, I respectfully ask Daniel Johnson to seek to withdraw amendment 11 and not to move amendment 16.

John Finnie's amendment 64 would mean that a pursuer who had the benefit of QOCS would not be liable for court fees at all. I consider

amendment 64 to be unnecessary. If a pursuer has the benefit of QOCS, they are liable to pay only the success fee at the end of the case, but only if they win.

As I said, it is the responsibility of the solicitor, not the pursuer, to pay up front all other expenses, including court fees. It is not clear to me why a substantial benefit should be provided to them when that benefit would come at a substantial cost to the Scottish Courts and Tribunals Service and, ultimately, the taxpayer.

10:15

In addition, I say that exemptions from civil court fees are best made in the body of court fees orders, in line with the existing enabling power in section 107 of the Courts Reform (Scotland) Act 2014. The new fees instruments that I mentioned include new additional exemptions that will be particularly relevant to women who seek civil protection orders for domestic abuse.

Therefore, although amendment 64 is well intentioned, for the reasons that I have set out at some length—I thought it important to do so—I believe it to be unnecessary and potentially harmful to the funding of the Scottish Courts and Tribunals Service, so I ask Mr Finnie to not move it.

Daniel Johnson: The arguments are relatively straightforward. I think that there is a slight contradiction between the minister's statement that law firms would be the primary beneficiaries and her dismissal of the point that they would be liable and would have to recover their fees. Amendment 11 addresses a significant barrier as regards cash flow, particularly for trade unions. For that reason, I press it.

The Convener: The question is, that amendment 11 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Finnie, John (Highlands and Islands) (Green)
Johnson, Daniel (Edinburgh Southern) (Lab)

Against

Adam, George (Paisley) (SNP)
Corry, Maurice (West Scotland) (Con)
Gougeon, Mairi (Angus North and Mearns) (SNP)
Kerr, Liam (North East Scotland) (Con)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)
Mackay, Rona (Strathkelvin and Bearsden) (SNP)
Macpherson, Ben (Edinburgh Northern and Leith) (SNP)
McArthur, Liam (Orkney Islands) (LD)
Mitchell, Margaret (Central Scotland) (Con)

The Convener: The result of the division is: For 2, Against 9, Abstentions 0.

Amendment 11 disagreed to.

Amendment 64 not moved.

Section 9—Expenses where party is represented free of charge

The Convener: The next group is on free representation. Amendment 37, in the name of the minister, is grouped with amendments 38 and 39.

Annabelle Ewing: In his report, Sheriff Principal Taylor recommended that

"in the interests of transparency, the arrangements as to how a litigation is to be funded must be disclosed to the court and intimated to all parties at the stage when proceedings are raised or notification given that a cause is to be defended. This applies equally to cases where legal representation is provided on a pro bono basis."

Amendment 37 makes that clear in the bill. The rationale for disclosure of funding arrangements is that that might facilitate earlier settlement of a case. Amendment 37 requires a party to disclose to the court that part or all of its legal representation has been provided free of charge. Section 10 already requires third-party funding to be disclosed, and the proposed new provision will complement that.

Section 9 permits a payment to be made to a charity when a party is successful in litigation and has been represented free of charge—in other words, on a pro bono basis. There is a long and honourable tradition of pro bono representation in Scotland. The payment to charity would be in place of expenses being paid to the successful party. Sheriff Principal Taylor thought that it would be inappropriate to compensate a party for a liability for expenses that it had not incurred. Amendment 38 makes it clear that the size of the payment to charity should be decided by the court on the same basis as it would have been if the representation had not been free of charge. That arrangement broadly follows the model of section 194 of the Legal Services Act 2007 for England and Wales.

Amendment 39 seeks to disapply the provisions of section 9(2) when a party is provided with financial assistance by the Equality and Human Rights Commission. Representation that is funded by the commission still has to be disclosed, as is the case for all funding arrangements. In its submission to the committee, the EHRC queried how section 9 would interact with section 28 of the Equality Act 2006, which empowers it to provide assistance in civil proceedings concerning equality law. The EHRC was concerned that, under section 9 of the bill as drafted, it might not get the expenses to which it would otherwise be entitled under section 29 of the 2006 act.

Amendment 39 therefore rectifies the situation, and the EHRC will still be able to claim expenses in such cases. My officials have checked, and

there appear to be no similar special expenses regimes for other public bodies; the Scottish Human Rights Commission, for example, is not empowered to fund civil proceedings by third parties.

I move amendment 37.

The Convener: I would comment that the amendments seem to improve transparency.

Amendment 37 agreed to.

Amendments 38 to 40 moved—[Annabelle Ewing]—and agreed to.

Section 9, as amended, agreed to.

Section 10—Third party funding of civil litigation

The Convener: The next group is on third-party funding. Amendment 41, in the name of the minister, is grouped with amendments 42 to 44, 61, 45, 46 and 12.

Annabelle Ewing: Sheriff Principal Taylor recommended both in his report and in evidence to the committee that all funding of civil litigation should be disclosed to the court, on the rationale that disclosure has implications for how parties proceed and their willingness not only to settle but to settle early. He said:

"disclosure expedites dispute resolution to the benefit of both parties and promotes efficiency in the legal system."

As a result, section 10 has been reworked to cover all disclosure of all funding of litigation. In the bill as introduced, section 10 provided only for transparency in the case of third-party funders with "a financial interest" in the outcome of a case. Amendment 41 adjusts section 10(1) to ensure that the section now applies a duty of disclosure to all funding of litigation in Scottish courts.

It might also be the case that a pursuer is crowdfunded by people using pseudonyms or who remain anonymous, so he or she will not know the identity of all the funders. Amendment 42 provides for that possibility and makes an exception to the rule that the names of all funders must be disclosed, with the effect that it will apply only if those funders are known to the litigant.

Amendment 44 now makes separate provision for those narrower cases in which the funder has a financial interest in the proceedings—in other words, commercial funding. Proposed subsection (2A) includes the text that was formerly in section 10(2)(c) as well as section 10(3), which is removed by amendment 43 and allows the court to make awards of expenses against venture capitalists and commercial funders if a case is lost.

Concern was expressed at stage 1 that solicitors and other providers of success fee agreements would also be pursued for expenses by a successful defender—albeit, of course, that such defenders would not be able to claim expenses from the litigant in personal injury cases because of the effect of qualified one-way costs shifting in section 8. New subsection (2B) as proposed in amendment 44 therefore makes it clear that the provision of section 10 on liability to expenses will not apply to providers of success fee agreements.

Amendment 61, in the name of John Finnie, makes it clear that a trade union or similar body representing the interests of workers will also not be liable for any expenses if the pursuer whom they have supported is unsuccessful in court. Amendment 12, in the name of Daniel Johnson, is similar, but restricts the exemption only to trade unions and exempts funding from trade unions from the general disclosure requirement. Such a provision would depart from Sheriff Principal Taylor's recommendations on transparency.

I have noted the concerns that were raised at stage 1 in relation to the application of section 10 to trade unions and similar bodies, and I am happy to support amendment 61. I am afraid that I cannot say the same of amendment 12. Although it seems likely that Mr Johnson was seeking to achieve the same results, I think that Mr Finnie's amendment better reflects the bill's overarching principles.

Finally, I note that in its written evidence to the Justice Committee, the Family Law Association expressed concerns about the application of section 10 in some situations. First, a pursuer, particularly one who has been dependent on their spouse or partner for support throughout their relationship, might require a litigation loan to raise proceedings against that spouse or partner. Secondly, parents might give a loan to a child to fund the deposit on a pre-marriage property that then becomes part of the dispute in subsequent proceedings.

The association's view is that it is neither helpful nor appropriate to require parties to family proceedings to disclose such funding arrangements. The Scottish Government agrees. Amendment 45 therefore disapplies section 10 in family proceedings that are funded by a close family member, who will therefore not be exposed to any risk of an adverse award of expenses. Additionally, in the interests of family privacy, the pursuer will not be required to disclose the funding. Close family members are defined as a spouse, civil partner, co-habitant, parent, child or sibling.

Amendment 46 is consequential on amendment 45 and defines family proceedings for the purposes of the exception for close family members.

I move amendment 41.

John Finnie: I align myself with the minister's comments, and I think that everyone is supportive of the principle of disclosure.

Throughout our deliberations, we have heard that the intention was never for trade unions to be caught up in the provisions. Amendment 61 refers to a

"trade union or similar body",

which will cover a range of staff associations. I hope that members will support that.

I strongly support the family privacy aspects that the minister outlined, which are an excellent addition to the bill.

Daniel Johnson: It is important that we explicitly exempt trade unions. I am minded to move amendment 12, although I recognise that John Finnie's amendment 61 largely achieves the same result; I will be mindful of that at the appropriate time.

The Convener: We will come to that in due course.

Liam McArthur: Like John Finnie, I welcome the amendments that improve transparency, which was certainly a theme at stage 1.

The minister talked about crowdfunding. I would welcome a bit of additional clarification on what the provisions that are to be put into the bill imply for what an individual who receives crowdfunding might have to declare. With any crowdfunding initiative, there will be people who will not be known to the individual, and that issue is captured in the provisions. However, there is the prospect of there being very many funders of small amounts that cumulatively add up to a lot. Is it the expectation that all those individuals would have to be revealed to the court under the amendments that we are considering?

Annabelle Ewing: I am proposing that only those funders who are known to the pursuer need to be disclosed. If the pursuer does not know who the people are, perhaps because they are using pseudonyms, they cannot be expected to disclose that information. I am happy to reflect further on that aspect as we move to stage 3, just to take a belt-and-braces approach and to ensure that we are covering what we need to cover and excluding what we need to exclude.

Liam McArthur: That is helpful. I welcome that clarification. I entirely support the principle; I am just wary about whether the provisions are proportionate in those specific circumstances.

The Convener: Were those your winding-up comments, minister?

Annabelle Ewing: Yes.

Amendment 41 agreed to.

Amendments 42 to 44 moved—[Annabelle Ewing]—and agreed to.

Amendment 61 moved—[John Finnie]—and agreed to.

Amendments 45 and 46 moved—[Annabelle Ewing]—and agreed to.

Amendment 12 not moved.

Section 10, as amended, agreed to.

Section 11—Awards of expenses against legal representatives

10:30

Amendment 47 moved—[Annabelle Ewing]—and agreed to.

Section 11, as amended, agreed to.

Section 12—Minor and consequential modifications to rule making powers

Amendment 48 moved—[Annabelle Ewing].

The Convener: The question is, that amendment 48 be agreed to. Are we all agreed?

Members: No.

The Convener: There will be a division.

For

Adam, George (Paisley) (SNP)
Finnie, John (Highlands and Islands) (Green)
Gougeon, Mairi (Angus North and Mearns) (SNP)
Johnson, Daniel (Edinburgh Southern) (Lab)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)
Mackay, Rona (Strathkelvin and Bearsden) (SNP)
Macpherson, Ben (Edinburgh Northern and Leith) (SNP)
McArthur, Liam (Orkney Islands) (LD)

Against

Corry, Maurice (West Scotland) (Con)
Kerr, Liam (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)

The Convener: The result of the division is: For 8, Against 3, Abstentions 0.

Amendment 48 agreed to.

Section 12, as amended, agreed to.

After section 12

Amendment 49 moved—[Annabelle Ewing]—and agreed to.

Section 13 agreed to.

Schedule—Auditors of court: modification of enactments

The Convener: The next group is on auditors of court. Amendment 51, in the name of the minister, is grouped with amendments 52, 50, 53 and 54.

Annabelle Ewing: Section 51(3) of the Solicitors (Scotland) Act 1980 and section 2(2)(b) of the Legal Profession and Legal Aid (Scotland) Act 2007 set out lists of auditors of court and other legal figures who are entitled to make certain complaints to the Scottish Solicitors Discipline Tribunal and the Scottish Legal Complaints Commission respectively. Those lists ought now to include the auditor of the sheriff appeal court, who, for the first time, is given statutory status by section 13 of the bill. Amendments 51 and 52 therefore allow the auditor of the sheriff appeal court to report any wrongdoing or inadequate professional services discovered on the part of a lawyer to the appropriate authorities.

Amendment 50 provides for situations in which there is a vacancy in the office of auditor of the Court of Session or where, for some other reason, the incumbent auditor of the Court of Session cannot carry out his or her functions—for example, due to illness or maternity or other family-related leave. Amendment 50 empowers the Lord President to appoint an ad hoc office-holder to act as auditor of the Court of Session for the relevant period. This amendment was requested by the Lord President of the Court of Session and has been agreed with his office and the Scottish Courts and Tribunals Service. The person so appointed on a temporary basis will be treated as the auditor of the Court of Session for most purposes, but he or she will not have any responsibility for the provision of the guidance under section 15 of the bill. A temporary auditor must, of course, comply with the statutory guidance.

Amendment 53 responds to concerns raised by the Lord President and the Scottish Courts and Tribunals Service that section 15, as drafted, would require the auditor of the Court of Session to produce a large tome of voluminous guidance on the taxation of judicial accounts, such as currently exists in England. It was feared by the Lord President and the Scottish Courts and Tribunals Service that the production of such a volume would take the auditor away from his or her normal duties, thus potentially causing delays in the taxation of accounts and even potentially inviting satellite litigation. The amendment amends section 15(2), which is the provision requiring the auditor of the Court of Session, as head of the auditor of court profession, to provide guidance on practice and policy relating to the taxation of accounts of expenses. It is intended that the auditor will provide guidance on questions of taxation of judicial accounts as they arise. That will build into a comprehensive set of guidance for practitioners, which is more consistent with the recommendations made by the Scottish civil courts review, headed by the former Lord President, Lord Gill. However, it should not be such an onerous task as to interfere with the auditor's other duties.

Amendment 54 makes it clear that, when preparing guidance, the auditor of the Court of Session must nonetheless have regard to the need for auditors across Scotland to exercise their functions in a manner that is consistent and transparent. The Scottish civil courts review referred to the objective of guidance as being

"to ensure that a consistent approach is taken to the taxation of accounts across Scotland".

Amendment 54 will achieve that objective, as regards the way in which we have now formulated the requirement.

I move amendment 51.

Amendment 51 agreed to.

Amendment 52 moved—[Annabelle Ewing]—and agreed to.

Schedule, as amended, agreed to.

After section 13

Amendment 50 moved—[Annabelle Ewing]—and agreed to.

Section 14 agreed to.

Section 15—Guidance

Amendments 53 and 54 moved—[Annabelle Ewing]—and agreed to.

Section 15, as amended, agreed to.

Section 16 agreed to.

Section 17—Group proceedings

The Convener: Group 14 is on group proceedings: opt-out proceedings. Amendment 13, in the name of Liam McArthur, is grouped with amendments 14 and 15.

Liam McArthur: I welcome the provisions in the bill that allow group proceedings to take place under Scots law. That is welcome, and I do not diminish the importance of that, but I believe that an opportunity will be missed to underscore the ambition that we have on protections for consumers if we limit ourselves simply to an opt-in model. The minister has argued that an opt-in solution is quicker and easier to put in place, but that is contested by the consumer organisation Which?, which suggests that it risks delivering very little for very few in practice. As Which? makes clear, breaches of consumer law invariably have a small impact on a large number of people, so the cumulative impact may be high but the

incentive for any single individual to bring legal action is perhaps very low.

For legislation that is meant to be about widening access to justice, and which looks set to do that in a number of areas, the current lack of ambition in relation to group proceedings is a concern. That is why my amendments seek to expand the options available, including the possibility of an opt-out route being taken. As colleagues will see, amendment 13 does not require opt-out rather than opt-in. Instead, it seeks to introduce discretion to the court, allowing it to take into consideration the nature and circumstances of a case. That reflects the approach taken in the Consumer Rights Act 2015 and seems a pragmatic and reasonable way of addressing the concerns that the committee heard at stage 1 from Which? and others.

For the sake of completeness, amendments 14 and 15 go on to lay out what would be required for a proficient opt-out mechanism, including the need to provide a description of a group of persons whose claims are eligible, as per the Consumer Rights Act 2015, as an additional condition of the court's assessment that reasonable measures have been taken by the representative party to identify and notify any eligible persons, so that they can choose whether or not they want to opt out. Those additional measures should help to address some of the concerns that have been raised that an opt-out proceeding might disadvantage any person or be an administrative burden on the court, by providing definitive boundaries and leaving responsibility for identification and notification with the representative party.

After the Competition Act 1998 introduced an opt-in clause, just one action was brought in 17 years. Only with the introduction of an opt-out provision in the Consumer Rights Act 2015 have we seen a move forward in consumer protection, illustrated by the successful case brought against JJB Sports in 2007 over price fixing for football shirts. I believe that amendments 13 to 15 provide a pragmatic solution that will reinforce the measures in the bill around group proceedings. They have the potential more effectively to incentivise corporate social responsibility on the part of businesses and to underpin the rights of consumers.

I look forward to hearing contributions from colleagues and the minister.

I move amendment 13.

John Finnie: I speak in support of Liam McArthur's amendments. The key word that he used was "opportunity". We deal with complex legislation, and the issue should not be the ease with which a provision can be applied. We heard some compelling examples of practice that the amendments would support, and it is important that we try to make that better in the future, so I support the amendments.

Daniel Johnson: I, too, would like to speak strongly in support of Liam McArthur's amendments. I think that they would be extremely useful. The examples that he set out and the impact of opt-in legislation that we see south of the border lead us to the conclusion that opt-out legislation would be extremely useful. The situations in which a large number of people are suffering a low-level cost present quite a compelling argument. For those reasons, I strongly support the amendments.

The Convener: I also welcome the amendments. We are presented with an opportunity, and I think that the amendments strike the right balance in giving the court the discretion to go to the opt-out procedure if that is deemed to be the best option.

Annabelle Ewing: I am pleased that the proposal to introduce group proceedings, otherwise known as class actions, to the Scottish courts has broad support. To pick up on Liam McArthur's description of my position, I would say that I do not lack ambition either, but I am perhaps more of a pragmatist, as a result of my position as a Government minister. I will flesh out the reasons why I take that view at this stage.

It is the position of the Scottish Government and most stakeholders—including the Faculty of Advocates, the Law Society of Scotland, the Scottish Trades Union Congress and the Association of Personal Injury Lawyers—that the best way forward is to proceed at this time by way of the introduction of an opt-in system. Principally, that is because it will be more straightforward to implement, easier for potential litigants to understand and easier for practitioners to administer. Further, there would also not be undue delay in commencing the procedure.

The Scottish Government does not have any financial or political objections to opt-out, and the decision to go for opt-in at this stage has been for purely practical reasons.

It is to be borne in mind, of course, that group procedure—notwithstanding the clever drafting of Liam McArthur's amendment 13—still involves the discretion of the court, and there still have to be court rules in place. That is where we get to one of the nubs of the matter. Group procedure—whatever kind of procedure is adopted—will require new court rules from the get-go, which will be drafted by the Scottish Civil Justice Council. Some of the issues relating to the opt-out option are much more complicated than those relating to the opt-in option. For example, the opt-out option

will imply that people might become part of litigation without their consent, and, possibly, without their knowledge. That would have to be addressed in court rules. Further, the concept of aggregated or global damages sits uneasily with Scots law, which adheres to the compensatory principle. No stakeholder has yet proposed a scheme that would ensure that individual claimants are not under or over-compensated.

Members will have seen that the Lord President has written to the committee commenting that any extension of the group proceedings provisions in the bill should be approached with considerable caution. He went on to say that the practical and legal challenges that are presented by an opt-out model are significantly greater than those that are presented by an opt-in model. The Government therefore believes that it would take the Scottish Civil Justice Council far longer to draft rules for both the opt-in and the opt-out procedures from the same starting point, which is what would be required if amendment 13 were to be accepted by the committee, because we would still need to have court rules in place in order to follow a procedure, regardless of whether the court exercised discretion to follow the opt-out procedure. It has been explained why, from the same starting point, it would take longer to formulate those court rules.

John Finnie: If your view is that you will not support the amendments, when do you think would be the appropriate time to move to the system that is proposed?

10:45

Annabelle Ewing: That is an extremely practical question. If we proceed on the basis of the bill as it currently stands, and proceed with the opt-in procedure—because that would allow us to start somewhere, as was highlighted by several of those who gave evidence to this committee—it will take some time even to get the opt-in procedures going. The next group of amendments address the issue of post-legislative scrutiny, and it might well be that that would be the perfect stage at which to assess where matters have got to.

There is no question of kicking the matter into touch for ever; my view is inspired by pragmatic considerations that have been raised. We heard in committee that the subject has been discussed for many decades. We need to get on with it and start somewhere. If it is too complicated from the start, we risk delaying the whole thing. Instead of being able to start with at least some opt-in proceedings, we may find ourselves in a position in which no class actions are possible for a considerably longer period of time, as an unintended consequence, because we are trying to be too ambitious at the outset. I am sure that that is not Mr McArthur's intention, but my concern is that class actions per se could be delayed.

A number of people, including Paul Brown of the Legal Services Agency, have given evidence to the committee to the effect of taking that more pragmatic view. It was not that those people do not wish to see opt-outs—they do. There is a fear that the simultaneous introduction of two processes—one of which is extremely complex, because it introduces elements that we do not currently wrestle with in Scots civil procedure—would mean a delay to all class actions.

I will pick up on the reference—I think it was by Mr McArthur or Mr Johnson—to the experience of the United Kingdom Competition Appeal Tribunal where class actions have been possible. I think that Which? flagged up that experience. We are not sure that the experience of the tribunal is typical; a particularly large number of claimants are before it in competition actions, and competition law is highly specialised and a technical area of law. Scotland has a much smaller jurisdiction, so introducing an opt-in scheme as the starting point would be more straightforward. That is something to bear in mind.

For all those reasons, I ask the committee not to support Liam McArthur's amendment 13. In response to Mr Finnie's point, I recognise that this area of the bill would be right for post-legislative scrutiny, assuming that, in the grouping of amendments that we will shortly get to, an amendment on post-legislative scrutiny is agreed to by the committee.

I would be happy to support Liam McArthur's amendments 14 and 15, which are potentially useful additions to the proposals for opt-in group proceedings. I emphasise that we are not closing the door on an opt-out scheme; I am simply guided by pragmatism whereby I wish to see class actions as a possibility in Scotland as soon as possible. Court rules will need to be drafted and it would be easier to start with an opt-in scheme and then move to opt-out. Post-legislative scrutiny would give members the assurance that this is not an attempt to kick opt-out into touch. If our starting point would be to have to come up with court rules for both opt-in and opt-out schemes, I fear that we would see no class actions for years to come because of the complexity of that approach.

Liam McArthur: I thank the minister and members for their contributions, and I thank the convener, John Finnie and Daniel Johnson for their strong support for my amendments. There seems to be a tussle over who has greater claim to the badge of pragmatism, and I stake my claim again. The way in which I have sought to cast the amendments strikes the right balance by recognising the complexities and the need for court discretion in taking the schemes forward.

The minister pointed out, quite fairly, that we still require amendments to rules of court. I do not entirely dismiss the concerns of the opponents cited by the minister, but, given the strength of the evidence that we have heard from Which?, which is a representative of consumer interests, we need to ascribe a suitable weight to its concerns. Direct comparisons between the situations north and south of the border are probably fraught with difficulties—I hear what the minister has said about the actions before the tribunal—but it has taken 17 years south of the border to move from the Competition Act 1998 to the Consumer Rights Act 2015.

We should gain some optimism from the fact that the Consumer Rights Act 2015 demonstrates that it is not beyond the wit of man to construct an opt-out model and in such a way that allows for group proceedings. As Daniel Johnson reminded us, the issue affects high numbers but has a low impact. Unless we address that, we will miss the opportunity that John Finnie raised in his comments.

Liam Kerr (North East Scotland) (Con): How do you respond to the minister's point about the delay? From what the minister was saying, it appears that if we agree to the amendment we potentially kick the whole thing quite a long way into the future. Is it not better to get the opt-in scheme going, then look at the opt-out model, perhaps at the stage of post-legislative scrutiny, rather than potentially put back the whole issue for some considerable time?

Liam McArthur: That is not an unreasonable point. The counter to it is that I dare say that Which? has no interest in seeing group proceedings delayed unduly. However, there is an opportunity at this stage to introduce a mechanism that embeds the opt-in model, but leaves the option open to courts to decide on an opt-out mechanism.

We saw the delays that occurred south of the border—they stretched for 17 years, which is a considerable amount of time. There is a bit of a risk that we hang our hat on post-legislative scrutiny because we see it as something that would allow us to return to the issue and address it at that stage. However, there will still be people at that stage, in five years' time, who suggest that having an opt-out model is awfully complicated, that it would be terribly difficult to amend the rules of court and that it would be better to kick the can further down the road. We have an opportunity now, while there is pressure in the pipe, to introduce group proceedings under an opt-in model and take additional time—I accept that that is needed—to propose a mechanism that allows opt-out proceedings in certain circumstances and in accordance with the discretion of the court. On that basis, I press amendment 13.

The Convener: The question is, that amendment 13 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Corry, Maurice (West Scotland) (Con)
Finnie, John (Highlands and Islands) (Green)
Johnson, Daniel (Edinburgh Southern) (Lab)
Kerr, Liam (North East Scotland) (Con)
McArthur, Liam (Orkney Islands) (LD)
Mitchell, Margaret (Central Scotland) (Con)

Against

Adam, George (Paisley) (SNP)
Gougeon, Mairi (Angus North and Mearns) (SNP)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)
Mackay, Rona (Strathkelvin and Bearsden) (SNP)
Macpherson, Ben (Edinburgh Northern and Leith) (SNP)

The Convener: The result of the division is: For 6, Against 5, Abstentions 0.

Amendment 13 agreed to.

Amendments 14 and 15 moved—[Liam McArthur]—and agreed to.

Section 17, as amended, agreed to.

Section 18 agreed to.

After section 18

The Convener: The final group of amendments is on post-legislative review. Amendment 55, in the name of the minister, is grouped with amendments 62 and 56.

Annabelle Ewing: During the stage 1 debate, several calls were made for there to be post-legislative scrutiny of the bill in five years' time. In its stage 1 report on the bill, the Justice Committee asked the Scottish Government to commit to post-legislative scrutiny of the bill within five years of its provisions coming into force. In particular, the committee was concerned that such a review should look at the impact of qualified one-way costs shifting.

I have listened to the arguments and I am persuaded that post-legislative scrutiny is appropriate for the special circumstances of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill. That does mean that the Government accepts that a statutory requirement for post-legislative scrutiny is appropriate for all legislation passed by the Scottish Parliament. The Government continues to believe that there is a need to take a flexible and proportionate approach to post-legislative scrutiny, so that time and resources are targeted effectively. We look forward to working with the Public Audit and Post-legislative Scrutiny Committee on that.

Amendment 55 provides for post-legislative scrutiny of parts 1 to 3 of the bill, five years after each part is fully commenced. In respect of part 4, on group proceedings, the five-year period will commence from the day on which the first rules of court for group proceedings come into force. That different arrangement is considered necessary because the detail of the procedures for group proceedings will be provided in rules of court to be brought forward by the Scottish Civil Justice Council, which will draft and consult on the rules of court that are to govern group procedure. Group proceedings cannot take place until such rules are in force. Arguably, there is therefore no point in triggering the five-year period for post-legislative scrutiny of group proceedings until they have actually taken place and have had a chance to bed in over the proposed five-year period.

The post-legislative reports that are envisaged in amendment 55 will require consultation with appropriate stakeholders. They will have to be laid before the Scottish Parliament as soon as is practicable after the relevant report has been prepared and then published. The post-legislative scrutiny will provide an opportunity to look at how various key parts of the act are operating and whether amendment is necessary. That could include, for example, the part 1 provisions, as amended, on the future element of damages, taking into account the likely addition at that time of specific damages legislation.

The post-legislative scrutiny of part 2 will allow, as the committee has requested, a review of the operation of qualified one-way costs shifting and how the grounds on which QOCS protection is lost are operating in practice, since they are intended to facilitate meritorious claims while discouraging spurious ones. The post-legislative scrutiny of part 2 will also allow consideration of whether QOCS should be extended to areas of civil litigation other than personal injury actions.

As regards post-legislative scrutiny of part 4, most stakeholders have agreed that opt-in is the practical option for the introduction of group proceedings. However, we heard the committee's view on that just a moment ago.

Amendment 55 seeks to link the post-legislative scrutiny to the timing of the entry into force of the various parts. I do not want to belabour the point.

Amendment 56 will mean that the whole of the new part will come into force automatically two months after royal assent.

Convener, your amendment 62 appears to have much the same purpose as the Government's objective in amendment 55. Although it embodies differences from the Government's proposal, I am willing to support it. As with other non-Government amendments that we are supporting at stage 2, the Government will consider whether any refinements are required and bring them forward at stage 3 if necessary. If Margaret Mitchell's amendment 62 is duly agreed to, we may nonetheless be required to reflect on the rationale for the timing of the review as it pertains to particular parts of the bill.

That is where we are. On the basis that I need to move amendment 55 in order for the group to be considered, I will move it, although that is only to allow debate to take place on the rest of the group of amendments.

I move amendment 55.

The Convener: Thank you, minister. I will speak to my amendment 62. I think that it complements the minister's amendment 55. Both insert provisions for post-legislative review of the operation of the act as soon as is practicable after five years, and both require the laying before Parliament of a report on the review.

However, in our stage 1 report, the committee specifically asked the Scottish Government

"to commit to post-legislative scrutiny of the Bill (within five years of its provisions coming into force), in particular to review the impact of introducing"

qualified one-way costs shifting in section 8. Amendment 62, therefore, specifically calls for a review of the effect and operation of section 8 and QOCS, which represents a radical departure from the traditional loser-pays principle. It also specifically calls for a review of the effect and operation of section 17, on group proceedings, including the opt-in approach, and now that the committee has agreed to Liam McArthur's amendment, it would include a review of the opt-out provision, as well a review of how sections 8 and 17 affect

"access to justice and the administration of Scottish courts".

Amendment 62 states:

"The report must include a statement by the Scottish Ministers setting out—

(a) whether they intend to bring forward proposals to modify any provision of this Act, and

(b) where no such proposals are to be brought forward, their reasons for not doing so."

As such, it covers all the provisions in the minister's amendment, but it specifically provides for QOCS, as the most contentious aspect of the bill, to be reviewed, with further scrutiny of its operation, together with section 17 and group proceedings.

As there are no other comments from members, I ask the minister to wind up.

Annabelle Ewing: I just want to point out that, as you have highlighted, post-legislative scrutiny

will permit a number of complex and technical aspects of the bill to be reconsidered in the light of five years of its operation. I must emphasise again that the Government does not believe that post-legislative scrutiny is necessary for every piece of legislation, but, as I have said, we will work with the Public Audit and Post-legislative Scrutiny Committee in that regard.

In the light of the convener's comments, I will not press amendment 55. I support amendment 62, in the name of Margaret Mitchell, and as with all stage 2 amendments, I will, if the committee agrees to that amendment, reflect whether any refinements might be required at stage 3.

11:00

Amendment 55, by agreement, withdrawn.

Amendment 62 moved—[Margaret Mitchell]—and agreed to.

Section 19—Regulations

Amendment 16 moved—[Daniel Johnson].

The Convener: The question is, that amendment 16 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division. [*Interruption*.] The clerks could not see who was voting. We will take the division again.

For
Corry, Maurice (West Scotland) (Con)
Finnie, John (Highlands and Islands) (Green)
Johnson, Daniel (Edinburgh Southern) (Lab)
Kerr, Liam (North East Scotland) (Con)
McArthur, Liam (Orkney Islands) (LD)
Mitchell, Margaret (Central Scotland) (Con)

Against
Adam, George (Paisley) (SNP)
Gougeon, Mairi (Angus North and Mearns) (SNP)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)
Mackay, Rona (Strathkelvin and Bearsden) (SNP)
Macpherson, Ben (Edinburgh Northern and Leith) (SNP)

The Convener: The result of the division is: For 6, Against 5, Abstentions 0.

Amendment 16 agreed to.

Section 19, as amended, agreed to.

Sections 20 and 21 agreed to.

Section 22—Commencement

Amendment 56 moved—[Annabelle Ewing]—and agreed to.

Amendment 17 moved—[Liam Kerr].

The Convener: The question is, that amendment 17 be agreed to. Are we all agreed?

Members: No.

The Convener: There will be a division.

For
Corry, Maurice (West Scotland) (Con)
Kerr, Liam (North East Scotland) (Con)
McArthur, Liam (Orkney Islands) (LD)
Mitchell, Margaret (Central Scotland) (Con)

Against
Adam, George (Paisley) (SNP)
Finnie, John (Highlands and Islands) (Green)
Gougeon, Mairi (Angus North and Mearns) (SNP)
Johnson, Daniel (Edinburgh Southern) (Lab)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)
Mackay, Rona (Strathkelvin and Bearsden) (SNP)
Macpherson, Ben (Edinburgh Northern and Leith) (SNP)

The Convener: The result of the division is: For 4, Against 7, Abstentions 0.

Amendment 17 disagreed to.

Amendment 65 moved—[Gordon Lindhurst].

The Convener: The question is, that amendment 65 be agreed to. Are we all agreed?

Members: No.

The Convener: There will be a division.

For
Corry, Maurice (West Scotland) (Con)
Kerr, Liam (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)

Against
Adam, George (Paisley) (SNP)
Finnie, John (Highlands and Islands) (Green)
Gougeon, Mairi (Angus North and Mearns) (SNP)
Johnson, Daniel (Edinburgh Southern) (Lab)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)
Mackay, Rona (Strathkelvin and Bearsden) (SNP)
Macpherson, Ben (Edinburgh Northern and Leith) (SNP)
McArthur, Liam (Orkney Islands) (LD)

The Convener: The result of the division is: For 3, Against 8, Abstentions 0.

Amendment 65 disagreed to.

Section 22, as amended, agreed to.

Section 23 agreed to.

Long title agreed to.

The Convener: That ends stage 2 consideration of the bill. The bill as amended will now be printed. The Parliament has not yet agreed when stage 3 proceedings will take place, but members can lodge stage 3 amendments with the clerks in the legislation team at any time. The deadline for lodging amendments will be announced as soon as it is known.

I thank the minister and her officials for their attendance, and I suspend briefly to allow them to leave.

11:04

Meeting suspended.

11:11

On resuming—

Alternative Dispute Resolution

The Convener: Agenda item 3 is an evidence session on alternative dispute resolution. I refer members to paper 1, which is a note by the clerk, and paper 2, which is a private paper.

I welcome Nicos Scholarios, who is the secretary of CALM Scotland; Isabella Ennis, who is the chair of the family law arbitration group Scotland, or FLAGS; Rosanne Cubitt, who is the head of practice for mediation with Relationships Scotland; and Dr Marsha Scott, who is the chief executive of Scottish Women's Aid. I thank the witnesses who provided the committee with written evidence, which is always tremendously helpful to us before we hold an evidence session.

We will move to questions.

John Finnie: Good morning, panel. To start us off, will you outline the types of ADR that are used in family law cases and describe the key features of the methods that are used?

Isabella Ennis (Family Law Arbitration Group Scotland): If you are talking about alternative dispute resolution in the legal sense, that means an alternative to litigation. Aside from litigation, family law arbitration is a litigious process, in that it is adversarial. There is a jointly appointed decision maker—both parties agree on who the decision maker is. In FLAGS, that decision maker is a specialist family lawyer—either a solicitor or an advocate who has had arbitration training specific to family law. The person is a member of FLAGS, which has produced its own rules and has its own committee. The parties, with their legal representatives, enter into a contract—the agreement to arbitrate—that governs the dispute. If the parties are in dispute about where the children should spend time, for example, the solicitors, clients and arbitrator enter into a contract stipulating that that is the scope of the arbitration.

The manner in which the dispute will be resolved is also a matter of agreement. It can be resolved by evidence or written submissions, and can take place in any location that suits the people who are involved. If the parties are in a remote location, they can conduct the process by Skype or telephone, or the arbitrator can go to them. There is a huge amount of flexibility, but generally, the parties have their legal representatives and there is an independent decision maker who specialises in family law.

Rosanne Cubitt (Relationships Scotland): The biggest other alternative is mediation. The committee has had discussions about that, so you probably have a sense of what it is. In Scotland, family mediation is primarily provided by Relationships Scotland and CALM, although there are a couple of private providers.

Do you want me to explain how it works?

John Finnie: Yes. Please expand on that.

Rosanne Cubitt: Parties can choose to meet with an independent mediator. They will initially have a one-to-one meeting to find out about mediation and to explore whether it is appropriate for their circumstances. They then meet with the mediator, who will help them to have a conversation, explore what the issues are, and then help the parties reach agreement; the mediator does not impose a decision on the parties. The process is quite creative, particularly for cases in which there are children and there are a lot of nuanced issues around where the children might live and how arrangements can be managed. It is a flexible and creative process for exploring options.

11:15

Family mediation in Scotland is also protected in terms of confidentiality. What is said in mediation is not taken to court. If a case collapses and it goes to court, what has happened in mediation is protected and confidential. That allows parties to try things out and lets them feel free to talk about things without feeling as though it will be used against them in court. It is a very productive and creative process.

Nicos Scholarios (CALM Scotland): CALM Scotland mediators are experienced family law solicitors who have trained to become mediators. We have a dual qualification in that we are solicitors in family law and trained mediators.

The process that is offered is similar to that which Rosanne Cubitt outlined. When a case is referred to mediation, it is referred to a CALM mediator. We meet the individual parties to assess suitability for mediation and to obtain a bit of background before we engage with the parties in joint mediation sessions.

I have been a solicitor for 35 years and a mediator for in excess of 20 years. I recognised early that a court is not always the best place in which to resolve disputes—especially in relation to families. In mediation, I deal primarily with contact cases and residence cases, but I also have a number of cases that involve financial aspects that arise from separation. More recently, I have dealt with relocation cases and cases involving family members who live in other areas—for example, disputes over estates or family businesses.

I am an enthusiast for mediation. Although I am a solicitor, I think that mediation is far and away

the best way to resolve most disputes—in particular, family disputes. It offers the parties the opportunity to be heard, first and foremost. We use the words "empowering parties". One of the comments that I frequently hear in mediation from people who have been to court is that they feel that they have not been properly heard. Mediation gives them a chance to speak, and not just for a few minutes but for an hour or two hours. They can have their say about what is of concern to them.

The process puts the parties front and centre of resolution of the dispute. It gives them the power and the permission to consider solutions that suit them, and does not impose solutions on them. Mediation also gives people the time to drill down into and consider the detail that is required in circumstances around, for example, arrangements for children. Not having time for that is often a problem with being in court.

Mediation generally lasts as long as it takes. We have individual sessions, then joint sessions, the number of which varies: it might be two or three, but the process might take much longer. It depends on the parties. The facility exists for the parties to return to mediation and to review and adapt to changing circumstances.

Rosanne Cubitt: One of the important points about mediation is that it gives parties the opportunity to try things out and then to come back to tweak arrangements. It is often the case with families that things change down the line. One of the parties might get a new partner or there might be a new baby. As children get older their needs change, so it is good to have an opportunity to explore what to do.

Nicos Scholarios: Another benefit of mediation is that we look for longer-term solutions, whereas the court system is designed to give a decision on a particular set of circumstances. Obviously, in mediation we also have to address short-term requirements or issues that have to be resolved. However, particularly when we deal with families with younger children, we try to get across to the parties that if they have children who are two or three years old, they are going to be parents for a very long time and are therefore going to have to co-operate, even though they might have separated or might no longer be partners. We therefore try to encourage parties to take a longer-term view of their problems.

On numerous occasions in mediation, I have heard relatively young people—say, in their 20s—relating the unfortunate experiences that they had of being in a broken family when they were younger, and realising that they do not want the same to happen to their children. That is where we can encourage them to think about the longer term; that it is not about taking out their hurt or anger on the other person, but about trying to overcome that and to think about the longer term for the children's benefit. Another point that we try to emphasise greatly in mediation is that the children are the most important people, and the issue is what is in their best interests. We constantly have to remind parties that they have to put their children, not their own feelings, first.

John Finnie: Can Dr Scott say something about the appropriateness of women going through the mediation process in cases involving violence? You say in your submission that you

"are aware that there will be times where women participate in a mediation process because they are unaware of their right not to".

Dr Marsha Scott (Scottish Women's Aid): I frame my remarks by saying that, in general, Scottish Women's Aid supports alternative dispute resolution and mediation, but not in the context of domestic abuse. The discussion has been had before in Scotland—indeed, it has been going on for many years—and it has been difficult to resolve. There is quite a sizeable evidence base that shows that women and children can be put at risk and, in fact, harmed in the mediation process when domestic abuse is part of the picture. We also very much welcome the input of Relationships Scotland, which has made it clear that mediation is not appropriate in domestic abuse cases.

We need to think about the prevalence of domestic abuse, which affects one in four women in Scotland, and about the number of relationship break-ups—to use a common phrase—that involve domestic abuse and which are not evident to the public eye. Those cases come from a variety of places.

First, as research that is about to be published will confirm empirically, women are routinely advised by their lawyers not to mention domestic abuse when they are involved in court cases, especially if the case involves child contact.

Secondly, we are very concerned that mediation is going on with women who have experienced domestic abuse. That is not because the mediators are ill intentioned and wish to put such abuse to one side—although it is being put to one side—but because the system itself is not competent to deal with domestic abuse. We find it scary that proposals have been made about making meetings about mediation mandatory because—as we are well aware—women's voices are not equal in a mediation relationship. In fact, women are often pressured into mediation by a variety of mechanisms, be it through their partner, through their lawyer or through the way in which the whole civil justice system works.

We receive reports consistently from our services that the issue is on-going. I got one such

report last week that I will share with the committee. I will not tell you where the service is, because the manager has quite a good relationship with Relationships Scotland. They sometimes manage cases together in the contact centre, and they would like to preserve that. The report says:

"Dear Marsha

Sorry to bother you, but I need to escalate an issue with you here ... One of our clients who has interdicts for her children and a non-harassment order in place against her husband for 100 years, by our local court"—

you can imagine the level of abuse that there must have been in that case—

"has received an invitation ... to come to mediation with her husband. We have had our local PF in the office this morning and he is shocked that this is happening, as are we. It was a high-profile case here, and we feel that"

the perpetrator

"is still trying to get to her. We feel that family mediation is totally inappropriate and our client is very disturbed to have been invited to it, and most worried because she has multiple children and she is worried that they will also receive letters of invitation as they come to age and she will have no way to protect them."

Again, I have to underline that it is an issue of competence across the piece—among family lawyers, mediators and all kinds of folks in the system. As we heard in the debates on the Domestic Abuse (Scotland) Bill, across the public sector understanding of the dynamics of domestic abuse can be very shallow. It is really important that we understand what might be the unintended negative consequences of privileging mediation in the system.

Daniel Johnson: I will follow on from those comments, and from what I heard in the opening statements about the advantages of mediation being flexibility and ensuring that voices are heard, and its being predicated on both sides having access to representation. To what extent is that view predicated on the notion that there is symmetry between the parties in terms of power, resource and their ability to articulate their situations?

I am wondering what the issues are with arbitration. The points around domestic abuse are well made and are obviously at one end of the spectrum, but there are a lot of scenarios in which there is asymmetry in people's ability to state their cases—there would be issues with mediation or arbitration if one party were able to put points over better than the other. What would you say to that observation?

Isabella Ennis: In family law arbitration, the purpose of the arbitrator as an expert family lawyer is to ensure that the process is fair. In the Arbitration (Scotland) Act 2010, the first obligation is to ensure that the process is fair, efficient and meets all the requirements of natural justice. In family law arbitration generally, each side would also be represented by a family lawyer. An imbalance in representation and power would occur only if one party could afford the arbitration process and the other could not.

The Scottish Legal Aid Board does not currently fund family law arbitration, which means that access to efficient, expert and tailored family-law justice is not available to people who are not financially capable of funding it. That is a big problem, but aside from that fiscal imbalance, if someone is appearing before a family law arbitrator, they have the protection of the arbitrator and their legal representative in the same way that they would have it if they were in court.

The advantage of family law arbitration is that the arbitrator brings to the table an enormous wealth of experience in family cases. They understand not just the point that is in dispute but the raft of reasons that lie behind bringing the point to adjudication—the enormous amount of back story—and, because they have experience that a sheriff or judge may not have, they understand that there are subtle issues at play that might not be evident.

Nicos Scholarios: There is no direct representation in the mediation process. However, we frequently advise parties in mediation to consult their own solicitors, so the solicitors are there in the background to provide advice. In my practice certainly, and, I think, in the practices of all CALM mediators—I am sure that it is the same for Relationships Scotland—nobody would ever be forced to make a decision there and then in mediation, without first being given the opportunity to seek advice, so the representation is slightly different in mediation.

The question that Daniel Johnson is asking is primarily about power imbalances. We are trained to recognise that and there are various ways in which we can deal with it. If we feel that one party is being dominated, we can separate the parties and speak to them individually. There are different models and there is flexibility to address power imbalances. If, as mediators, we were to feel that the power imbalance was too great, we would probably stop the mediation process. We are very conscious of such issues.

11:30

Dr Scott: There is a generic equality impact assessment that would shine some light on those issues. Women, in particular, whether or not they are experiencing domestic abuse, are more likely to be poor and much less likely to have access to a solicitor, and their access to legal aid is often

quite problematic. In general, women walk into those negotiations at a disadvantage. Mediation is intended to redress some of those disadvantages, but I suspect that it is only partially successful in doing that.

Rosanne Cubitt: I agree with Marsha Scott that, when domestic abuse is an issue, mediation is not appropriate. I agree with what Nicos Scholarios has said about it being part of the job of the mediator to give people an opportunity to speak and be heard. Some of the research—not on domestic abuse cases—suggests that mediation creates the opportunity for some women to have a voice, because the mediator can slow things down. Often, one party is more articulate than the other—it is not always the man—and the role of the mediator is to allow the conversation to happen and to allow the less articulate person the opportunity to speak. For many people, that is empowering—they are given power where they did not have it before. That is an important part of the mediator's role.

Dr Scott: As a children's rights organisation in Scotland, Scottish Women's Aid is constantly worried about the lack of children's and young people's voices in decisions that are made about their lives. In the context of mediation, we have a lot of exploration to do on how children's voices can be reflected not as a one-off but as real participation in decision making. We do not seem to have an answer to that.

Rosanne Cubitt: Some Relationships Scotland mediators have undertaken additional training to work with children. If it is appropriate, if the parents agree and if it seems that it would provide a good opportunity for the child, those mediators can meet the child and feed their views back into the mediation process. There is a facility to hear children's voices within the mediation process.

Isabella Ennis: In family law arbitration, a decision about the welfare of a child has to be determined under Scots law. The Children (Scotland) Act 1995 imposes an obligation to take the views of the child into account. The arbitrator would be obliged to do that, and so the voice of the child would be heard.

However, it is important to note that the power imbalance in mediation can exist because SLAB funds mediation. The less fiscally flush might feel forced to go to mediation because that would be funded whereas an alternative dispute resolution service such as arbitration, which may be more suitable to them, is not open to them because of a lack of funding. We are not serving all the community fairly if we prohibit, by economic imbalance, the access to alternative dispute resolution through family law arbitration.

Fulton MacGregor (Coatbridge and Chryston) (SNP): My question is mainly for Dr Scott. Given the prevalence of domestic violence and the passing of new legislation on it, which has sent out a clear message on what we think of such offences and behaviour, should there be a robust screening process to ensure that people are suitable for mediation or similar processes? Is that approach appropriate at all if there has been domestic violence? Rosanne Cubitt said that, if such behaviour has taken place, it is not in the interests of the woman—it is mainly women—to proceed. What are your thoughts on a more robust screening process to detect domestic abuse early?

Dr Scott: It is important to avoid a binary approach of saying yes or no to mediation and not considering anything else. Isabella Ennis raised the good point that women may feel that mediation is their best option, given a limited set of very bad options. Part of the too-hard box that is involved here is that women in Scotland routinely do not have access to legal advice or to support and representation when they need it. As I mentioned, we have ample empirical evidence that women are being coerced into mediation in many places in Scotland, and we are very concerned that, given that evidence, a one-meeting assessment is not an adequate assessment process.

From much of the evidence that was given during the consideration of the Domestic Abuse (Scotland) Bill, we know that women's voices about their experiences are discounted all the time. It is highly unlikely that a woman who has few resources and who is being assessed for whether there is domestic abuse will disclose that in a one-off meeting with somebody who probably does not have an enormous amount of training in assessing that. With coercive control rather than physical violence, in most cases, there is probably not a police record that can be referred to, so it is highly unlikely that the system will be sensitive enough to establish safety in the mediation.

Does that answer your question?

Fulton MacGregor: Yes—you have made the point very clearly.

Convener, can I ask an additional question of the other panel members?

The Convener: We are on to supplementary questions now, but there will probably be an opportunity later.

Rona Mackay (Strathkelvin and Bearsden) (SNP): Does Women's Aid think that it is acceptable for mediation to be used for child contact issues when there is no domestic abuse involved, given the issues with child contact centres?

Dr Scott: When there is no domestic abuse involved, we do not have an opinion. However, that is a really big "when". As I have mentioned previously, in many contact cases, domestic abuse is not flagged when it clearly exists, and we are concerned about that. We do not believe that the way to solve the problem is to keep filtering an infinitely smaller number of cases into mediation and not to have a solution for the others. We need to look at the fact that, at the moment, the system coerces women into being quiet, and we need to consider how we can address that.

Rona Mackay: You are saying that an alternative solution should be found.

Dr Scott: Yes.

Nicos Scholarios: Nobody in this room underestimates the impact and seriousness of domestic abuse, but I would like to differ slightly from some of Marsha Scott's points. I do not think that mediation should be discounted in all cases. There are many cases in which women who are subject to domestic abuse still need to get matters resolved, whether those matters are to do with children and child contact or financial issues. Mediation can offer assistance with that, subject to the right model being chosen and the appropriate safeguards being put in place.

CALM has engaged with Scottish Women's Aid. Members of Scottish Women's Aid have given us training on domestic abuse, and that could be further enhanced.

I agree that the screening process could be looked at and made more robust, and we are happy to engage with Scottish Women's Aid on that. However, I have a slight concern about closing the door fully on mediation as an option in all domestic abuse cases.

The Convener: Before I bring in Liam McArthur, I want to get some perspective on the scale of the issue. Does Scottish Women's Aid have any statistical evidence on the percentage of civil family law cases that include evidence or allegations of domestic abuse?

Dr Scott: No, but if you look at evidence on child protection, for example, you can see that many of those cases intersect with contact disputes in which domestic abuse has not been identified until after criminal justice and civil justice proceedings. There is a lot of statistical and empirical evidence in that respect. However, as far as the body of civil law cases in Scotland is concerned, I am not aware that that number is available, but I am happy to look for it.

The Convener: That would be helpful.

Liam McArthur: The questions that I was going to pursue have generally been covered very well, so I will pick up a couple of points from what has already been said.

With regard to the availability of legal aid, during our round-table evidence session there was a bit of an exchange with Colin Lancaster about forthcoming meetings to discuss legal aid in the context of arbitration. If those negotiations are on-going and there has been no resolution to them, that is fine, but there seemed to be a recognition that this might be an anomaly that needs to be addressed. It would be helpful if you could provide us with an update on those discussions and on whether any further discussions with SLAB are planned.

Isabella Ennis: I have no information to update you with. Historically speaking, though, FLAGS has always tried to engage with SLAB and with Mr Lancaster's predecessor on the issue. I know that the Faculty of Advocates and some other bodies are engaging in the strategic review, which I understand has said that arbitration, particularly in contact cases, ought to be considered for legal aid funding. Such an approach would be quicker, more efficient and more appropriate, but it is my understanding that it will take primary legislation to allow arbitration to be funded through legal aid. Until that happens, there is not a lot that we can do, although FLAGS is always keen to have a dialogue as long as SLAB or the Scottish Government wants to have that with us.

Liam McArthur: I declare an interest, as my wife is a trained mediator with Relationships Scotland Orkney.

On the question whether all domestic abuse cases should be kept away from mediation, I was interested in the point about the voice of children. I am certainly aware from cases that have been brought to me that despite the fact that there has been domestic abuse, possibly of a controlling or coercive nature rather than abuse involving violence against the mother, the children in those discussions have, for whatever reason, shown loyalty towards or a desire to make contact with the father. In those circumstances, possibly without some form of mediation, how can contact arrangements be made that give due weight to the child's interests and wishes? I appreciate that it is difficult to answer that question hypothetically, but such situations seem to arise reasonably routinely and I suspect that you are all wrestling with finding a way of getting through those issues.

Dr Scott: I heartily recommend a piece of research that was funded by Scotland's Commissioner for Children and Young People, which came out a couple of years ago and looked at court reports in the context of domestic abuse and contact.

11:45

Our position is often mistakenly identified as being that we are opposed to contact in all cases, but that is not the case. We think that part of the problem in the system is that decisions are being made without children and young people being consulted about whether they want contact. The research shows that, when contact is ordered, it agrees with what the children want about 80 per cent of the time when they want contact and about 20 per cent of the time when they do not want contact. The system is skewed towards a certain outcome, which is part of our concern.

We have been working with the children's commissioner to look at alternative models. For instance, in West Lothian there is a specialist domestic abuse children's rights officer who produces reports for the local sheriffs. Coming at it from a children's rights perspective, the officer spends time with children as young as four years old to talk about what they would like and then makes an independent report to the court. There are a variety of ways to feed children's voices in, and we know, because I was working in West Lothian when we set up that post, that sheriffs asked the children's rights officer what she thought they should decide. She would say that that was not her job and that her job was to communicate to the sheriff the views and experiences of the children.

Liam McArthur: That is helpful. Is there any reason why the input of that skilled individual, who is trained in those specifics and in articulating the views of the child, could not be factored into mediation or arbitration as well?

Dr Scott: I think that we should be creative, and I do not see any reason why that could not work. The point that I want to underscore—which we have in legislation but, sadly, not in practice—is that the safety of the children and their mother needs to be paramount. If an assessment finds that their safety cannot be guaranteed, that is the trump card as far as we are concerned. Given that we have libraries of evidence to say how often, in those cases, children and women experience re-victimisation in the context of visitation and contact, we need to be very robust in the assessment of whether contact is safe, but that is not how the system operates just now.

Liam McArthur: Am I right in saying that some mediations take place entirely without the individuals sitting in the same room and that that is not uncommon?

Rosanne Cubitt: It does happen, but in Relationships Scotland, although it is not unheard of, it would be unusual. The point is that mediation is not going to work if there is a coercive relationship. Mediation is a voluntary process, as we operate it, and both parties have to be prepared to engage in a discussion and be able to do so freely. If there is a coercive control situation, mediation is not going to be appropriate, and that decision will be made by the court. The question is then whether the contact centre's supervised or supported contact can take place, but that is a whole other argument.

I thought that this discussion was about mediation in civil disputes generally, and learning from family cases. My experience of 15 years is that, although mediation has been around as an option in family cases since the mid 1980s, its uptake is still pretty poor. I understand what Marsha Scott says about being wary of a requirement for people to go to an information meeting, but unless something changes there is not going to be a cultural shift towards a more collaborative approach to resolving disputes.

There needs to be some change that ensures that people fully investigate all their options. Mediation is a big one, but there is also arbitration and collaborative law. We need a more formal requirement for people to investigate all those options and still make an informed decision about what is appropriate. The court might well be the appropriate option. I am not saying that we should not have the court—we need to have it—but we also need to do something to make a step-change shift. Mediation has been around as an option for families since the 1980s.

There is a rule of court referral. In some areas, sheriffs use that, but in other areas they do not. Some family lawyers are good at explaining the options to clients, but others are not so good. It comes back to the need for something that compels people to at least investigate all the options thoroughly.

Liam McArthur: Is it not the case that, to get legal aid for a court case, people need to demonstrate that they have at least explored the option of mediation or some alternative dispute resolution?

Rosanne Cubitt: Those rules changed a couple of years ago.

Nicos Scholarios: Yes—people need to demonstrate that. The Scottish Legal Aid Board has been more proactive in asking about attempts to negotiate or resolve the matter, and a question is asked about mediation. However, in our view, that is still not enough. I think that CALM and Relationships Scotland share a view on what is required. I read the *Official Report* of the committee's previous discussion on the issue and I noticed that a couple of points were highlighted, one of which was about information on mediation and other forms of dispute resolution. There is a

great need to expand on that to ensure that everybody is well informed about their options.

At the moment, lawyers are obliged to talk about alternative dispute resolution, but there is no overview or checking of that. As Rosanne Cubitt said, the extent to which the matter is discussed is fairly patchy. There has to be a sea change in attitude and approach, and that really has to come from above. Unfortunately, we offer the dispute resolution mechanisms in the context of an adversarial system, which is still the default mechanism for resolving disputes in this country. Speaking as a solicitor and a mediator, in my view, access to that adversarial system is still too easy. There has to be some compulsion—although I hesitate to use that word, because I appreciate that that is a whole different discussion—to at least make people stop and think and explore other options before they jump into the adversarial process.

Rosanne Cubitt: Relationships Scotland and CALM have made a joint proposal to the Scottish Legal Aid Board and the Scottish Government to pilot in four court areas a more structured requirement for people in contact cases to go to an information meeting to find out what all the options are. That proposal is sitting with the SLAB policy committee at the moment.

Nicos Scholarios: Mr McArthur mentioned the steps that the Scottish Legal Aid Board takes. They perhaps help, but only in respect of people who are eligible for legal aid. No hurdle or cause for pause is created for those who are not eligible for legal aid, who still have straight access to the courts and the adversarial system.

Isabella Ennis: I cannot comment on the voice of the child in mediation, but it is important for me to say again that, in arbitration, when the arbitrator is making a decision about a child, the welfare of the child is the paramount consideration. Before a decision can be made, the arbitrator must have explored whether the child has a wish to express a view and, if they do, what that view is. The arbitrator must then determine the weight that is attached to that view. That is all dependent on the age and stage of the child and the circumstances in which the views are expressed. The arbitrator can have an independent court reporter obtain a report or the views of an expert child psychologist. As arbitrators, we have a range of ways of obtaining the voice of the child in a dispute.

Nicos Scholarios: The same applies in mediation. Isabella Ennis has properly outlined the fundamental concepts in how we deal with the rights of the child. In law, there is a need to hear the voice of the child, and we certainly seek to do that in mediation, whether that is by discussion with the parents, who ultimately are probably best placed to know what their child is going through, or, where appropriate, by speaking more directly to the child and gaining his or her views. That is certainly an option.

Rosanne Cubitt: I think we all agree that no one solution is right for every family and every circumstance and we should be moving towards people being able to make an informed choice about the best option for their dispute. Interestingly, Ireland has introduced mediation legislation covering all civil disputes. Many jurisdictions are going down this route, and it is important that we explore it properly here.

Isabella Ennis: Rosanne Cubitt is absolutely right. People ought to be able to make an informed choice about the best method for resolving their dispute and that choice should not be trammelled by their economic wealth.

Dr Scott: I welcome the support for the voice of the child, but it is really important that we understand how much our system needs to change for that to be taken seriously. I encourage the committee to look at the joint project between Scottish Women's Aid and Scotland's Commissioner for Children and Young People that spoke to children and young people and found out about their experience of intersections with court reporters. Their stories, which were pretty compelling, were put together in a film that is available on the website. Please take a look at it, because it expresses the difficulties of pasting a system designed for adults on top of children and young people.

The Convener: Liam Kerr has a supplementary question.

Liam Kerr: We have heard how the court and its more adversarial system might be more appropriate in these cases but, taking a slight tangent, I wonder whether, given that we are looking at ways in which we might improve what we have, anyone on the panel has a view on the one family, one judge idea, under which the same sheriff would hear all the criminal and civil matters in question. Is it worth trialling such an approach?

Dr Scott: Given that I hoped that the committee would take up the idea during the passage of the Domestic Abuse (Scotland) Bill quite some time ago, I have to say that I am heartily in support of it. We have had some conversations with a retired US Supreme Court judge in New York who was involved with instituting the approach there, and she is very enthusiastic about it. Indeed, she says that it is more efficient with regard to court time and resources, and it would certainly help to address the problem of the gap between criminal and civil law in Scotland, which we have already discussed and, indeed, which underpins a lot of our civil law discussions.

We have also spoken to a number of sheriffs who would consider such an approach, but a problem with the system is that the way in which the court schedules cases might have to be restructured. There are other issues to address, but we heartily recommend taking a good look at putting that model in place. I think that it is in the gift of sheriffs principal at the moment, though.

Rona Mackay: We have already touched on this issue and I do not want to labour the point, but I wonder whether you can give us some perspective on how often, in practice, a sheriff or judge would refer a case to mediation and whether the court system is working well or not doing enough in that respect.

Nicos Scholarios: The situation is fairly patchy. I do not have any particular numbers for referrals, but certain sheriffs, who might themselves be ex-mediators, are more favourable towards mediation and can see its benefits, while others see fewer benefits and try, to some extent, to mediate themselves in child welfare hearings. Sheriffs should certainly be encouraged to use the mediation option more, even in the context of a court case.

Going back to the one family, one judge idea that Liam Kerr highlighted, I think that having more specialist sheriffs dealing with family cases must be better. I know that that happens in the bigger courts and that there is a resource issue in other courts, but it would certainly be helpful to have someone who is experienced in family law, who can manage a case in a more proactive way and who might be able to bring in other forms of dispute resolution. I do not think that the uptake of alternative dispute resolution for family cases that go to court is sufficient.

Rona Mackay: As a solicitor, do you see it as the solicitor's role to advise the family or clients that such options are available to them?

Nicos Scholarios: Most good family lawyers will seek to find a resolution. The court is very much the last option, and other options will certainly be explored.

Rosanne Cubitt: All that I would say is that not all family lawyers are good family lawyers. Some of them are excellent, but not all of them are good.

12:00

Isabella Ennis: On the one family, one judge plan, that is of course what you get if you go to family law arbitration. You choose your arbitrator, who is an expert family lawyer and who sees the arbitration through from beginning to end. You do not have different sheriffs or judges dealing with different aspects of the case at different stages. In Glasgow, Aberdeen and Edinburgh, we have designated family sheriffs and we now have a judge and a half in the Court of Session, but that does not mean that they can always see through every aspect of the procedure of a case, such as interim decisions. Most of them try very hard, but they do not always achieve that. However, you get that in family law arbitration.

Rosanne Cubitt: I am not sure whether that links the criminal and the civil aspects.

Isabella Ennis: No—family law arbitration is in civil law only. There is no arbitration in crime.

Rosanne Cubitt: There is the issue that Nicos Scholarios alluded to about the disconnect between the criminal and civil aspects. A case can be considered in a civil court without any knowledge of previous criminal convictions. That is an issue for our contact centres. We get cases referred to us with no information about other convictions, unless the people happen to disclose that to us. That is another topic on which I am not an expert, but there is a bit of a disconnect between the criminal and civil sides in the way in which cases are managed. I do not know enough about the one family, one judge approach but, if it was to resolve that disconnect, that would be ideal.

Liam Kerr: Thank you—that is all extremely useful.

Maurice Corry (West Scotland) (Con): My question is for Isabella Ennis and Rosanne Cubitt. What weight do you give to evidence from the child contact centres in the ADR process, bearing in mind that those centres are not regulated, which concerns me greatly?

Rosanne Cubitt: Relationships Scotland runs most of the child contact centres as well as working on the mediation side. Child contact centres are great places that act as a bridge when there is no contact and help to establish a better relationship. As relationships improve, many families who use our contact centres will access family mediation, which is an opportunity for them to talk about the issues that they have and try to find a way of moving on so that they do not rely on a contact centre. They might use the centre just for drop-off and then, ultimately, have their own arrangements outwith the centre.

Contact centres play an important role in helping children to establish or re-establish relationships with a parent who they do not live with. I know about the concerns about regulation. We support regulation, although there is an issue about the funding that there has historically been for child contact centres. In many cases, contact centres play a really important role as a stepping stone for families where one parent has not had a relationship with a child. Increasingly, we see families who have never lived together and where,

some years after the child was born, the parent who has not been living with the family—most often it is the dad, but not always—wants to get to know their child. For the child, there is suddenly another adult who is their parent but who they have never met, so there needs to be a safe place for that relationship to develop and for the parent to learn parenting skills.

We are getting quite off topic, but contact centres play an important role, and mediation can support that process. That is particularly the case in Relationships Scotland, because many of our centres run both those services, so families can move between the two.

Maurice Corry: One issue that concerns me greatly is that children in a domestic abuse situation are sometimes forced to meet the abuser as part of the mediation in contact centres. There is something seriously wrong with that, because it can affect the child. Does that concern you?

Rosanne Cubitt: Absolutely.

Maurice Corry: What are you doing about it?

Rosanne Cubitt: In cases where there is domestic abuse, children absolutely need to be safe and not be exposed to further abuse. I agree with Marsha Scott that the way in which decisions are being made in the court process needs significant review.

We would argue that a proper risk assessment needs to be done prior to an order for contact being made. When cases come to us that have a court order, we do a risk assessment to decide whether we can facilitate contact that is safe. However, we are not the decision makers on whether that is appropriate within the bigger picture of the family. Much better risk assessment needs to be done when domestic abuse is a concern, prior to cases coming to the contact centres.

Maurice Corry: We have not heard from Isabella Ennis. Would you like to respond to my questions?

Isabella Ennis: If a decision has been made that contact should happen, the arbitrator, the sheriff or the lord ordinary will have made that decision in a particular context. They do not make such decisions in a vacuum. They will have heard how the contact is proposed to happen, whether it will be in a contact centre and, if so, what the facilities are, how the contact is to be managed and whether it is to be supervised, unsupervised or monitored. All of that will be in evidence that is with the decision maker before the decision is taken.

If such a decision is taken, the decision maker will have taken all those issues into account and considered that, nonetheless, the welfare of the child is best protected and promoted by contact in that environment or an alternative environment. The decision maker will have heard about how the contact centre works. In any event, a FLAGS decision maker will have had professional interactions and experience with the contact centre.

Maurice Corry: Do you agree that non-regulation is a concern?

Isabella Ennis: In what respect?

Maurice Corry: It is basically the choice of the sheriff, whatever area he is in, as to what sounds like a good place to go. That evidence was given to us by the Public Petitions Committee, which I was on, and it really concerned us on this committee.

Isabella Ennis: It is not the choice of the sheriff, the FLAGS arbitrator or the lord ordinary. They will have been presented with evidence about a particular contact centre and the facilities that are available there. If the decision maker's view is that the child's welfare is best promoted by the model that they have before them, the decision will be taken, and the welfare of the child is the paramount consideration. The decision makers do not get a buffet of options from which they choose independently. Their choice is based on the evidence that is put before them by both parties, one of whom will often want unsupervised, open-ended contact while the other wants supervised or monitored contact at a particular contact centre.

The decision is not made in a vacuum. It is made using the evidence that has been put before the decision maker, and that evidence is tested and explored. In addition, the FLAGS arbitrator brings their own insight and experience as a family lawyer.

Maurice Corry: So you have no concerns.

Isabella Ennis: I do not know that I have no concerns—

The Convener: The view has been expressed that there can be concerns but there are checks and balances as far as possible. That does not mean that improvements cannot be made.

Nicos Scholarios: I agree with everything that Isabella Ennis and Rosanne Cubitt have said about the process. A decision is made with all appropriate evidence having been presented and duly weighed.

Contact centres play an important role in contact with children, and to some extent they also address the concerns when there has been a level of domestic abuse. Contact centres provide a safe environment and they can be a way of reintroducing a parent to a child. They are absolutely crucial in contact cases in which there

has not been a particularly good relationship previously.

I share the concerns about standards. The word "regulation" was used, but I think that "standards" is better. It should be appreciated that contact centres are pretty much charities that rely on donations and they are usually grossly underfunded. If there is a concern about contact centres and standards, there is also a funding issue. They have to be better supported because they play an essential part in facilitating contact between children and parents.

The Convener: We have gone off topic, so I ask whether the witnesses have any view on whether the English requirement to attend a mediation information and assessment meeting before proceeding to court in a divorce case is a model that should be considered in Scottish cases. I believe that an exception is made if there is any question, evidence or risk of domestic violence.

Rosanne Cubitt: In broad terms, we support having an information meeting so that people can explore all the options prior to deciding how they are going to take things forward and resolve their dispute. I am aware of some issues with the introduction of mediation information and assessment meetings—or MIAMs—in England, and I think that the situation was impacted by the removal of legal aid at the same time, which sent quite a confusing message. It is difficult to work out the impact of the introduction of MIAMs, as it cannot be looked at discretely from the big changes to the legal aid system down there.

We can learn from that approach, and we can look at what has and what has not worked, but in broad terms, we and CALM Scotland would support some requirement to attend an information meeting to ensure that all the options are explored. In England, that meeting has been called a MIAM, which narrows it down to mediation, but we are keener on what would be called a family dispute resolution information meeting. I realise that that does not make for an easy acronym, but it is more about family dispute resolution and allowing people to find out what their options are. I absolutely agree with the exception for domestic abuse and other such matters, but, of course, people can just decide that they want to go to court. That would be retained as one of the options.

Dr Scott: We looked at the arrangements for mediation information and assessment meetings in England and Wales and found that, although there was an exemption for domestic violence, it could be accessed only by providing the judge with evidence such as a police report showing that such violence had taken place. That brings us in a big circle back to all the problems that we mentioned at the beginning, about the systems not being competent to assess such things.

Nicos Scholarios: I talked earlier about the element of compulsion. CALM and Relationships Scotland conducted a number of meetings and engaged with Scottish Government and Scottish Legal Aid Board representatives and put together a proposal for a family dispute resolution pilot—we can present that to the committee, if that is deemed appropriate. We felt that that perhaps found the appropriate level of compulsion. We are not saying that people have to be compelled to attend mediation or pursue other forms of dispute resolution before they can enter the court system. The element of compulsion was that attending a meeting would be a requirement, but not an absolute one. Certain safeguards would be built in. For example, if someone refused the option of the meeting, they could give reasons for that refusal—for example, that there had been domestic violence. There would not be the requirement that Marsha Scott highlighted to produce evidence by way of a police report, but our general feeling is that if we want to effect significant change, people have to be given a bit of a push.

Daniel Johnson: My questions have largely been answered, but I am interested in the relationship between mediation and the court. Courts can refer people to mediation, but what happens then? Do they maintain any oversight of the matter? Is there any requirement on mediators to consider whether it would be appropriate to refer cases back to court? Indeed, is there any way in which the court can step back in? Do mediators just go their own way and never come back, or does oversight or communication continue after that point?

Nicos Scholarios: It depends on the stage at which a case is referred to mediation, which will vary. Sometimes parties approach us directly, even before they consult solicitors or before a court action has been raised; at other times, cases are referred to us after three or four years of litigation, perhaps at the very last stage of the process.

At the moment, a sheriff is allowed to refer a case to mediation only where there are issues of parental rights and responsibilities, contact or residence, but not in relation to financial matters. The case will be referred to a mediator through the auspices of the solicitors involved in the case. As mediators, we will conduct a mediation process as far as we can—hopefully, to a successful conclusion; if not, we end the mediation process and refer the case back to the solicitors.

Because of the confidentiality issues, we do not produce any form of report as to what has happened, what has been said or who has acted properly or improperly in the mediation context. If

we deem that mediation has run its course and a solution cannot be found, the case is referred back to the solicitors and the court process is picked up. If a sheriff refers a case to mediation, they will very often sist or suspend the process to allow mediation to take place. Successful mediation hastens the early conclusion of the court process; if mediation is not successful, the sheriff will pick up the court process again with the solicitors.

12:15

Daniel Johnson: Following on from that, I am wondering whether there is scope to improve the process. Could consideration of whether mediation might be appropriate happen not just at the start but at other points in the process? I understood your points about the pilot, which were well made, but are there other stages at which mediation could be brought in, which would improve the process?

Nicos Scholarios: That is a difficult question, because most cases are very different—indeed, each case is unique—and that is where the sheriffs have an important role. In a lot of contact cases—in numerous child welfare hearings—the parties and the solicitors will be before the sheriff in court but in a more informal setting than that of a final hearing, and there are always options at that time for representations to be made or for the sheriff to consider a referral to mediation.

We have suggested that there should be some form of mediation information meeting before the whole process starts. We think that that would be a good opportunity to invite people to pause, while appreciating that there will be certain circumstances in which a pause is not appropriate, such as if protective measures are required or if there are issues that have to be dealt with. I am not sure when we might introduce a pause at a later stage. Perhaps that could happen before a final hearing is assigned—a final proof that witnesses have to attend—but it is difficult to impose a hard-and-fast rule, given the differences in each individual case.

Rosanne Cubitt: By that point in the proceedings, a lot of views will have become very entrenched through the adversarial process. The earlier people consider alternatives, the better, and the more likely such alternatives are to be successful.

Nicos Scholarios: A lot of damage could have been done by that late stage of the process.

Fulton MacGregor: We have talked a lot about domestic abuse, child welfare and contact. Following on from Daniel Johnson's question, I am keen to hear what would happen—as a specific example, if you like—if, during the mediation process, you become aware of domestic violence for the first time. What do you do? Is the case referred back to the solicitor with no report being made, as you described to Daniel Johnson, or are other mechanisms in place to deal with circumstances involving issues such as domestic violence?

Nicos Scholarios: When we undertake mediation through CALM Scotland, we send out an introductory letter with the referral form, which asks questions about safety and whether there has been any domestic abuse. When a case is referred to us, it is likely that those issues have already been aired by advisers and the case has still been thought appropriate for mediation.

When we have an individual session with clients, we speak to each separately to begin with. Those sessions can last from an hour to an hour and a half. We go through the background fairly thoroughly. We have very experienced family lawyers and mediators, who would get a sense of whether there was a significant issue of domestic abuse and whether that would prevent—

Fulton MacGregor: What about during the process itself? Given the passing of the Domestic Abuse (Scotland) Bill, which I appreciate has only just happened, what would happen if you witnessed coercive and controlling behaviour during the mediation process?

Nicos Scholarios: I would stop the mediation straight away. I frequently do that, and separate the parties. That is where we have to rely on the experience and judgment of the mediator to decide whether it is simply a case of somebody who has got a bit hot headed and perhaps a lot of the angst arising from the separation is spilling over, or whether there is a more serious underlying problem. I have experienced both scenarios, and where I feel that a more serious issue is involved, I will stop the mediation, separate the parties and say that mediation cannot continue—at least, not in its present format. I would very quickly stop that. We cannot expose people to any form of coercive control or verbal or other abuse in the context of mediation.

Rosanne Cubitt: We have clear policy and practice procedures. If that situation arose in a joint session, we would stop the session and take responsibility for the mediation not continuing. We would not make a report about either party being more or less responsible; we would just say that the mediation was not progressing and that the parties would have to resolve their dispute in a different way.

Fulton MacGregor: So a report would not be submitted, even if a crime had been committed.

Rosanne Cubitt: That is correct, because we would not be investigating that situation. We would just say that the mediation could not go ahead,

because it was inappropriate. In mediation, both parties must be able to negotiate and, if that is not possible, mediation cannot progress. We would just say that mediation was not possible; we would not pass any view on that party's situation beyond the mediation room.

Dr Scott: I have pretty much said what we think about mediation where domestic abuse might be involved. As I said, there is the binary problem: mediation or no mediation. Women often wind up in that position because they have really limited choices, and they might not be able to fall back on paying a solicitor to protect their interests. That points to the larger problem that we have with women not being able to reliably access legal support.

We must be careful not to create a system that further privileges alternative dispute resolution such that women find themselves in those situations. If a woman has made the decision that the safest thing for her to do is to try to find some resolution to the contact issues, because otherwise she will be seen as disputatious or non-compliant, we have really put her in a box and put her children at great risk. There is no good solution. I absolutely agree that the mediation should be stopped in the situation that Fulton MacGregor raises, but it is really unfortunate when it gets to that point, because the woman then has a vanishingly small number of options.

Liam McArthur: You have referred a couple of times to the need for the system not to further privilege alternative dispute resolution. As we have heard, the deployment of those options is fairly patchy. Would you therefore view it to be further privileging ADR if there were more consistency in the availability of the options, or is your concern that there would be, as Mr Scholarios suggested, more of a requirement on individuals to demonstrate that they had at least considered those options? I am interested in what you mean when you talk about further privileging ADR.

Dr Scott: We are all well aware of the problems with overcrowded courts and overlitigious approaches to resolving disputes. Women who are caught up in that system and who are experiencing domestic abuse, and who may or may not have been well advised by a family lawyer, are sometimes pushed—sometimes unintentionally but sometimes explicitly—in the direction of mediation because they do not have alternatives. We need to solve the problem of women not having alternatives, instead of expecting mediation to be the solution.

Nicos Scholarios: In the context of victims of domestic abuse, if we do not offer alternatives as a way of resolving the issues that have to be resolved, the default situation is a court case, which is horrendous. People think that mediation might be bad, but it is not a pleasant experience to go through a court case in which your former partner, who is perhaps your abuser, sits next to you in court, and in which you are cross-examined by a solicitor who is acting for that person.

Other options have to be available. By all means, let us look at the models that are available or design more robust models to address some of the points that Marsha Scott has made, but alternatives to the default adversarial court system have to be offered.

Dr Scott: There are worse outcomes than court. I agree with that description of court, but there is a lot of evidence about revictimisation and the violence and coercion that can happen in the context of dispute resolution. It is really important for us to remember that. Women and children get killed in those situations. I do not want to overdramatise that because it is very rare, but it is really important that we remember that that is what we are talking about when we talk about revictimisation.

Isabella Ennis: It is important that families who are in dispute know what all the options are, that all those options are available to them regardless of their income, and that they have good information that enables them to pursue the best options for their family. No one size will fit all. Mediation will not suit everyone, and nor will arbitration, litigation or collaboration.

It is vital that all families in a dispute know that there is a range of options, and that one of them—or a combination of them—will be best for them. They need access to choice.

The Convener: Does Fulton MacGregor think that his question has been answered?

Fulton MacGregor: I just want to sum up my line of questioning. There seems to be consensus among the panel that many women will choose to use ADR. It is appropriate in many situations and it might also be appropriate for women who have experienced domestic violence.

I am reassured by some of the things that we have been told are in place for those who have experienced domestic violence. However, I would be more reassured if each of the panellists were to commit to increasing training and awareness. Given the new domestic abuse legislation, this would be the ideal time for that. I suppose that the position for women and men who experience domestic violence regularly is the same. When we took evidence on the Domestic Abuse (Scotland) Bill, we looked at what the police do to learn about and respond to such situations. We also looked at what social work does and what the courts do. I suppose that your organisations are no different. Can you give me that commitment?

Rosanne Cubitt: We are committed to training in domestic abuse. Someone from Scottish Women's Aid came to look at the training we provide for our mediators and they felt that it was robust. We are keen to do more, and we run training for our practitioners every year in domestic abuse and the emerging thinking in that area.

I acknowledge that there is more to learn, and there is absolutely more that we can do, but we are committed to doing the training and we have worked with Scottish Women's Aid on our policy and practice procedures, and on training for mediators. We will continue to do that.

Isabella Ennis: FLAGS is absolutely committed to maintaining the training of its already trained arbitrators. We have local training pods across Scotland and we have annual training events. In addition, all our arbitrators are solicitors or advocates and so are obliged to engage in their own continuing professional development and training annually. They have to undertake a set number of hours of training as part of our professional requirements. FLAGS has its own training convener and it undertakes local training.

Nicos Scholarios: CALM echoes everything has been said. We also have domestic abuse training for our mediators and, as I have said previously, we have engaged with Scottish Women's Aid. That training recurs annually, and we are looking at introducing an element of it into our initial core training.

We are certainly open to further co-operation. We do not take lightly the comments that Marsha Scott has made on behalf of Scottish Women's Aid. I echo what Rosanne Cubitt said: we can always learn more about processes, we can constantly review processes and we can take advice from those who are more expert in a particular field. That is essential.

CALM is absolutely committed to training.

12:30

Rosanne Cubitt: In a lot of domestic abuse cases the decisions are made by sheriffs, who often base those decisions on child welfare reports. My concern is that more than 90 per cent of child welfare reports are written by family lawyers, and there is no requirement for them to be experts in domestic abuse. I would like the issue of child welfare reporter training to be noted. There is a real need for better training in domestic abuse, to inform the reports on which the sheriffs base their decisions.

Ben Macpherson (Edinburgh Northern and Leith) (SNP): Some of the points that I was going to raise have already been touched on, and I thank you for all your evidence so far. I have two main queries.

First, there was some discussion earlier about future funding of legal aid for ADR providers and provision. However, there was more discussion of greater regulation of the sector and new regulation, perhaps, to encourage uptake and create a cultural shift or sea change. I think it was Nicos Scholarios who said that because we have an adversarial system at present, change is required to come from above, in order to create a more collaborative and problem-solving approach. I would be really interested if witnesses can elaborate on any regulatory reform that they see as being necessary, such as the potential mediation act that was mentioned earlier.

Secondly, we have discussed training, but I also want to consider training within the legal profession in general. Do we need to think more seriously about legal education as well as CPD in the sector, in order to encourage and facilitate increased usage of ADR, so that mediators or arbitrators can give the experienced judgment that is required?

Training is important for the legal profession, but it is also important when considering ADR in the round—I know that from some case work that I have received as a constituency MSP. Do we need to consider whether we have enough psychologists and therapists trained in the area of relationship counselling for families?

There are several questions wrapped up in that, but that is intentional in order to give witnesses a chance to respond to those theoretical points as well as to the practical side.

Dr Scott: I will not bang the same drum too much, but I get quite nervous when I hear the word "compulsion". I understand the sense in which it was being used, in relation to trying to create a system that is a bit more influential about decision making. However, any time that we have any kind of compulsory regulation, there is a sanction involved for people who do not comply. If a penalty was imposed on failure to undertake mediation, that would place women in an impossible position. I need to underscore that.

On training, I absolutely accept the good intentions of the entire panel. The problem is with the proof of the pudding at the moment. Whatever is being done is not obviously and consistently delivering the outcomes that we would like. Therefore, we need to scrutinise really carefully whether training is delivering competence. This is not the first time that this committee has heard us talking about the need for training, not only for family lawyers—which is very much needed—but for judges and sheriffs. I know that that is not in your gift at the moment, but if we can keep the

conversation going in Scotland that would be helpful. I suspect that my colleagues on the panel would support that.

Finally, our groups often say that they would like to be able to provide access to counselling for children and adults. However, it is critical that we are careful in thinking about that. The use of counselling often implies that there is a person who is damaged and that that is the problem to fix, rather than the abuse itself. Counselling of perpetrators is not an appropriate response to perpetration. Although in general counselling probably needs to be more available to people who need it in Scotland, I would be very cautious about recommending it as a response in the context of domestic abuse.

Isabella Ennis: On whether we need a regulatory framework such as a mediation act, I am not sure that a rush to regulation is the best first step. As Mr Scholarios said, we need to raise awareness and ensure that ADR and the range of options is known about, and that they are all funded.

On training and education, for lawyers, the point of a law degree is to learn the law of Scotland, and that includes the Arbitration (Scotland) Act 2010. The diploma in legal practice is for those who have learned the law to learn how to apply it in a practical way. The ability to know how to advise a client on access to ADR is best dealt with at the diploma stage. At the recent FLAGS annual general meeting, we had representatives from the University of Edinburgh. FLAGS would welcome a request from any university to provide input to its diploma course on arbitration in a family law context.

On the availability of psychologists and therapists, I do not know what the numbers are but accessing them is, again, a funding issue. If someone has funds to access that sort of expertise to assist with a case, they can find it. However, if someone is in a difficult position or is legally aided, finding an expert who is available to do that at legal aid rates is problematic.

Rosanne Cubitt: On the regulatory framework and whether we need a mediation act, as a punter looking in, I think that we often bring about cultural change by having a change in legislation, as happened with the ban on smoking and the seat belt legislation, for example. When there is clear intent in legislation, we are more likely to bring about cultural change. A mediation act would show an intent to encourage the use of alternative dispute resolution.

I have said what I needed to say about training for the legal profession, particularly on issues to do with domestic abuse and the impact on children. I appreciate that legal professionals are well trained in legal areas, but training in relation to children and domestic abuse could perhaps be improved.

Relationships Scotland provides relationship counselling and some counselling for children and young people. We have some family therapists but, actually, there are very few trained family therapists in Scotland. It would be good if there were more available but, at the moment, they just are not there. SLAB has said in its new guidance that it will consider paying for family therapy, but the challenge at the moment is that there are not people in Scotland who can provide that service.

Nicos Scholarios: The regulatory framework is a big issue. To effect the kind of significant change that we are talking about, there is no question but that primary legislation would be needed. We have tried to look at ways of encouraging the greater uptake of alternative dispute resolution through the pilot scheme that CALM and Relationships Scotland have proposed. In the long term, my position is clear: I am a great fan of alternative ways of resolving disputes rather than using the adversarial system that we have, so anything that moves towards that would be positive.

On training in the legal profession, I agree with what Isabella Ennis has said about the appropriate time being when students have completed their law degree and are doing their diploma prior to entering into practice. However, that training has to be extended into CPD once they have qualified. The more training that is available, not only on ADR but the effects and the impact that it has, the better. It is priceless.

I do not think that I can comment further on the issue about therapists or psychologists. I have no particular specialist knowledge in that area.

Ben Macpherson: You mentioned the fact that primary legislation would be required for the kind of cultural shift that could be envisaged. I appreciate that I am putting you on the spot here, so I will understand if the answers are not forthcoming at the moment, but do you have any idea of what that primary legislation would encompass?

Nicos Scholarios: You really are looking at embedding mediation, arbitration or some other form of dispute resolution in the court process. At the moment, the access is still straight to the courts. You would have to examine court rules and how the courts are structured. It is a big issue, obviously.

The Convener: That concludes our questions. Thank you; that was an excellent session.

12:41

Meeting suspended.

12:42

On resuming—

Subordinate Legislation

Premises Licence (Scotland) Amendment Regulations 2018 (SSI 2018/49)

The Convener: Agenda item 4 is consideration of a negative instrument. I refer members to paper 3, which is a note by the clerk. If the committee wishes to report to the Parliament, it has to do so by 29 March. Do members have any comments?

Maurice Corry: Knowing the pub industry quite well, and being aware of the state that it is in, I point out that there is a contradiction in the papers before us. Regulation 2(2) says that an application must provide

"A disabled access and facilities statement ... in the form set out"

by Scottish ministers. However, paragraph 4 of the policy note says:

"the Disabled Access and Facilities Statement does not form part of the premises licence application".

We need to clarify that. It might be a get-out for traditional pubs that face problems with making adjustments in relation to disabled access, so that they do not have to worry about it, but I do not know. It is something that should be clarified.

Daniel Johnson: The regulations are welcome. It is the best part of a decade since the Licensing (Scotland) Act 2005 was passed, and this move is something that the barred! campaign, which was run by Mark Cooper and Capability Scotland, worked long and hard to secure. It is worth noting that they will be pleased that the regulations will come into force at the end of the month, although I note Maurice Corry's comments.

Maurice Corry: I support the regulations, and the move is a good thing, but we need to clarify the issue that I raised.

The Convener: We have two options. We can seek clarification and return to the issue at a later date or agree to make no recommendations but seek clarification nonetheless. I am entirely in members' hands.

Maurice Corry: I think it might be just an issue to do with the combination of the words, but they should be a bit clearer. At first sight, to anyone reading the regulations, there appears to be a contradiction.

The Convener: I am sure that the intention is clear in the Government's mind. It is probably just an issue of drafting.

Maurice Corry: Yes, the regulations need to be redrafted.

Liam McArthur: I hear what Maurice Corry and Daniel Johnson have said and I agree that we have waited a long time for the move. On the basis that there appears to have been no consultation on the regulations, only discussion of them, I would be inclined to seek the clarification—fairly urgently—with a view to agreeing the regulations once we have it. The worst thing would be that we nod them through and then discover, upon receiving the clarification, that the issue that Maurice Corry has identified is more of a problem than we thought.

The Convener: We have ample time to seek clarification. Do we agree to that course of action?

Members *indicated agreement.*

The Convener: That concludes the public part of today's meeting. Our next meeting is on Tuesday 13 March, when our main business will be to take evidence on the use of remand in Scotland.

12:45

Meeting continued in private until 12:56.

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