OFFICIAL REPORT
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Justice Committee

Tuesday 26 November 2019

Session 5

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Pàrlamaid na h-Alba

Tuesday 26 November 2019

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JUSTICE COMMITTEE
29th Meeting 2019, Session 5

CONVENER

Margaret Mitchell (Central Scotland) (Con)

DEPUTY CONVENER

*Rona Mackay (Strathkelvin and Bearsden) (SNP)

COMMITTEE MEMBERS

*John Finnie (Highlands and Islands) (Green)
*Jenny Gilruth (Mid Fife and Glenrothes) (SNP)
*James Kelly (Glasgow) (Lab)
*Liam Kerr (North East Scotland) (Con)
*Fulton MacGregor (Coatbridge and Chryston) (SNP)
*Liam McArthur (Orkney Islands) (LD)
*Shona Robison (Dundee City East) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Jamie Bowman (Scottish Government)
Iain Fitheridge (Scottish Government)
Hannah Frodsham (Scottish Government)
Margaret Main (Scottish Government)
Shona Spence (Scottish Government)
Simon Stockwell (Scottish Government)

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Justice Committee

Tuesday 26 November 2019

[The Deputy Convener opened the meeting at 11:00]

Children (Scotland) Bill: Stage 1

The Deputy Convener (Rona Mackay): Good morning and welcome to the Justice Committee's 29th meeting in 2019. We have received apologies from Margaret Mitchell.

Agenda item 1 is the committee's first evidence session in its stage 1 consideration of the Children (Scotland) Bill. I refer members to paper 1, which is a note by the clerk, and paper 2, which is a private paper. I welcome the Scottish Government's bill team to the meeting. We have Simon Stockwell, head of the family law unit; Iain Fitheridge, head of the children's hearings team; Hannah Frodsham, family law unit; Shona Spence, looked-after children team; and Margaret Main, Jamie Bowman and Victoria Morton, Scottish Government legal directorate. I invite Hannah Frodsham to make brief opening remarks of up to five minutes.

Hannah Frodsham (Scottish Government): Thank you for inviting us to speak to you today about the Children (Scotland) Bill. I will give a brief overview of the bill and then we will be happy to answer any questions you may have.

At the time, the Children (Scotland) Act 1995 was seen as groundbreaking. However, we have heard concerns from many children, parents and organisations about how part I of the act works in practice. We consulted last year on reviewing part I. As well as the Children (Scotland) Bill, we published a family justice modernisation strategy in September 2019. The strategy aims to improve the operation of family justice and the culture of the courts in family cases. It sets out our on-going work, plans for secondary legislation and improved guidance and areas for further consideration.

The key policy aims of the bill are to ensure that the child's best interests are at the centre of any contact and residence case, ensure that the views of the child are heard, further compliance with the United Nations Convention on the Rights of the Child, and further protect victims of domestic abuse and their children in family court proceedings.

On ensuring that the child's best interests are at the centre of contact and residence cases, section 11(7)(a) of the 1995 act provides that:

> "the court ... shall regard the welfare of the child concerned as its paramount consideration and shall not make ... any order unless it considers that it would be better for the child that the order be made than that none should be made at all".

We have tried to ensure that none of the provisions in the bill cuts across that central principle while, at the same time, taking steps to put the child more at the centre.

Section 8 of the bill introduces a register of child welfare reporters. Those are individuals appointed by the court either to obtain the views of the child or to provide a report on the best interests of the child. That will ensure that all child welfare reporters are subject to suitable and consistent qualification and training requirements, so that the best interests of the child are reflected back to the court. Training will cover domestic abuse and coercive control.

Section 16 places a duty on the court to investigate any failure to obey an order under section 11 of the 1995 act. The investigation can be done by a child welfare reporter or by the court itself. Understanding the reasons behind non-compliance with an order could help the court to ensure that the order remains in the child's best interests.

The second aim of the bill is to ensure that the views of the child are heard. Sections 1 to 3 remove the presumption that a child aged 12 or over is considered mature enough to give their views in a number of circumstances. That includes cases under section 11 of the 1995 act around contact and residence, children's hearings and adoption and permanence proceedings. The presumption was never intended to restrict children aged under 12 giving their views. However, we have heard that in practice that can sometimes be the case. The intention is for all children who are capable and wish to do so to be able to give their views. Of course, if a child does not wish to give their views, that should be respected. The Scottish Government believes that a child should be able to express their views in a manner that is suitable for them. That may be by completing a form, giving views via an appropriately trained and qualified child welfare reporter or speaking directly to the court.

The third aim of the bill is to further compliance with the UNCRC. The policy memorandum that accompanies the bill provides further information on the relevant UNCRC articles for the bill. In addition, we have published a full children's rights and wellbeing impact assessment that goes into more detail on that. I will focus on the key areas.

The provisions that I have already mentioned on the best interests and views of the child are relevant to a number of the UNCRC articles, notably articles 3 and 12. Adding two factors to

those that the court must consider when making an order under section 11 of the 1995 act is relevant to articles 5, 7 and 18 of the UNCRC. Section 10 aims to strengthen the law in relation to a local authority's duty to promote contact and personal relations between a looked-after child and their siblings. That is relevant to articles 8, 16 and 20.

The final key aim of the bill is to further protect victims of domestic abuse. The bill looks at two key areas—the stage during a child welfare hearing and the final stage of a case when evidence is led. Section 7 gives the court the power to order a range of measures to assist the parties if attending or participating in the proceedings is likely to cause distress that could be alleviated by the use of such a measure. The measures are similar to existing measures that are available when giving evidence in other civil and criminal cases. Those include screens, live video links and allowing a supporter to be present in a child welfare hearing.

Sections 4 and 5 introduce a new measure into the Vulnerable Witnesses (Scotland) Act 2004 that prohibits a party from personally conducting their case in certain circumstances. The new measure is available in cases under section 11 of the 1995 act or in court proceedings arising out of children's hearings. If a party is subject to that restriction and is unwilling or unable to appoint a lawyer, one would be appointed by the court from a register of lawyers established by Scottish ministers.

I hope that that brief overview has been helpful. We are happy to answer any questions that the committee has.

The Deputy Convener: Thank you. That was very helpful. You mentioned removing the 12-plus presumption in respect of a child giving their views. Do you think that there is any contradiction between that and retaining the existing presumption that only a child over 12 is mature enough to instruct a solicitor? Although that provision is already in the bill, could it be monitored to see whether it could be changed at some point?

Hannah Frodsham: The Scottish Government's view is that even children of a very young age are able to give their views in contact and residence cases about who they want to live with or have contact with but that a child would need a certain degree of maturity to be able to decide whether they wished to instruct a lawyer to give their views to the court. Therefore, the presumption of 12 is retained in those circumstances.

The Deputy Convener: That will probably not change, as far as you can see. Children mature at different rates, but do you think that it is better to set a benchmark of 12 for that?

Simon Stockwell (Scottish Government): That was our view about instructing a lawyer when we were preparing the material. As Hannah Frodsham said, we thought that a child could express views for a court at a very young age, and a variety of methods can be used for that—it does not have to be done by traditional methods or using forms. A child welfare reporter could use other ways to get views. However, instructing a solicitor has to be a more formal process. The solicitor has to be happy that the child understands the instructions that they are giving. We thought that it was right to keep the presumption of 12, given that there is a difference between instructing a solicitor and offering views more generally in a contact or residence case.

James Kelly (Glasgow) (Lab): The financial memorandum notes that in 90 per cent of cases the decision of the court would be explained by a child welfare reporter as opposed to the court itself. Will you explain the thinking behind that approach?

Simon Stockwell: When we spoke to the judiciary, the court service and legal practitioners, the view was that, although they could see some attractions in the court explaining decisions to the child and the court getting views directly from the child by, for example, the child going to see the sheriff, there was a degree of caution about that. There were a number of reasons for that caution: first, sheriffs' time is limited; secondly, not all sheriffs would necessarily have the full training to explain decisions to the child; and thirdly, it might be a bit off-putting for the child to go to the court. There are a number of reasons why, although we could see the rationale for saying that the child might want to speak directly to and have direct contact with the sheriff or with the court, we thought that in practice it might be more realistic to expect that most decisions would be relayed to the child by way of a child welfare reporter. In the bill, we are looking to improve the training, qualifications and experience of child welfare reporters. We thought that one of the key functions of child welfare reporters in the future, as well as taking the views of the child in the first place, would be to explain the decisions to the child.

James Kelly: Do you think that sheriffs need more training in how to deal appropriately with children, given the fact that one of your reasons for putting the onus on the child welfare reporters to take the lead is that you feel that sheriffs might not be able to handle it appropriately?

Simon Stockwell: I need to be careful not to tread too much on the judiciary's toes when it comes to judicial training; otherwise I will be told off by the Judicial Institute for Scotland. Judicial

training is not directly a matter for the Government; it is for the Judicial Institute. We speak to the Judicial Institute about training requirements.

Sheriffs are generalists, on the whole. In the central belt, there are sheriffs who do family cases most of the time, but most sheriffs are doing a quite wide variety of cases—criminal cases, other civil cases, family cases—and we have to accept that when you have a generalist system, which we probably need, given Scotland's geography, sheriffs cannot be trained in, and be experts in, everything. Speaking and listening to children is quite a skill. It is something that child welfare reporters are quite good at and we want to encourage them to be better at it through more training and laying down requirements for qualifications and experience. We recognise that we have a system of generalist courts that often deal with family cases, but we have child welfare reporters who are specialising now and we hope that they will specialise even more in the future. The bill reflects that reality.

The Deputy Convener: What is your view on integrated domestic abuse courts hearing both criminal and family cases? Would you support or consider that?

Simon Stockwell: We have considered it. Around the time that the bill was introduced, we published some research that looks at some detail of how such courts operate in other jurisdictions. We can send the committee a link to that research if that would be helpful. We have some concerns about how it might work in practice. One of the concerns is that if entry to the court depends on there being a criminal case, what happens if the person who is accused is found not guilty or the case is not proven? Does it then fall out of the court and back into the ordinary courts? Another concern is about whether it would operate across all of Scotland or just in some parts of Scotland. There might also be knock-on implications for the scheduling of other cases. We would need to think about which lawyers would be doing such work. Some practitioners are skilled in family law and other practitioners are skilled in criminal law. There was quite a lot to think through in respect of integrated domestic abuse courts when we published the research. We will look further at the issue, but we felt that we were not ready to do what you suggest in the bill, because there are a lot of issues to think through before we introduce it.

The Deputy Convener: It would be helpful if you could send the link to that research.

Simon Stockwell: We will certainly do that.

John Finnie (Highlands and Islands) (Green): I readily accept that Governments consult on a wide range of measures that do not necessarily make their way into a bill. One area that was consulted on was child support workers, as a mechanism to support children through the system, as the title suggests. Can you explain the rationale for the Scottish Government not including that in the bill? Are there any proposals to legislate on that in future?

Hannah Frodsham: We appreciate that child support workers can play an important role in ensuring that children can give their views, but there are concerns that a child may end up with a number of child support workers for different situations—for example, for children's hearings and criminal cases—and that may not be in the child's best interest. Also, many children already have child support workers. They are available in some areas of the country, such as West Lothian, Aberdeen and Glasgow, and Scottish Women's Aid offers them.

That is why we have not included child support workers in the bill. However, in the family justice modernisation strategy, we have said that we will consider the matter further, because we need to ensure that there is a joined-up approach for the different sorts of advocacy and support workers.

John Finnie: I understand that there might be a specific role of child support worker, although you are right to identify that a range of people provide support across a range of circumstances. Are there any plans in the strategy to have a template or post specification for people who would have the capability to provide support, including in court?

11:15

Simon Stockwell: You are right that, as part of the work on the family justice modernisation strategy, we need to give thought to what child support workers are for and what qualifications, experience and training they need. One of the issues that we have been wrestling with for the past 10 years, since I started this job, is the experience, training and qualifications of child welfare reporters. If we were to make provision in legislation on child support workers, we would also need to think about the training that they require to carry out their role and what the role would be. I certainly have sympathy with what I think is Mr Finnie's suggestion that we would need to think about a holistic approach in which child support workers work in a variety of situations and whether it would be possible to have one worker taking a child through a variety of processes. That is perhaps easier said than done, but we would look at what the role of child support workers would be if we were to introduce them in future and how it could be a joined-up service rather than a bitty one.

Iain Fitheridge (Scottish Government): We will be introducing advocacy workers in the children's hearings system. I think that that is the type of person that Mr Finnie is referring to. Those workers will start next spring. They will help young people through the process, prepare them and help them to understand it. They will also be another person who can express a view for a child. It is about finding out what the needs of the child are and supporting them through the whole process of the hearings. That would go into the court side, if the hearing extended into a proof or some other stage. It will be helpful for us to evaluate how that goes and there might be an opportunity to extend that approach if it works.

John Finnie: That is interesting. You are right that an evaluation is important, because there is no point in just training someone to have a skill—they need to be deploying that skill. We are trying to avoid people going to court rather than having a skill that is required in court. However, I am sure that we will follow that work with great interest.

The Deputy Convener: Why does section 12 not include a specific statutory requirement relating to parental alienation?

Simon Stockwell: The term "parental alienation" is much disputed among practitioners, voluntary sector organisations and others. It attracts considerable attention. Scottish Women's Aid would argue that some of the research around it is not right, whereas shared parenting organisations argue that it is appropriate. The Scottish Government generally supports both parents being involved in a child's life. We recognise that, in some cases, that is not possible.

The term "parental alienation" would probably attract a considerable amount of adverse comment, so we did not think it right to include it in the bill. We could include something about one parent turning a child against the other parent but, in practice, if that was happening, we would expect the court to pick that up and cover it. We thought that including the term "parental alienation" would perhaps raise more concerns than it would answer. More generally, if there is any evidence of that type of behaviour happening, the court would have to look at what is in the best interests of the child and take a decision anyway.

The Deputy Convener: It is quite an extreme phrase, but there are issues if the child does not want contact with a parent. We need to look at that seriously, because there have been issues with that in the past. It might come down to training or just understanding the needs of the child, but I take your point.

Shona Robison (Dundee City East) (SNP): How does the Government envisage that the statutory regulation of the child welfare reporters and curators will work in practice? For example, how does the Government propose to set fee rates for those officials, whether they are reporters or curators?

Simon Stockwell: This has been a long road for us, because we have been looking at child welfare reporters ever since we published research on the issue a number of years ago and then set up a working group. There is general consensus that there needs to be regulation of child welfare reporters. We would do that by secondary legislation and would consult widely as to exactly what needed to be laid down in that secondary legislation. The Cabinet Secretary for Justice is keen that we do not just think about lawyers acting as child welfare reporters but that we consider whether other professionals, such as social workers, can act as child welfare reporters.

We have existing models to follow for fee rates. We have the work that is currently done by the Scottish Legal Aid Board on how much it expects to pay for child welfare reports, and we have a model on the children's hearings side, for which Iain Fitheridge is responsible. We will look at existing models and then seek views.

Our aim is to have focused reports rather than lengthy ones, so I do not think that we will pay by the page or something like that, because there would be a risk that people might be encouraged to write 250-page reports when 25 pages would do. It will be based on things such as how much work has been put in and what travel has been required. We will need to recognise that being a child welfare reporter is undeniably a difficult and skilled job. It involves making a recommendation to the sheriff on something that matters deeply to the child and the parents. It is not a straightforward matter by any stretch of the imagination. The sheriff courts rely on child welfare reporters and usually follow their recommendations, so the fee rates will have to be set at an appropriate level to attract good-quality people to do the work.

Shona Robison: Section 13 requires that the courts appoint curators only where necessary and that the courts should give reasons for that appointment and reassess every six months. The likely result of that is a reduction in the number of curator appointments made in family cases. Is that potentially a problem?

Simon Stockwell: I do not think so. The aim is to ensure that the curator is needed and is working to protect the child's interests. We want to make certain that, when somebody is appointed to do that work, the child actually needs the person and it is helpful. Where a court has decided that the child needs a curator, possibly because the child is quite young, we need to check that the child continues to need the curator and that the curator is continuing to perform a useful and valuable role.

The provisions are there to act as a check to make certain that the role of the curator is still required in particular cases.

Liam McArthur (Orkney Islands) (LD): To follow up on that, it has been suggested to us that the threshold for the appointment of a curator is based on necessity rather than the child's best interests. Would it not be more appropriate to set the bar at best interests, which would probably be more consistent with the general approach in the bill?

Simon Stockwell: We will have a look at any particular points that are made in written or oral evidence about whether we have the wording right. At the moment, the provision talks about protecting the child's interests, which I think would cover the point that you are raising, but we will look at any detailed points and see whether we have got it right.

Liam McArthur: It has been suggested to us that, currently, the responsibility of child welfare reporters is to the court rather than the child. I know that they have a broader range of responsibilities but, where their work touches on the child, would it not be more appropriate for their primary responsibility to be to the child rather than the court?

Simon Stockwell: Ultimately, the court has to have the welfare of the child as its paramount consideration, so we get there, but perhaps by a more indirect route. If the court decides to appoint a child welfare reporter, it cannot abdicate its responsibility to decide the case with the welfare of the child as its paramount consideration. Child welfare reporters know when they are appointed that their primary responsibility is to give a report to the court that takes account of the key point that the welfare of the child is paramount. That aspect probably works all right at the moment, in that the legislation is clear that the welfare of the child has to be paramount. The court knows that, and the child welfare reporter knows it when appointed.

Liam McArthur: In the absence of a specific reference to an advocate, unlike in the children's hearings system, if the child welfare reporter's primary responsibility was to the child, that would address the concern.

Simon Stockwell: That already is their primary responsibility to an extent because, as I say, the welfare of the child is paramount. Certainly the child welfare reporter reports to the court, but their primary duty is not to the parents or to any of the other parties to the case; it is to provide a report on what is best for the child.

Hannah Frodsham: The child welfare reporter can already be appointed specifically to get the views of the child rather than to look at the best interests of the child. The reason why a child welfare reporter is appointed depends on what is decided in each case.

Liam McArthur: I am sure that we will explore that with future panels.

James Kelly: I am interested in the approach set out in sections 4 to 6 in relation to cross-examination. In comparison to the approach taken in the children's hearings system, it would appear that there are greater restrictions on cross-examination in that system than in the approach that is set out in the bill. What is your thinking on that?

Hannah Frodsham: We aim to ensure that witnesses are appropriately protected in both systems. Children's hearings proceedings usually focus on the behaviour of the child or the parent and those are set out in the statement of grounds, which is specific and detailed. The protective measures that are open to witnesses are tailored depending on the nature of the grounds. Family cases operate differently where the subject matter of the case does not inform whether prohibition applies, so a different approach is required. In cases under section 11 of the 1995 act, criminal convictions will not be drawn to the attention of the court by virtue of the subject matter of the proceedings.

Fulton MacGregor (Coatbridge and Chryston) (SNP): There is an argument for a children's hearings-type system for all court matters affecting children, but I can understand why that might not be within the scope of the bill. Was any consideration given to the overlap between the systems that means that when serious issues are raised by a civil case, there is some sort of mechanism to refer the case to statutory bodies or to the children's hearings system?

Shona Spence (Scottish Government): There is already a provision to do that in the 1995 act or the Children's Hearings (Scotland) Act 2011.

Margaret Main (Scottish Government): It is in the 2011 act.

Shona Spence: The 2011 act already has a provision that the court can refer, in any civil matter, to a children's hearing if there is concern about the welfare of the child.

Fulton MacGregor: I am aware of that, but I am talking about more routine cases. Perhaps this is a better way of explaining it. If children are not having their voices heard through the court system, their voices could be heard through a hearings system or the type of environment that the hearings system produces. Was any consideration given to widening that provision as opposed to its being just for child protection or other serious concerns?

Shona Spence: There are a number of reasons, from lack of care to abuse and so on, why a child can be referred to the reporter. The reporter's job will be to assess whether there is a need for compulsion in relation to those children.

The reporter service will already receive a number of referrals in those circumstances and then it will be for the reporter to determine whether there is evidence that a ground for referral applies, and thereafter whether the child needs or may need compulsory measures that justify the intervention of a children's hearing. A children's hearing is an extra intervention in the family's life. The process exists, but I am not sure whether you mean that the family court environment should be different.

Simon Stockwell: One thing that we briefly considered—it has been raised occasionally with us—is whether we should take these private contact and residence cases out of the courts and set up a family tribunal instead. We would have some concerns about doing that.

11:30

First, a number of current cases probably raise more than one issue. They might raise divorce, financial provision, possibly an interdict, or contact, so you would be splitting cases up, which might not be in people's best interests. Secondly, although a tribunal might sound attractive, we are not certain that it would resolve matters. We might end up with the same sorts of issues that we have now with the court. The general view was that we should stick to the existing system but change it and try to improve it rather than do something more radical.

We are aware of the example of England and Wales, which have family courts with family judges and a system that has a higher degree of specialisation, but we have recognised that it is harder to do that in Scotland, given our geography.

Liam Kerr (North East Scotland) (Con): I will stick with James Kelly's line.

In her opening comments, Hannah Frodsham talked about sections 4 to 7 and how one of the practical impacts would be to prohibit certain parties from personal conduct of their case. Instead, they would have a lawyer who was appointed by the court from a panel appointed by the Scottish Government. I think that the Scottish Government consulted on a different model under which automatic legal aid would be provided for litigants who are subject to a ban on personal conduct. What was the thinking underlying the change in approach? Who would pay for the automatically appointed lawyer? Is there any research on the impact that the measure could have on the profession?

Hannah Frodsham: As you pointed out, the bill takes the power to establish a register of lawyers who would be appointed. We expect that those lawyers would be appointed in only a very few circumstances: first, because such cases generally do not reach the stage of getting to proof; and, secondly, because by the time they get to that stage, a party will often already be represented. Also, a party might be given the opportunity either to seek legal aid funding for a lawyer if they are eligible or to pay for one privately. The list of lawyers would be there for when parties are not eligible or are otherwise unable to appoint a lawyer.

We did not put it down as a legal aid system, because a party might not meet the financial or merits test for legal aid and there might be cases in which a party has tried to obtain a legal aid lawyer in their local area but has not been successful. A party could use that as a delaying tactic in the court proceedings. That is why we propose to introduce the register of lawyers. As for who would pay, we assume that Scottish ministers would fund the lawyers.

Liam Kerr: I understand. Thank you for the clear answer.

Sticking with the same area, in contrast to the position of vulnerable witnesses in sections 4 to 6 of the bill, in the context of section 7 of the bill no litigant is deemed to be vulnerable, as such. Instead, there are several different elements to the test of whether someone might be defined as vulnerable. What is the thinking behind the difference in approach between sections 4 to 6 and section 7?

Hannah Frodsham: Section 7 is to do with vulnerable parties, mainly in child welfare hearings. We have heard that, in some circumstances, vulnerable parties attending child welfare hearings have not had access to special measures such as live television links, television screens or supporters—measures that are available when they are witnesses in civil or criminal cases. Section 7 is aimed specifically at ensuring that special measures would be available, mainly in child welfare hearings but also in other cases where there is a vulnerable party as opposed to a witness.

Liam Kerr: Forgive me, but I want to press the question in case I am not quite understanding this. Hannah Frodsham might have answered this already. In sections 4 to 6 of the bill, there is deemed vulnerability—someone objectively does or does not have that characteristic—whereas under section 7, one almost has to satisfy certain tests to avail oneself of vulnerable status. A

different approach has been taken. I am trying to understand the underlying reason for that difference.

Jamie Bowman (Scottish Government): Maybe I can assist. As Hannah Frodsham pointed out, sections 4 to 6 deal with situations where the vulnerable person is acting in the capacity of a witness and, as a witness, there is scope for them to have direct interaction with the other parties to the case. Section 7 concerns situations where the vulnerable person is acting in their capacity as a party litigant. In those situations, there is less scope for them to have engagement with the other parties as directly as they might when they are being cross-examined, for instance. That is the difference in the context, which I think underpins the difference in the approach taken.

As you say, there are no deeming provisions in section 7. The deeming provisions in sections 4 to 6 strike at situations in which a victim of an offence is being cross-examined as a witness by the person who committed the offence. The threshold that is set in section 7 is quite low and gives the court relatively broad discretion to authorise such special measures—supporters or television links, for example—as it considers would be appropriate to assist the party in their participation and reduce their distress.

It is possible that a party might have the benefit of both. They might be protected in their capacity as a party by the use of a screen, for example, and also in their capacity as a witness by the imposition of the prohibition on personal representation.

Jenny Gilruth (Mid Fife and Glenrothes) (SNP): If someone failed to follow a court order, section 16 would impose a new duty on the court to investigate why the order had not been complied with. How often do you think that would be carried out by a child welfare reporter as opposed to by the court itself?

Simon Stockwell: I suspect that that is quite a difficult question to answer. Some voluntary sector organisations that support people who are involved in this sort of case told us that the way in which the courts dealt with the enforcement of court orders was fairly patchy, that there were not necessarily any consistent procedures laid down, and that, as a result, the court possibly was not doing quite as well as we might hope. We put the provisions in to clarify that if the court thinks that there is an issue about how a contact order is being complied with, or not being complied with, it should investigate the reasons for any non-compliance.

Will the courts ask for child welfare reports? It probably depends on how complicated any non-compliance is. In some instances, the non-compliance might have a fairly simple reason. The child might be ill or something like that, or there might have been a misunderstanding about timing. If the reason is relatively simple and straightforward, the court could probably deal with it by itself without appointing a child welfare reporter. If, on the other hand, the explanation that is given is rather more complicated, a child welfare reporter might be needed. I suspect that the answer depends on how complicated the situation that the court faces is, whether the court can deal with it fairly quickly, or whether it will need more information or advice, in which case it might have to appoint a child welfare reporter.

Jenny Gilruth: It is still ultimately in the gift of the court to choose to appoint that person, so if that still happens across the board, there is potential for patchy provision. Because there is no compulsion, the court might choose not to appoint a child welfare reporter when it should have done.

Simon Stockwell: There is a balance for Government to strike here. People have raised points about procedures in family courts across Scotland varying, saying that what happens in one sheriff court might not happen in others. Equally, cases inevitably vary and we cannot lay down in primary legislation provisions that are too prescriptive because we would be cutting across judicial independence and the court being able to reach a view on an individual case depending on the facts and circumstances. There is a balance to be struck in trying to ensure consistency across Scotland while reflecting the fact that cases simply vary.

Liam McArthur: I understand that Children 1st, which is obviously very supportive of the bill generally, has raised a concern about information that is gathered as part of the therapeutic work that it does with children who might have experienced a range of abuse over a period of time and which forms the basis of case notes. It is concerned about the fact that there have been occasions—even when Children 1st has sought to register such information with the court in a confidential envelope—on which the court has taken a decision to share the information; sometimes it has even been shared with others who might have a record of abuse. Is there anything in the bill that would give Children 1st some reassurance on that issue?

Simon Stockwell: We consulted on that specific issue and have had a number of meetings about it. Before the main consultation, we also issued a discussion paper on it. Most people who responded to the consultation paper and looked at the earlier discussion paper generally concluded that the existing provisions in the area that is known as commission and diligence work, and

they were very nervous about us changing provisions in that area.

When we looked at the issue in more detail, one of our concerns about changing the law in this area was that we were not certain that we could do very much, because we did not think that we could provide that the welfare of the child would be paramount in the context of the disclosure of the documents. There might be a number of people with an interest in the documents, including parents, other children and the service provider, so it is difficult to say that, in this instance, the welfare of the child has to be paramount. We thought that we would have to simply provide that the court would have to take account of the varying interests of the parties involved and reach a view as to whether the documents should be disclosed and, in essence, we think that that is what the law is now. We did not see an easy way to amend the law in this area.

We have said that we will think about issuing some guidance in this area in an effort to provide clarity and to meet the particular concerns that have been expressed by Children 1st. We will continue to discuss the matter with Children 1st, but the majority opinion in the consultation was against a change in the law.

Liam McArthur: I am not sure whether you have seen the work that Dr Barnes Macfarlane has carried out. She has expressed concerns about the extent to which, as things currently stand, the rights of unmarried fathers in such situations have kept pace with where we are on human rights, but the bill does not propose any changes in that regard. What was the basis for that decision?

Simon Stockwell: The question of unmarried fathers' rights has been around since at least 1992—I think that this is in Lesley-Anne Barnes Macfarlane's report—when the Scottish Law Commission recommended that all fathers should have parental responsibilities and rights. The law was changed in 2006 so that unmarried fathers can get parental responsibilities and rights if they jointly register the birth of a child. The statistics—which we can send on if that would be helpful—show that about 96 per cent of fathers now get parental responsibilities and rights, either by being married to the mother or by jointly registering the birth. We thought about whether we should extend parental responsibilities and rights to all fathers and decided against it.

I think that Lesley-Anne Barnes Macfarlane's report discusses whether there are fathers to whom we might not want to give parental responsibilities and rights. Are there concerns about abuse and violence? Why is the mother not jointly registering the birth with the father? Does the mother have some concerns about the father? In the end, we came to a balance of rights and thought it best for us to make no changes to the current provision, given that it provides most fathers with parental responsibilities and rights and probably provides some protection for women in certain situations.

11:45

Liam McArthur: It would certainly be helpful to have the figures that you referred to.

Earlier this morning, the point was made to us that simply registering the fact that an individual was the father of a child would not necessarily imply responsibilities and rights where there were concerns about what the implications of those responsibilities and rights might be, either for the child or children or, indeed, for a current or former partner. A distinction was drawn between those two aspects and, on the face of it, it does not seem unreasonable for the child to at least know that X was their father; in a sense, it would appear to be in their interests to know that. Whether the child would choose to have contact with them or whether the court would assume that it would be in the child's interest to prescribe contact are other matters entirely.

I am curious about why you took the decision that you took. Was it simply because, at the moment, 96 per cent of fathers are covered, through marriage or joint registration, and it is assumed that there are other factors at play in relation to the remaining 4 per cent and you do not want to interfere with that?

Simon Stockwell: Each year, I go to the annual conference of the Association of Registrars of Scotland, a group of people who have to deal with challenging issues face to face and who often give Government a hard time when we appear before them.

I have discussed with registrars whether there should be something like compulsory birth registration, so that when somebody came in to register a birth, they would have to disclose who the father was, and registrars have told me that they think that that would be quite challenging and difficult for them; frankly, they have sometimes put it in more colourful language, which I will not repeat in front of the committee. They have pointed out that, in some cases, the mother might not know and, in other cases, there might have been violence and the mother might be reluctant to put the father on the birth certificate, even if that does not give him parental responsibilities and rights; she might be concerned about those sorts of issues.

Registrars have asked what they can do if the informant simply gives wrong information. It might be quite hard to challenge the informant, because

the registrar would not know. We have thought about that sort of issue, but in practical terms—I think that the registrars would say this—what you are proposing might be difficult to achieve.

Liam McArthur: That is helpful. I am sure that the registrars will be listening in attentively and will avail us of their views in due course.

Currently, we are left in a situation in which court proceedings are the only option for a father who is being denied what he sees as his right to be registered as the father of a child. That seems to be almost incentivising a point of conflict in relation to at least registering the fact that an individual is the father of a child without applying responsibilities and rights.

Simon Stockwell: There is a balance of rights to be considered here. We could make provision that we could try to enforce so that all fathers are named on birth certificates. In many cases, that would provide a benefit to those fathers, but there might be a downside for the mother in certain cases, particularly depending on the nature of the birth and the nature of her relationship with the father.

I think that we have reached a balance of rights here. In practice, the sole birth registration rate is now only about 4 per cent. We have provided information, which I think that we will look to update, about what responsibilities and rights a father gets through joint birth registration. The rate of sole birth registration has fallen in recent years—statistics show that it has gone down from about 6 per cent to 4 per cent.

I know that registrars provide information to people when they register a birth and talk them through what the issues are. In practical terms, I think that we have a reasonable system of birth registration that has worked fairly well, by and large. If we changed it, there might be concerns about adverse impacts on the rights of some people.

Liam McArthur: We will brace ourselves for the registrars' submission and get ready to redact some of the more colourful language.

Simon Stockwell: I am sure that they will be polite to you, Mr McArthur.

Liam McArthur: The bill does not include a requirement on parents to at least attend information sessions about the opportunity for mediation. It would be helpful if you could set out why the Government has chosen not to put that in the bill.

Simon Stockwell: Although there is nothing in the bill on mediation, we certainly recognise the value of mediation in a number of family cases. There is financial support for mediation, we regularly refer people to mediation and we are looking to improve our guidance and signposting to mediation as part of the family justice modernisation strategy. We are not ignoring mediation.

When it came to putting provisions on the face of the bill, we decided not to for a number of reasons. First, there is the issue of domestic abuse. Scottish Women's Aid and others will say that there should never be mediation when there has been domestic abuse. An attempt could be made to put in provisions—

Liam McArthur: I entirely understand the rationale behind that, but we are talking about making information about mediation available rather than having a requirement or a presumption in favour of mediation as a first course of action.

Simon Stockwell: I think that we assumed, having looked at the English model, that it would probably be necessary to have some exemptions from getting information about mediation, one of which would be to do with domestic abuse. I suppose that we could have a provision that said that everybody had to go to an information session, but—Scottish Women's Aid could probably say more about this than I can—I suspect that some victims of domestic abuse might object even to going to an information session about mediation or might see it as a waste of time, on the basis that they do not believe that the issues that they have with the other party could be resolved by mediation. There would be issues around domestic abuse, even if we were talking only about an information session.

It would also be necessary to consider whether there was a need for any other exemptions. We have looked at the provision that is in place south of the border, and it is evident that there might need to be exemptions for people who have tried mediation recently or for situations in which there is no mediation service available in the local area, no information is available or there is an emergency. There might need to be a number of exemptions. In our consultation, we outlined the position south of the border and talked about some of the exemptions that might be needed.

I would like to make a final point about dispute resolution outside of court. In family cases, it is not just about mediation. Mediation clearly plays a valuable role in family cases and is the most commonly used form of dispute resolution outside of court, but we know that collaborative law is used in some cases and that family group conferencing might be used in Edinburgh. Often, a couple will be able to resolve their dispute outside of court. Therefore, it is not just about mediation. There are other forms of dispute resolution, which is another reason for providing information and guidance rather than putting something firm on the face of the bill.

Liam McArthur: I appreciate that a reasonableness test would be required. Where no service is available, it would clearly be unreasonable to expect individuals to go down that route. However, broadening the definition to include alternative dispute resolution mechanisms beyond mediation would not appear unreasonable and would send a stronger signal that at least availing oneself of the information about the alternatives is in everybody's interests. Even if someone were to reject it at the first point of asking, at least a message would have been conveyed that going through the courts is not necessarily in their or anybody else's interests, albeit that people absolutely retain the right to opt to go down that path if they so wish.

Simon Stockwell: I agree that in many cases court is not the place to go, and that is one of the reasons why we are looking to improve guidance in this area. I often tell people over the phone—and personal friends, for that matter—not to go to court unless they have to, but to try to resolve the issue by mediation or another form of dispute resolution, or just by talking to the other party. We see that as something that would work better by way of providing better guidance and information rather than by putting provisions on the face of the bill.

Liam McArthur: You have referred two or three times to drawing parallels with provisions that are in place south of the border. Has that thrown up a series of unintended consequences or inevitable circumstances that you wish to avoid, with the result that you have decided not to go down that route in the bill?

Simon Stockwell: When mediation, information and assessment meetings were introduced south of the border, legal aid was largely removed from family cases. It can be slightly difficult to look closely at the English provisions because, in England, legal aid was taken away in a way that it was not in Scotland.

Generally, the message from south of the border is that MIAMs have not been a great success. The amount of mediation has not seemed to increase, and there have had to be a number of exemptions from the requirement to go to an information session. When we looked at the provisions south of the border, to be frank, that seemed to be a model not to follow.

Fulton MacGregor: I want to ask a very brief question about delay in court cases. What effect do you think that the new duty on the court in section 21 might have?

Simon Stockwell: That is an area that has been discussed since 1992. At the time, the Scottish Law Commission noted that a provision on delay might be included in what became the Children (Scotland) Act 1995, but the commission concluded that it would be better to include that in court rules.

In practice, we are 30 years on and we still do not have sufficient provisions on delay. The provision that we have put into the bill is at a very high level. It sends a clear signal, following some court cases that have undeniably taken far too long, such as a particular Supreme Court case, that the court must have regard to the need to avoid delay, and that delay cannot be in the best interests of the child.

The provision on delay also sets a framework for court rules to be put in place. The family law committee of the Scottish Civil Justice Council is currently looking at the court rules, which are very much about case management, how to manage family cases properly in the first place, what sorts of issues need to be explored at an early stage in the case so that the court knows what areas are likely to come up and how those can best be managed. The provision on delay in the bill sets a high-level framework. We hope that, beneath that, some court rules will come into place on how to manage cases and avoid drift and delay.

The Deputy Convener: Thank you. That completes our questions. Thank you all very much for attending. It has been a very useful session.

11:58

Meeting suspended.

12:00

On resuming—

Justice Sub-Committee on Policing (Report Back)

The Deputy Convener: Agenda item 2 is feedback from the Justice Sub-Committee on Policing on its meeting on 21 November 2019. I refer members to paper 3, which is a paper by the clerk. Following the verbal report, there will be an opportunity for brief comments or questions from members.

I invite John Finnie to provide feedback.

John Finnie: Thank you, convener.

As you said, the committee has a paper on the subject. The sub-committee met on 21 November, when it took evidence as part of its inquiry into the use of facial recognition technology by the Police Service of Scotland. Issues were raised about Police Scotland's intention to introduce the use of live facial recognition and the current facial matching processes. Witnesses raised concern about whether there is a sufficient legal framework for the use of facial recognition technology by the service and whether legislation has kept pace with the development of that technology. The sub-committee heard that there should be a clear framework and guidelines in place before live facial recognition is used in Scotland.

Another concern that was raised was the high level of inaccuracy that is associated with such technology, particularly in falsely identifying women and people from black and ethnic minority communities. Witnesses felt that Police Scotland should verify the claims that have been made by private technology companies before purchasing facial recognition technology.

The sub-committee also heard that, because of the invasive nature of live facial recognition technology, its unreliability and bias, public support for its use is low. Police Scotland needs to demonstrate that there is a clear purpose for using the technology that meets human rights requirements. There is also a need for Police Scotland to demonstrate that it has learned from the approach that it took to the introduction of the use of cyberkiosks for front-line officers; in particular, it should adopt a transparent approach and include stakeholders from the outset to shape policy.

In addition, the sub-committee heard that examination of the issues around the use of live facial recognition technology by the police should be a key priority for the Scottish biometrics commissioner once they are in post.

The sub-committee will hold its next evidence session on facial recognition technology on 5 December. I am happy to take any questions.

The Deputy Convener: Thank you. As there are no questions or comments, that concludes the public part of today's meeting.

Our next meeting will be on Tuesday 3 December, when we will take evidence from Gill Imery on the report of Her Majesty's Inspectorate of Constabulary in Scotland on its thematic inspection of the Scottish Police Authority.

12:02

Meeting continued in private until 12:42.

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