OFFICIAL REPORT
AITHISG OIFIGEIL

Justice Committee

Tuesday 17 December 2019

Session 5

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JUSTICE COMMITTEE

31st 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:

Diane Barr (Clerk)
Susie Dalton (Scottish Women's Aid)
Megan Farr (Office of the Children and Young People's Commissioner Scotland)
Sarah Harvie-Clark (Scottish Parliament)
Bill Kidd (Glasgow Anniesland) (SNP) (Committee Substitute)
Sue McKellar (Scottish Women's Aid)
Dr Fiona Morrison (University of Stirling)
Gael Scott (Clerk)
Professor Elaine Sutherland (University of Stirling)
Professor Kay Tisdall (University of Edinburgh)
Dr Richard Whitecross (Edinburgh Napier University)

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Justice Committee

Tuesday 17 December 2019

[The Convener opened the meeting at 10:01]

Children (Scotland) Bill: Stage 1

The Convener (Margaret Mitchell): Good morning and welcome to the Justice Committee's 31st meeting of 2019. We have received apologies from Jenny Gilruth. Bill Kidd is attending as a substitute and I welcome him to the meeting.

Agenda item 1 is consideration of the Children (Scotland) Bill. We have two evidence sessions, the first of which is a round-table evidence session that will focus on the participation of children in contact disputes. I refer members to paper 1, which is a note by the clerk, and paper 2, which is a private paper. I welcome all the witnesses attending the round table. Perhaps it would be good if we went round the table introducing ourselves—we will go round anti-clockwise, for a wee change.

I am the convener of the Justice Committee.

Rona Mackay (Strathkelvin and Bearsden) (SNP): I am the deputy convener of the Justice Committee.

Susie Dalton (Scottish Women's Aid): I am the children and young people's worker at Scottish Women's Aid.

James Kelly (Glasgow) (Lab): I am an MSP and a member of the committee.

Sue McKellar (Scottish Women's Aid): I am the improving justice in child contact co-ordinator at Scottish Women's Aid.

Shona Robison (Dundee City East) (SNP): I am an MSP on the committee.

Megan Farr (Office of the Children and Young People's Commissioner Scotland): I am a policy officer at the office of the Children and Young People's Commissioner Scotland.

Liam Kerr (North East Scotland) (Con): Good morning. I am an MSP on the committee.

Sarah Harvie-Clark (Scottish Parliament): I am from the Scottish Parliament information centre.

Liam McArthur (Orkney Islands) (LD): I am the MSP for Orkney.

Professor Kay Tisdall (University of Edinburgh): I am from the childhood and youth studies research group at the University of Edinburgh.

John Finnie (Highlands and Islands) (Green): I am an MSP.

Fulton MacGregor (Coatbridge and Chryston) (SNP): I am an MSP.

Dr Fiona Morrison (University of Stirling): I am a lecturer at the centre for child wellbeing and protection at the University of Stirling.

Bill Kidd (Glasgow Anniesland) (SNP): I am an MSP and a substitute member of the committee.

Diane Barr (Clerk): I am one of the clerks to the committee.

Gael Scott (Clerk): I am one of the clerks to the committee.

The Convener: The reason for the round-table format is that it is a good way to encourage discussion, to give you an opportunity to respond to each other's questions and to be more free flowing in your responses. It would be helpful if you indicate when you wish to speak. It is like magic—you do not have to worry about switching on your microphone; it will come on automatically when I call you to speak.

Let us start with a general question. We know that there have been quite a few projects hearing directly from children that have tended to involve domestic abuse cases. Given that a key aspect of the bill is the views of children being heard, it seemed good to take evidence first from those with experience of research on hearing directly from children. I will ask a question of the two academics who have been involved in some of that research. I see that your research was wide ranging. Did it involve anyone who was not involved in a domestic abuse case? More generally, there are open questions on the age of the children and how they were selected. We will start with those things: the types of cases, the age of the children, and the selection.

Dr Morrison: The research that Kay Tisdall and I have been doing with Clan Childlaw has looked more broadly at children's participation in family actions, and at how compliant current law, policy and practice are with the United Nations Convention on the Rights of the Child. As part of that, we involved a group of young children who advised our research and helped us to determine the priorities for the project. That was a very small group of children who had all experienced domestic abuse, which reflected the fact that many of the cases that go to the family court involve domestic abuse or child welfare concerns. However, our research was broader than that. We also looked at what other jurisdictions are doing in relation to children's participation in family actions

and we interviewed members of the judiciary and legal professionals in Scotland about their experiences of children's participation. We looked at the UNCRC and used it as a lens to see how compliant current policy and practice are around children's participation.

The group of children we spoke to at the beginning talked to us about the difficulty of giving views in disputed contact cases. They spoke about how they felt kept out of the legal process, which was not positive for them, and about their confusion and frustration in trying to understand how much their views had been listened to in the legal process and how much weight had been given to them. Those were the three priority areas that they had for our research, which fed into our project as we went on.

The Convener: What age were the children?

Dr Morrison: I think that the youngest was seven and the oldest was about 12.

Professor Tisdall: In Scotland, we have an accumulation of evidence from studies that are relatively small-scale but which have very consistent findings. Social scientists call that triangulation—we now have clear messages from different stakeholders through different methods. We are glad to share that evidence with you, but we can be reliant on those studies.

There are two groups who have not really been heard from. We have not heard from children who are involved in cases that are not contested, which means that they never go to court, and we have not heard from children who are not supported when they go to court. Those are two gaps but, from the children we spoke to and the issues that they raised, there are clear messages that we can be confident about.

The Convener: I will take the witnesses in reverse order so, before I go to Scottish Women's Aid, I ask Megan Farr to comment.

Megan Farr: You mentioned at the beginning of your question the particular focus on domestic abuse. Our first piece of work on the issue was to commission research from Kirsteen Mackay, which was published back in 2013. That research raises a fundamental point as to why domestic abuse is an important issue. In Kirsteen Mackay's analysis, although she writes that only 5 per cent of parents who do not live together take a dispute to court—which means that the vast majority of cases where parents break up do not reach court—the evidence is consistent in Scotland and in similar jurisdictions that around half or more of the cases that reach the court include an element of domestic abuse. From our office's point of view, the issue of domestic abuse was raised by children and young people back when the previous commissioner did his initial consultation with them. There is also the issue of the disproportionate percentage of the cases reaching court that include domestic abuse.

The Convener: Was that proven allegations or allegations?

Megan Farr: It was allegations that were written in the initial writ in defences or where there was police involvement. It was more than an anecdotal accusation; it was where there was in effect a statement as part of the court proceedings.

The Convener: Are there statistics about how many of those allegations were proven at the end of the day?

Megan Farr: Not that I am aware of. However, we know that, as was discussed a lot in the committee when the Domestic Abuse (Scotland) Bill was passing through Parliament, under the domestic abuse legislation that we had in place historically before that bill became an act and came into force, conviction rates were very low. That was because our understanding of domestic abuse was focused on incidents rather than courses of behaviour.

The Convener: Is that because we would expect cases in which there was an element of domestic abuse to be contested? That would explain why there was such a high proportion of such cases among the 5 per cent of parents who go to court.

Megan Farr: My understanding is that the 5 per cent relates to cases in which there is the highest degree of conflict between parents. Domestic abuse is often a factor in such cases. At times, it involves the non-abusive parent fighting very hard to protect their children from the impact of such abuse.

The Convener: That was evidence from Kirsteen Mackay. When was the survey done?

Megan Farr: She did an analysis of data, which was published in December 2013.

The Convener: Do we have any more up-to-date evidence anywhere in Scotland?

Megan Farr: We did some follow-up work. I am due back here on 7 January, so I can find out whether further similar analysis has been carried out.

The Convener: That would be lovely.

Susie Dalton: I will give a bit of background on the work that we have been doing over the past few years directly with children and young people and the justice system. I will then talk about a project that we have going on at the moment involving a young expert group, which Sue McKellar leads on.

The first project that we undertook in this area began in 2016 and was called power up/power down, which is a very hard project to say with a Northern Irish accent, so bear with me. Twenty-seven children and young people between the ages of six and 17 took part in the project. We worked with them through three Women's Aid groups and presented them with a story that was based on what we had heard in the network about children and young people's experiences in civil courts and contact cases. The story was about two young people—Zayne and Mia—going through court-ordered contact. By working on concepts of power and concepts of children's rights and participation, the children and young people who were involved rewrote the story and made recommendations based on what they had gone through in court-ordered contact. The project took an explicitly children's rights-based approach and aimed to build the capacity of the children who were taking part and of the workers, as duty bearers. The project, which we undertook with the Children and Young People's Commissioner Scotland, also had an explicit focus on the UNCRC.

In 2017, we began a project called Everyday Heroes, which linked directly to the equally safe delivery plan. The Scottish Government commissioned the project to hear the views of children and young people on what needed to change in three areas of the delivery plan—justice, services, and gender equality and societal attitudes. Forty-seven children and young people aged six to 25 took part in the justice report. Scottish Women's Aid led on that report, but it was a joint project between Scottish Women's Aid, Rape Crisis Scotland, Dr Claire Houghton at the University of Edinburgh, the Scottish Youth Parliament and Barnardo's. The power up/power down project had an explicit focus on domestic abuse, but the Everyday Heroes programme had a wider scope and looked at a range of gender-based violence. Eight organisations—Angus Women's Aid, ASSIST, Children 1st, Glasgow Women's Aid, Polmont young offenders institution, the Rosey Project in Glasgow, Shakti Women's Aid and the Rape and Sexual Abuse Centre in Perth and Kinross—were involved in recruiting and working with the young people.

The recommendations that came from both reports were closely aligned, unsurprisingly. I think that we will have a chance to discuss the recommendations later in the session, but I will highlight the main areas that the Children (Scotland) Bill goes some way to addressing. I will also mention the areas that are covered by the recommendations that have been omitted or are not present in the bill. The bill gives consideration to hearing more from all children and young people, to how to facilitate that, to what participation looks like and to how to make the process safer for children and young people. Some consideration is also given to the communication of decisions to children and young people and to improvements in the roles that come into contact with children and young people both in the court system, such as child welfare reporters and sheriffs, and outwith it in contact centres.

However, some of the recommendations of children and young people are not present in the bill, the most obvious ones being the presence of support and advocacy workers in courts and the protection of confidentiality.

10:15

The Convener: I will stop you there because you are getting into the recommendations. We were just looking for a rough idea and you have given us the age of the children and how they were selected, which is good. Would Sue McKellar like to add anything?

Sue McKellar: Yes. The young people in the expert group who responded on the bill—Yello!—were involved in the power up/power down and Everyday Heroes projects. That was four years ago when they were nine or 10 and they are now young people. The fact that they are still involved is probably good evidence of how well the projects have been done and how participation in them has supported the children and young people and feels empowering for them—they have specifically asked to come here to give evidence and they have spoken directly to Ash Denham about the bill and their feelings about it. As well as supporting Scottish Women's Aid and our policy, they are expert advisers to four other countries in Europe that want to implement projects similar to power up/power down and Everyday Heroes.

The Convener: How were their views gathered?

Sue McKellar: For the response to the bill?

The Convener: For the research.

Sue McKellar: The power up/power down research?

The Convener: Yes, or any other research.

Sue McKellar: That was done with the Children and Young People's Commissioner. The Yello! group of children and young people who responded to the bill have been involved in previous participation projects and they are a well-established group. For power up/power down they attended different types of sessions, but they were with their support workers from Scottish Women's Aid so they had established relationships within the group.

Susie Dalton: The Women's Aid workers selected the participants in those sessions by looking for children and young people who they thought would get the most out of it with a wide range of ages and experiences. As Sue McKellar said, there was already an established trusting relationship between the Women's Aid workers and the children and young people. The sessions explored concepts of power such as who has power, what power looks like and whether it is a good or a bad thing. They used the story of two young people going through court-ordered contact, which was based on experiences from the Women's Aid network, looking at what was happening to them and opportunities for things to have been different. In discussions, the children and young people were asked to step in and say, "This could be different," or, "Here is where I would want to share my views," or, "Why did that happen to those young people?" Based on what the children and young people said, views were gathered by the Women's Aid workers allowing Women's Aid and the Children and Young People's Commissioner to create an alternative story.

The Convener: Would that include things such as views on power?

Susie Dalton: Yes. It explored power as a concept in terms of what we in the network hear again and again from children, which is that they feel powerless. We looked at what that means and how power can be restored to children and young people in the civil courts and the justice system in general.

Sue McKellar: The children rewrote the story and gave their opinions about what should have happened. Stories had been taken from the Women's Aid workers' experiences of many different children and young people who had experienced the justice and contact systems. In the power up/power down project, the children wrote the story of two young children going though that experience, saying how they thought it should have gone. That involved listening to children and gathering their views.

The Convener: That is a very powerful way of recording it.

Sue McKellar: Yes.

Megan Farr: The methodology that we used for power up/power down was important. Because the children and young people were working through the characters of Zayne and Mia, they were not talking directly about their own experiences and we were not asking them directly about those. That is very important when young children are participating. They need to be able to speak in that way. It was a good project, because it captured how the children and young people wanted things to be different for other children. Given the talk about participation, particularly in relation to the current bill, we want to see more of that, particularly as the children have carried on to be involved through Yello!, Everyday Heroes and other groups. They found it empowering to feed into a system that they felt was not right for them and could be better.

Sue McKellar: Part of that was that the children and young people came to Parliament to present their thoughts to Nicola Sturgeon, and they got feedback on the decisions that were made about the information that they had given. It was not just a consultation where they were left and never got feedback.

The Convener: How were the views recorded in the research by Kay Tisdall and Fiona Morrison? I think that you mentioned that you worked with other countries. How were views recorded there? We have heard about one way in which views were recorded, but I want to get an idea of whether there are any different ways.

Professor Tisdall: Fiona Morrison might want to talk about that, because she did the international work.

Dr Morrison: I am not sure what the question is. Are you asking how other countries facilitate children's views?

The Convener: It was about how the views were recorded in your project, and then perhaps whether you know what happens elsewhere.

Dr Morrison: Our research project was not a huge empirical one with children. We started off with children to try to set the priorities for the research, because they were seen as experts who could tell us what our research should focus on. We had a workshop with children in which we looked at the mechanisms through which children can currently participate in family actions. We asked about the pros and cons of those mechanisms and what adults needed to know about participating in family actions. The children's thoughts were then distilled into the three priority areas that we kept to throughout our research project. In interviewing sheriffs, solicitors and advocacy specialists, we picked up the priorities that children told us were important to them and asked those people to reflect on them.

The Convener: So you gathered information on the children's priorities and that was passed on.

Dr Morrison: Yes, and that fed into the rest of our research. It set the parameters of what we were doing.

The Convener: Professor Tisdall, would you like to add anything? Do you know how other countries gathered information?

Professor Tisdall: There is a distinction between how children's views are ascertained in research and how they are ascertained in the family law system, on which we have accumulated information, as Fiona Morrison said. If we look at research in general, there are a variety of ways of doing that. Obviously, all of us who are here have tried to develop approaches that are sensitive to the issues. Many of the approaches are qualitative and ensure that support systems are there.

Rona Mackay: I want to ask a bit more about the power up/power down project. To clarify, did you say that the work was done four years ago?

Susie Dalton: It began in 2016.

Rona Mackay: Sorry—I picked that up wrongly. I thought that you said that it was four years ago.

Was there anything in the children's accounts that you found surprising or that you had not realised was the case? Were the overall findings simply that they wanted to be listened to and to have more participation or did anything else come out?

Susie Dalton: I do not think that there was anything surprising, given what we hear from the network. That was why we were so keen to take stories from the network and to create a template for the children and young people involved to work from.

Sue McKellar: As a children's support worker who has been involved in participation, one surprising thing is how keen children and young people are to speak to power. We often assume that children will be shy and intimidated by the circumstances but, actually, when the children we have worked with have been given the opportunity to express their views on larger stages, they have been keen to do so.

Susie Dalton: Also, seeing some of the outcomes for the children and young people and what they have gone on to be involved in as a result has been perhaps not surprising but heartening or exciting. Young people who were involved in power up/power down and Everyday Heroes have got involved in Yello!, which is the young expert group that Sue McKellar leads on. There has been continued participation over the past few years.

Rona Mackay: Since that work was done, the Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019 has been passed. In your professional opinion, has there been any improvement or difference in the way in which children interact with courts since then?

Susie Dalton: In terms of some of the recommendations from the Everyday Heroes programme around special measures for vulnerable witnesses, there has been improvement. Matters are set to improve for women especially, as well for as children and young people, through the bill. With regard to the participation of children and young people, we have not seen much change since the work began.

Rona Mackay: Are you hopeful that the bill will improve the situation?

Susie Dalton: Yes.

Sue McKellar: The feedback is that when special measures have worked, they have worked really well; however, the picture is not consistent and not every child has a positive experience.

Megan Farr: I have been reflecting on the work that we did five or so years ago. As Kate Tisdall said, there is real consistency between what was found through the research that Kirsteen Mackay did for us and what we find in power up/power down, where we are finding the same theories.

We hear about examples of good practice, although I am not convinced that certain good practice, such as sheriffs writing to children, is what we should be aiming for. It is better than a lot of practice at present, but I think that we could do a lot better in relation to feeding back to children, which is another element of the bill.

We are hearing a lot of consistency—we have an inquiries line, and we continue to hear similar stories. People are saying the same things that Kirsteen Mackay wrote about for us in 2013, such as young children not having their views heard or taken into account. We still hear of families in which a child under the age of 12 is not having their views taken into account, yet older siblings' views are. Somehow, as soon as the child reaches 12, their views are taken into account, and in some cases, the contact order is revoked as a result.

Children's views do not miraculously change the minute that they turn 12, but their capacity to express their views evolves over time from birth. However, we are still hearing about the same issues around children's views not being heard and not being given due weight. There is a lot of consistency across the evidence, as well as in what we hear through our inquiries line and from other professionals in the sector.

Dr Morrison: I will say a bit about what we found when we looked at other jurisdictions. We were really hopeful that would find promising practice that we could maybe promote as something that Scotland could do, but we found that, in other jurisdictions, courts and families are struggling with a lot of the same issues. We saw people worrying about upsetting or traumatising children. We saw questions being raised about how child friendly some mechanisms really are

and whether they are more suited to the courts' purposes rather than the child's purposes. With the bill, when it comes to children's views, I would encourage the committee to think more about where the children are at, rather than what a court needs, and how that practice can be extended.

Across jurisdictions, we saw that domestic abuse is a particularly difficult and thorny issue for courts to deal with. As Megan Farr said, there are allegations of domestic abuse in almost half the cases that come to court. If we cannot get participation right for that group of children, we will struggle to get it right for other children. Therefore, I encourage the committee to think more about the extended approaches for children who are particularly vulnerable and about cases that are particularly complex, because those are the cases that come to court.

Liam McArthur: As I listen to the discussions about how the child or young person's voice is heard, it occurs to me, from my experience of bringing up my own children, that as well as listening to what they say, we need to manage their expectations about what is realistic. That is not unique to children; adults often have expectations that seem to run directly contrary to one another. Through the research that you have been undertaking, how do we manage expectations, rather than giving the child the impression that anything and everything that they wish to see can be made manifest, whether by the justice system or more broadly?

10:30

Megan Farr: There are two aspects to that, and the first is that participation is a process, not an event. Children need to be supported properly when they are participating and giving their views. They also need to be supported properly to understand what their rights are and to understand what giving their views, and those views being given due weight, means. That includes giving reasons why sometimes the decision that is made will not be the one that they wanted.

The second aspect is that children should be given proper feedback that explains decisions, as well as support to understand those decisions. They should also be able to ask questions during that feedback. I go back to the example of writing a letter. In that situation, a child cannot ask what certain parts of the letter actually mean. It is important to make sure that that whole process is in place for a child, because inevitably there will be cases in which a decision that is made on the basis of a child's best interests does not align with the child's views.

Liam McArthur: As you say, participation is a process rather than simply an event. Based on your experience, does that shape the way in which the child then expresses their views? Do they moderate what they are saying on the basis of their expectations?

Megan Farr: It could go either way. Part of that support is about helping a child to understand their rights, and a child who understands their rights may ask for them to be realised. In Scotland we have a commitment to incorporate the UNCRC. The system has to be compliant with children's rights under the UNCRC, and those include giving them an understanding that their views are part of the decision-making process and an understanding of their right to participate in that process and to be properly supported in doing so.

Professor Tisdall: That confirms something that I wanted to say earlier. The power up/power down videos are mesmerising. One of the strongest things that comes out is the child support worker, along with the "Are you a Super Listener?" card. The improving justice in child contact project has been able to produce the card in combination with power up/power down. That is overwhelmingly strong. We are concerned about it not being included in the bill and about whether we can make it stronger if that is the biggest demand.

The other thing that has come from power up/power down—it is not a surprise, because we knew it already—is that people often get worried that they are asking children to choose between their parents. Sometimes children want to choose and we have to respect that, but this is about hearing children's views. The power up/power down videos show a family with a pet, and we know from other research that children often want to give their views about where their pet should be. They do not want to choose between their parents, but their views are wider than that. That is an important point when decisions are being made on what is in a child's best interests. We need a system that allows for that and does not put children in a position of choosing if they do not want to.

Rona Mackay: I will pick up on something that Megan Farr said about children not always having decisions go in their favour. Can you talk about an instance when a child has said that they do not want to see their father, and explain why that view may not be listened to? Does that happen a lot?

Megan Farr: Scottish Women's Aid probably hears that a lot, and I think that it happens a lot. Possibly, the child's views have not been given the weight that they need to be given in those instances. We also hear about cases—there have been a couple of high-profile ones—where children have point-blank refused to attend a contact session, and there have been consequences for the parent with residence from those cases. That is an example of the risks that

arise when those views are not given due weight. Decisions can be made that are not the child's views. I go back to the example of things that are important to a child but which cannot happen for an adult reason, such as having a say over where their pet should stay. The important point is that when such things happen, they are explained to them and they understand why, because that might go some way towards addressing some of their concerns.

I am not giving this next example in a domestic abuse context. A child might say that they do not want to go and see their dad, but, if the reason for that is explored and discussed with the child, they might change their mind. I stress that domestic abuse is a different situation and needs to be dealt with by people who have appropriate training and understanding of it.

Another example of something that cannot be agreed to because of an adult reason is a situation in which a child says that they want to live with each parent 50 per cent of the time, but, because the parents live some distance apart, that is not practical.

Fulton MacGregor: The issue of children potentially being traumatised through the court process and through the information-gathering process has been raised by a few people today. The committee can identify with that, because today's evidence session has come out of our attempts to balance how we get views in that area.

You do not all need to answer this question, but do you think that the bill can help to get that balance right? Of course, it might be that that is one of those things that we will never be able to get totally right. Can you give the committee advice, based on your research projects, about how we can best gather information so that, at the end of the bill process, we are not looking back and saying that, even though this is a bill about children, we feel that children were not consulted?

Susie Dalton: The considerations around the retraumatisation of children are well intentioned, but they can often be quite unhelpful from the point of view of ensuring that the views of children and young people are listened to, believed and used in a way that impacts the decisions that are made about them.

We completely understand those considerations and the issues with the court process. It is interesting to hear what you say about consideration in this space closely mirroring what children and young people experience in courts, where they are kept out of things because there is a concern about retraumatisation. Some of the children and young people in our young expert group have clearly said that certain things have happened to them and that, therefore, they need to be involved in the discussions about them, because they know best and it is those discussions that will inform the decisions that impact them and it is important to ensure that those decisions are in their best interests.

It is also important to remember that participation is a fundamental part of recovery for children and young people who have experienced domestic abuse. Excluding children from participation can mirror and compound some of the effects of domestic abuse, which involve children being silenced and having their views dismissed while the views of the perpetrator are seen as being more important.

In terms of recovery, ensuring that children are listened to and believed and have information fed back to them is a fundamental part of regaining some sense of power and autonomy. When it comes to getting that right in the bill and in the civil courts, our experience of creating safe and meaningful participation in the projects that we have undertaken suggests that it is important to have support all the way through—before, during and after—and that information must be made available to the children and young people who are taking part at all stages in the process. Further, there must be confidentiality around children's views and an explicit child's-rights focus in the work. The bill must contain all those things in order to ensure that children and young people can share their views in court in a safe and meaningful way that ensures that those views influence the decisions that impact them.

Dr Morrison: The UNCRC and the general comments on it say that the important issue is how children are supported throughout the process. That includes the support that they get before going to court, while they are in court and after they have given their views. That expanded view of participation points to a great way to think about how we support children to take part in decisions about family actions, contact disputes or residence disputes.

We have heard anecdotal evidence of poor practice around how children's views are taken with regard to the questions that they are asked by child welfare reporters not always being the most appropriate questions to ask. We could certainly think more about that and the way in which we consider how to think about children's views in the broadest sense, as Kay Tisdall said. By that, I mean for example not asking children to choose between parents and instead finding out their views more generally about their family and what they want to happen.

It is also important to bear in mind that children's best interests and children's participation rights are not in conflict with one another. We will not achieve an outcome that is in children's best

interests unless children are able to participate. Rather than seeing those rights as competing, they should be viewed as being complementary.

John Finnie: I want to pick up on a number of the comments. Megan Farr laid out the UNCRC position and the participation rights throughout the legal process. The findings were that children were not given the option and the court decided whether and how they would participate. Would sheriffs ordinarily give feedback about why they did not allow participation in the process? Does that tie up with the confidentiality aspect? Do they feel that they are sparing the children something retraumatising, to put it in layman's terms? Surely children have the right to have as much information as possible. Will you comment on the link between non-participation and confidentiality?

Megan Farr: It is becoming an outdated attitude, but someone told me that children could not hear about what had happened because they were not a party, when they were, in fact, the subject. That attitude is changing but there are still some attitudes about children's participation that are somewhat outdated. We are pleased to see the presumption around 12 being removed, and the current law would be strengthened if there was a presumption that all children can participate in decisions, with their views given due weight.

On the potential for retraumatising, we have talked a lot about vulnerable witnesses and how they can be retraumatised, and the same applies to children. We have accepted that we need to change how the courts work and to change the culture so that people are not retraumatised. That is particularly important for children, and it requires a culture change to the way in which the system works.

I do not think that I have answered your question, but I hope that I have gone some way towards doing so.

John Finnie: It was helpful. The question was wide ranging and there seem to be a number of overlapping issues. I was not condoning the approach of sparing the child by not giving them information; the act of participation is important. What is your comment on the extent to which people hide behind confidentiality?

Megan Farr: There is a lot of evidence in the work that those who are around the table today and others have done that shows that, rather than being traumatising, it is an empowering experience for children, and that what can be traumatising is having their views heard and not being given due weight, and their not understanding that. There are cases in which a decision might be made that goes against a child's views but, if they have an understanding of that, that is one of the important ways that their experience can be mitigated.

Susie Dalton: Was the question explicitly about feeding back decisions to children and young people?

John Finnie: Yes, including decisions on their non-participation.

Susie Dalton: From what we hear in the network, that does not often happen. Whether that is based on not wanting to complicate things or retraumatise people, we hear from children and young people that it is disempowering not to hear what decisions have been made and why they have been made without their views or, if they have given their views, what has happened as a result of the decisions being taken. The UNCRC lists feedback as an essential part of participation but, crucially, it is often missing from the experiences of children and young people in the Women's Aid network.

The bill does not really provide a clear mechanism for feedback in a lot of cases. Section 16 is on decisions being communicated to children and young people. However, there is not enough protection to ensure that children and young people are the ones who set the bar for how much and what kind of information comes back to them. That seems to be left up to the adults who are in power, and we ask the committee to consider that that does not really take a children's rights-based approach and does not take into account what meaningful participation looks like.

Not all children and young people will want to hear all the information about all the decisions that involve them in courts, but they, rather than the adults, should set the limits on that.

10:45

Liam McArthur: I will pick up on the issue of confidentiality, but will approach it from a slightly different perspective.

Children 1st has raised concerns about information—quite personal, intimate information—being made available to the courts. So far, we have been talking about the empowering process of giving the child or young person a voice, where they are in control of the information that is communicated about them. Children 1st has expressed concerns about children having a lack of control over files that may have built up over time and have been made available to the courts. Are those concerns legitimate? Do you share those concerns and are there things in the bill that we need to tighten up to provide a degree of protection around that set of information?

Susie Dalton: Absolutely—that is a major concern, from our perspective and in what children and young people have consistently shared. Children and young people need to know what kind of information they are being asked for and why, what that information is being used for and what could happen as a result of that information being shared. That is missing at the moment.

We completely support Children 1st's call for confidentiality to be dealt with in the bill. The issue is addressed in the family justice modernisation strategy but, in order to be compliant with the UNCRC and the European convention on human rights, the bill needs to afford much more protection for children's confidentiality.

One of the young experts recently shared an example with us that gives an overview of how some elements of participation are met while others are not. When she was going through a contact order, the child welfare reporter came to her house and—in line with her wishes—asked her to write her thoughts and experiences in a diary, rather than sharing those face to face. She chose to do that, and was glad that that had been taken into account. However, when she gave the diary to the child welfare reporter, she did not see it again and did not hear anything more about it at any point in the rest of the process. She has no idea whether her dad saw that diary. Again and again, children and young people have said that that kind of thing is missing. The bill could address those concerns.

The Convener: Megan Farr and Kay Tisdall have both indicated that they want to come in. We will then move on to Shona Robison so that we can get through all of our questions.

Megan Farr: We addressed that in our response to the Scottish Government's consultation, because Children 1st had shared its experience.

Children have a right to privacy under the ECHR. That is already enshrined in Scots law, and it will be strengthened when the UNCRC is incorporated. Although there are situations in which that right can be interfered with in the case of court proceedings, that needs to be proportionate. Our view is that any requests for information need to be justified and narrowly drawn. There should not be a situation in which a support worker's entire file can be released without extremely careful consideration of whether the child's right to privacy is respected.

The big risk is that children's confidence in the people who support them can be negatively affected in situations such as the example that Susie Dalton shared. Thankfully, it does not appear to be a commonplace occurrence, but our view is that, in terms of commission and diligence, any information that is being sought needs to be properly and narrowly defined. Otherwise, young people must have the confidence that they can seek support. As service providers, none of us can give children an absolute guarantee of confidence, and that is because, for child protection reasons, if we hear something that makes us feel that a child is at risk, we are under an obligation to report that. Nevertheless, children should have reasonable confidence that their privacy rights will be protected.

Professor Tisdall: I can see that we are in agreement. Obviously, if you are taking a children's perspective, confidentiality and privacy are terribly important to them—we know that. When the Children (Scotland) Act 1995 first came out, we were doing research in the area and saw a difference when children were supported. Children were anxious, but once they were with a supportive person who worked with them, they were comfortable with some things being shared. Again, it comes back to the issue of support.

Shona Robison: I want to drill down a bit more into the improving justice in child contact project. We have touched on the work of the Yello! group, but I would like to look in more detail at the two models. The project is a year in with a year to go, and the models are the power up/power down model, which we have talked about, and the domestic abuse children's rights officer model—I would like to hear a bit more about that. A year in, have any findings emerged from the project? Are the findings likely to be published at the end, or will findings emerge as the project develops?

Professor Tisdall: That question is probably for me, and Sue McKellar can also come in. The project will be in two countries; a commitment to having a worker has been made by Cyprus and either Romania or Bulgaria. In short, therefore, we do not have the findings but we have their interest in the model and doing the project. We have evidence from the successful pilot in Scotland, which Scottish Women's Aid can talk about.

Sue McKellar: The children's rights officer model is a West Lothian project. The officer dealt specifically with children who were going through the contact system and had experienced domestic abuse, to take their views, work through the views that had been heard in the court system and feed back. In the model, the officer is a social worker with a background of specific training in supporting children and young people who have domestic abuse experience and who have the knowledge of the justice system and the contact system.

Shona Robison: Will the two models be evaluated to find which is the most effective, or are they both options that are available and may have merits? I guess that it may be a bit early to say,

given how early on the project is, although the work has gone on for some time.

Sue McKellar: In the IJCC project, those two models have been successful in Scotland and are established. The power up/power down model was proved in 2016 and 2017. They are being replicated in Europe because of their successes, due to the feedback from children and young people and from services. Four countries in Europe want to replicate the projects, as much as they can in their contexts. The young people are advising them on how best to involve children and young people to fit in with those countries' specific contexts.

Shona Robison: From our point of view in Scotland, therefore, the evidence about the application here is already available. Although the application in other countries may be useful, I guess that, given the differences in justice systems and in services and infrastructure, the best evidence is already here for Scottish purposes.

Professor Tisdall: It is an example of how Scotland is leading the way with some of these ideas, and the issue is whether and how the model can be adapted in different systems.

Shona Robison: That is helpful.

Liam McArthur: Susie Dalton touched on this topic in response to the convener's questions, but I would be interested to know—particularly from the two academic witnesses—whether, based on the emerging research, there are gaps in the provisions of the bill, which has generally secured broad support.

Dr Morrison: We are a bit disappointed that advocacy support for children is not in the bill, with regard to child welfare. It is in the modernisation strategy, but that feels a bit far away. There is no advocacy service for children that would allow them to claim their rights to participate. At the moment, it is at the discretion of the court. It would be brilliant to have something that was squarely there to support children before, during and after the legal process.

The introduction of the concept of capability in the bill is concerning. We are not sure what capability means. Is that a higher bar than already exists in the legislation around practicability?

Unfortunately, there is nothing about complaints or redress for children, which is one of the directions from the UNCRC. If children feel that their rights have not been upheld, there is no way for them easily to complain. If we are looking towards compliance with the UNCRC, that needs to be in the bill. Those are my key concerns.

Professor Tisdall: Fiona Morrison and I work together a lot. You will have gathered from what we have said that routine data on children's participation in courts—and their satisfaction with it—is not available. We need to monitor that and accumulate the data.

Liam McArthur: Would that point be captured in legislation? It tends to be a policy intent for Government to monitor in order to facilitate further research, but do you want that written in as a provision in the bill?

Professor Tisdall: I am always interested in levers. I am interested because I sit on the board that worked on the minimum unit pricing of alcohol. The review—and the research that was set up after the measure was put into legislation—was powerful. It is focusing minds.

The Convener: James Kelly was interested in that issue. Do you want to chip in, James?

James Kelly: No, it has been covered.

Dr Morrison: It is great to see things in the bill around children being able to choose their mode of participation, so that they would be able to decide which way to express their views to the court. My concern is that there is no infrastructure to support that. Without an infrastructure whereby children have options to choose ways to convey their views to the court, I have little faith that it will make much difference to what happens now. Without something like an advocacy service specifically for children, which supports them throughout the process, I am not sure how that will change what happens now in courts.

Megan Farr: Generally speaking, we are supportive of the provisions in the bill, but we feel that they need to be strengthened. In some cases that have been discussed by colleagues today, legislation needs to go further, whether that be in the current bill or a future bill under the strategy.

Some things are missing. There should be an explicit presumption regarding all children to replace the existing presumption about the age of 12. That would send a clear message that there is no age at which a child becomes capable of forming a view. They develop that ability over time, and we should always approach the situation assuming that the child can form a view. We are also concerned that there is still the odd exception or exemption around children's age and capacity, and, as Fiona Morrison said, around capability.

Liam McArthur: Would you wish to see the presumption in relation to instructing a solicitor removed entirely?

Megan Farr: It exists in the Age of Legal Capacity (Scotland) Act 1991. It does not serve a useful purpose in the bill. The risk is that it suggests a continuation of the existing presumption around 12. Through our casework, we see inquiries about cases in which children

have not been permitted to give their views until they are 12, or of children's views not being taken into account until they are 12. Therefore, we would like that presumption to go. It is not necessary in the bill. We have views on the Age of Legal Capacity (Scotland) Act 1991, which are for another time. However, the provision on that in the bill is not useful and could lessen the impact of the change that we are trying to achieve.

We are meeting and have fed back to the Scottish Government on making the language of the bill more UNCRC compliant and, given incorporation, taking a rights-based approach.

Susie Dalton: I will add a couple of other recommendations from the power up/power down research and the children and young people who took part in the Everyday Heroes programme, which we do not see so much in the bill. There are explicit recommendations around training on speaking to children and young people and for that training to happen with sheriffs, which is not currently provided for in the bill.

Training on diverse children and young people's experiences and in particular on understanding black and minority ethnic children's experiences was recommended. In addition—this is directly linked to the point that Fiona Morrison made on advocacy and support workers—young people have said that they would like justice professionals to be able to speak to adults whom they trust and who know their views.

11:00

As we have said, many of the cases that we are speaking about will involve domestic abuse. Many of the children will be in contact with Scottish Women's Aid services, and the support that is available from the Scottish Women's Aid network across Scotland is not really being utilised. There is inconsistency in how Scottish Women's Aid workers and children's support and advocacy workers are asked to give evidence or support children's views and submissions to courts. We would like full advantage to be taken of that form of support, which already exists, and for it to be taken a lot more seriously.

Professor Tisdall: We have found that the presumption of age 12 has not worked as intended. I was around when the Children (Scotland) Act 1995 went through. The presumption was intended to increase children's participation. However, as I said, we have had an accumulation of evidence that, instead, it is a bar to it. That is why we support the presumption of age 12 being taken out of the bill.

The Convener: The final question is from Fulton MacGregor.

Fulton MacGregor: Are there any issues concerning the bill that relate to children's participation that have not already been covered as we have gone along? That goes back to my earlier question about whether any advice can be given to the committee on how to ensure that children's views are heard as we develop a bill that is, in essence, about their views.

The Convener: That is a catch-all question.

Professor Tisdall: As I said, the members of Yello! want to speak to the committee. That wish comes from a place of support. From working with Claire Houghton, Susie Dalton and Sue McKellar, I really appreciate that they have developed mechanisms that make sure that children are supported. I am sure that the committee has done so as well, but we would be glad to share ours, so that the consultation experience can be constructive.

Sue McKellar: One reason why we are lucky to have Yello! is because its members have had positive experiences of participation and are willing to share those. They clearly see themselves as speaking not only on behalf of their younger siblings but for other children who have had the same experiences as them. As Kay Tisdall said, they want to come and speak to you. They are more than willing to share their expertise with the committee, if you want it.

The Convener: Does anyone else have anything to add? This is your final opportunity.

Megan Farr: I echo Sue McKellar's comments concerning Yello! I add that we have talked about the way that courts can do participation differently, so this might be an opportunity for Parliament to engage differently with young people. That would be fantastic.

Susie Dalton: Both in terms of the development of the bill and what it sets out to do, again and again, children and young people have said that the most important thing for them is that they are listened to and believed, and, as Sue McKellar said, this is an opportunity to see that acknowledged more in the development of the bill.

The Convener: That concludes this session, which has been very worth while. I am sure that the evidence that we have heard can go forward to make the bill better. I thank you all for your contributions.

11:03

Meeting suspended.

11:10

On resuming—

The Convener: I welcome this morning's second panel of witnesses on the Children (Scotland) Bill. They are Professor Elaine Sutherland, University of Stirling, and Dr Richard Whitecross, Edinburgh Napier University. I thank both the witnesses for their written submissions; it is always helpful to get those in advance of hearing evidence.

I refer members to paper 3. We will move straight to questions. Do you support the proposal in the bill to remove the 12-plus presumption in relation to the child's views and, if so, why?

Professor Elaine Sutherland (University of Stirling): My first reaction to that provision was that I did not think that it was necessary, because the provision in the current legislation that a child of 12 is capable of forming a view in no way denies the capacity of younger children to form a view. Like one of the earlier witnesses, I am old enough to remember the passage of the Children (Scotland) Act 1995. It was seen as an enabling provision that was intended to make it clear that it is definitely appropriate for 12-year-olds to express a view; the provision was not intended to disempower younger children. It appears that that has been misunderstood subsequently. If that is the case, we might as well clear up the misunderstanding and, in that respect, I welcome the provision in the bill.

I would like something a little clearer that reinforces the idea that younger children should be presumed to be capable of expressing a view. The United Nations Committee on the Rights of the Child has been clear that it is the responsibility of the adult legal system—all of us—to find a way to let children express their views and it is not up to children to navigate their way through an adult system. We have to be imaginative and proactive. I would like the provision to be made stronger in that respect.

The Convener: Would you be in favour of a presumption that all children have the capacity to present a view?

Professor Sutherland: I would support that approach.

Dr Richard Whitecross (Edinburgh Napier University): I agree fully with what Elaine Sutherland has said. The idea should not be that a person suddenly becomes capable at 12. I have interviewed children who were younger than 12 and who had their own views that were not being taken into account. We have to remember that, although the legislation sets out a framework, it has to be understood and implemented by the practitioners, whether they are legal professionals or the judiciary. We do not want them to think that the child's view becomes important only when the child is 12. The bill is not just about cases reaching court; it is about legal professionals giving advice in matters around the family, before the matter even reaches court. We should signal that they should be including the children in those discussions, too.

The Convener: That is nice and clear. Let us move on to the proposed exceptions to the duty on the court to let the child express a view, which relate to the child's capacity and the child's location being unknown. Do you have a view on that?

11:15

Professor Sutherland: Yes. The Adoption and Children (Scotland) Act 2007 contains a provision about a person's whereabouts not being known. In that context, courts have made it clear that every avenue must be pursued in order to locate a person—no stone is to be left unturned. As long as the same approach is taken to those words in this bill—we can reasonably expect that courts will take the same approach—not being able to find a child is, perhaps, not terribly worrying. However, it is to be hoped that courts will be quite proactive in that, while they are waiting for every stone to be turned over to locate a child, they can continue the case.

The situation of a child not being found will not occur in many cases. I am rather more worried by the idea that a child is not capable of forming a view and what is meant by that. That area of the bill lacks clarity and should be re-examined.

The Convener: So if we have a presumption in favour of every child having the capacity, you would want there to be something explicit to explain why there would be an exception to that.

Professor Sutherland: Yes.

Dr Whitecross: Yes. There has to be something to guide the courts in making that decision and to make sure that the decision is recorded properly. What makes a child unable to give a view? The word "capability" is worrying. I know that a number of people have raised that point, but we need to come back to it and consider it more carefully.

The Convener: It is always good to hear suggestions, if you have any.

I want to ask about whether children should have a say in how their views are conveyed to the court, and, more generally, whether they are mature enough to instruct a solicitor. That is, do you have a view on the bill's retaining the 12-plus presumption relating to when a child has the maturity to instruct a solicitor?

Professor Sutherland: In so far as it will be the solicitor who assesses whether the child has the capacity to instruct them, the first stage of that decision will be determined when the child is attempting to instruct a solicitor. The solicitor must be satisfied that the child is capable of doing that. I would hope that solicitors would understand the provision properly and realise that it is not, and was never intended as, a disempowering provision.

I would hope that it would be less dangerous in the context of solicitors, whom we could expect to understand the law, than more generally in the community. Perhaps it is less dangerous to leave in that provision but, if it is capable of being misunderstood in other contexts, perhaps it should be removed.

I believe that the thinking behind leaving that provision in the bill was that it would keep the internal coherence of the Age of Legal Capacity (Scotland) Act 1991, in which the age of 12 appears in other contexts. A previous witness talked about whether we should revisit the whole business of the age of legal capacity. The answer to that is yes, but that is not what we are doing in the bill. That might be why the provision is being left.

Dr Whitecross: That is one of those issues to do with reading different pieces of legislation and ensuring that there is coherence among them. We would hope that lawyers would understand what we were doing.

There is a question about how often lawyers see the children. It is usually the mother who goes into their office, assuming that it is the mother who looks after the children. Are lawyers meeting the children and assessing their capability to inform the lawyers of what they would like? As a researcher, I am not entirely convinced that that happens regularly. It is usually the mother who instructs the lawyer.

There is still a gap between a child's capability to instruct and how a child finds the mechanism to have their voice heard. Would they know to go to a lawyer? Maybe something needs to be done to educate lawyers to apply that principle when they meet clients and to say, "We should meet your children to take their views." That would give the lawyers a wider picture. Legislation simply creates the framework—that is the law—but there is then everyday legal practice. It can be difficult for a busy lawyer to find time to see children around school times.

I have a slight reservation about the issue. We need to think beyond the bill and consider how the legislation will be implemented. There has been discussion about evaluating the act. We need to monitor how it is working but, unfortunately, we have limited statistics and information on civil justice. That is partly because, since fairly recently, we are no longer allowed to review old cases to see what happened and how the law is working in practice. Without that information, we rely on either research or anecdote.

The Convener: Why are you no longer able to do that?

Dr Whitecross: Previously, I did research on the use of bar reports, which are now called child welfare reports. I looked at how those were used in three courts over a historical period. I understand from the Scottish Government that I would not now be given permission to do similar research in the courts. We could give all the caveats about confidentiality and about the protections that are required but, without that information, we do not know what is going to the courts and what decisions are being made. Our jurisdiction is unusual in that regard—colleagues in England can do such research.

The Convener: We would like to get an answer on that, so perhaps we can write to the Cabinet Secretary for Justice to ask why that is the case. I agree that it would be worth while to still be able to do that and learn for the future.

Dr Whitecross: There are many areas that we do not know about. Many of the lawyers who I have spoken to are great and really open but, to understand how the system works, we need to look into how it works in the courts.

The Convener: I have a final question on hearing children's views. Should children have a say on the actual method of conveying their views? From your experience, does the bill do enough to ensure children's participation in court actions in practice? I think that we know the answer to that, but can you think of anything that could be added to the bill in that regard?

Dr Whitecross: I fully support what Fiona Morrison and Kay Tisdall said on that earlier. We have not found success on that in other jurisdictions, where there are still issues around getting children's views. Children should have the right to say how their views are taken and delivered, and not just at the court. That should happen earlier, to inform the lawyers on both sides as to how to move forward, working with mum and dad.

Professor Sutherland: Before we move on from listening to the child's views, I should like to highlight a couple of aspects of the bill, one positive and one negative.

I shall start positively. The bill puts some new language into the Children (Scotland) Act 1995, in that it talks about the child being given

"an opportunity to express the child's views"—

this is the new bit—

"in a manner suitable to the child".

The addition of those words is wonderful and will make the legislation incredibly child centred. It is clear that that is the focus. The child is not fitting in with the adult system; the system is working round the child. That is the plus.

The minus is that, in the current legislation, there is reference to whether the child wants to express those views. Those words do not appear in the bill, which I think is a mistake, because we need to be absolutely clear. The United Nations convention makes that point in its general comments, where it says:

"Expressing views is a choice for the child, not an obligation."

That is saying that it is clearly the child's choice as to whether to express a view. That is in the existing legislation and we should not lose it. It would not be difficult just to pop those words back in.

Those are a couple of points on the child's views.

The Convener: That is helpful.

John Finnie: The Scottish Government consulted on the possible inclusion of a specific proposal in the bill relating to the confidentiality of the information that children provide to the court.

Clearly, as with many issues, things are not as straightforward as they might seem and there might be tensions between individual rights and the system of disclosure. Will you comment on the proposal and say which side you come down on, if, indeed, you come down on any side? Clearly, if we want to encourage children to be as frank as possible, it might help if they understand that that information will not be shared.

Professor Sutherland: A truly child-friendly world would give children that guarantee of confidentiality. We have to understand that children are coming from a family setting in which they are the least powerful people. They could be a lot more honest if they felt that there would be some confidentiality. However, that has to be balanced against the rights of their parents. If a decision that affects you is being taken on the basis of certain information, you have a right to have that information put to you so that you can correct it or dispute it if you think that it is wrong. That is an inescapable consideration. Although, in a perfect world, there might be full confidentiality for children, the adults cannot be denied their right to discuss the truth or otherwise of important things that are said about them.

Those two considerations are perhaps irreconcilable. Given that the right to know of the allegations and be aware of the information on which the decisions are based is enshrined in the European convention on human rights, I do not see a way around the issue, short of possibly giving parents the opportunity to surrender that right in individual cases by saying that they are happy not to know what the child has said to the sheriff. However, as a general approach, I do not think that a guarantee of confidentiality for children is terribly workable. I do not think that we can guarantee absolute confidentiality to children any more than we can guarantee it to any other witness or participant.

John Finnie: I see that Dr Whitecross is nodding.

Dr Whitecross: I agree with Professor Sutherland. When I was doing my research on the bar reports, there were F9 letters to the sheriff that were sealed and which we were not permitted to look at. However, absolute confidentiality cannot be guaranteed because, if an allegation is made or something is said that affects one of the parents, they need to know what it is. That is simply one of the tensions. A sheriff who is interviewing a child will usually say, "I may need to talk to your mum or dad about this." When they say that, they are really saying, "You can tell me in private, but I might have to discuss in general terms what you say with someone else," which means that there is no complete confidentiality.

The other important consideration is the rights that the parents have, particularly in the court setting.

Liam McArthur: Children 1st and other organisations have touched on the issue of information that has been accumulated on a confidential basis over a period of time being revealed to the court. In that situation, there is not necessarily an opportunity for the child to be informed that that information might ultimately be revealed to the court. That is different from the sheriff's interaction with the child that Dr Whitecross talked about. Do you see a way of managing that? Clearly, there is a view that some information should not be made available to the court.

Dr Whitecross: The question is: who is collecting the information and why? At present, when a sheriff orders that a court welfare report be prepared, they indicate what they are looking for information about. With regard to the diary that was mentioned earlier, there should have been a statement that it would be handed to the sheriff or simply be used to inform a report and that it would then be destroyed or returned to the child. There should have been some follow-up with the child in that case. The people who are taking the information should speak to the child and tell them what will happen with the information. However,

we do not have that detail. We do not know how the process will work.

If a child is capable of giving their views, they are capable of understanding that their diary will perhaps be returned to them, or we might have to say, "We will discuss this with this person." There should be a bit more clarity. We have to remember that the people who quite often collect the information are lawyers, who are quite busy and might not ask all the questions that we would ask a child. They might even just take back the information and leave it in their office. At the end of the day, where is it going to go?

11:30

Liam McArthur: How do you see that squaring with the right of privacy, to which the earlier panel referred?

Dr Whitecross: That comes back to the national system. The person who is appointed to gather the views of the child—the child welfare reporter—should have a way of communicating with the child and updating them about any information that is gathered. Quite often, the child is not updated about what is happening with the report. Quite often, the report is produced the day before the child welfare hearing, so parties see it only as they go into court. If documents have been taken or things have been done with the child, that needs to be reported back. There needs to be some form of training for child welfare reporters.

We should flag up the need to think through the confidentiality of what is going on, particularly if we are asking for a diary. What will be done with it at the end of the process? Will it just go into an archive?

The Convener: Given that we have moved on to discussing child welfare reporters, James Kelly can ask his questions.

James Kelly: It is important that there is proper regulation of child welfare reporters and curators to ensure that children's rights are at the centre of the process. What are the key factors in regulating child welfare reporters?

Dr Whitecross: The reports are really important: I know from my research that the courts rely on them. At present, reporters are appointed by the sheriff court and are primarily lawyers. I know that there is opposition to there being a register and to more regulation being put in place—we do not have the detail, because that is to be left to the Scottish ministers—but the reports are so important for decision making by the sheriffs that regulation is needed.

Training also needs to be provided to cover wider issues such as how to look after documents from a child; it should not just be about when the reporter meets the child.

I would welcome regulation, but I would also like a broader range of people to be involved as report writers. A person can know the law and be legally qualified but not be trained in how to interview a child. That is particularly important, if we are moving away from the presumption that 12 is the age at which people can make decisions, in respect of a child of eight or nine who is being interviewed. As someone said to me, being a parent does not mean that a person knows how to do that. There is a need to think about child psychology. How do we get children to open up? How do we make them feel relaxed? That cannot be done at the first meeting.

The proposal is good, but until we see the detail of how it will be implemented and how it will operate, I will be quite cautious. I am happy to give a longer answer, but I do not want to wander off.

James Kelly: That was very helpful.

Professor Sutherland: I endorse what Richard Whitecross has said. The child welfare report is immensely important in the process, and we have a number of excellent child welfare reporters in Scotland who are very experienced in the job. That said, there is every reason to put in place a better, more comprehensive and consistent system of training and fees. All the things that the committee has been hearing about what matters to children could feed into that system.

It is to do largely with practice, which can be done through training. I expect that there would be some resistance—possibly from people who have been doing the job for a long time—to a requirement for training. We must be a bit careful that we do not, with training, regulation and payment, cause the supply of child welfare reporters to dry up. We need them to be part of the system, so we cannot afford to put too many obstacles in people's way.

The issue of fees feeds back into the whole system of legal aid lawyers who are available to do family law work, which is another problem in the system. If you do not pay people well enough to make a living, you will not have the supply: people will not be there to do the job.

My goodness! I never thought that I would find myself sitting here saying that we have to worry about paying lawyers. That is not typically what you would expect an academic lawyer to be saying. However, we have to be realistic: people will only do the job if they can afford to pay their bills through doing it.

Dr Whitecross: I agree with Elaine Sutherland about payment. This is a side point, but I feel that I have to emphasise it. I have done research in

which only three out of 20 women had legal aid, and the others who were paying were not very well off. There is a big issue about how people find a lawyer who will do the work through legal aid.

John Finnie: We have moved on a bit, but I will come back and ask you about child welfare reports. We talk about the quality of child welfare reports. Surely it is important, and an indication of fairness to all the participants, that they do not only get sight of the report—if I have understood you correctly—just as they are going into the court. Surely advance sight should be a fundamental principle.

Dr Whitecross: Having done research with people who prepare the reports, I know how hard it can be to get time to meet the parties to whom they need to speak, to prepare evidence and then to prepare the report. I have also spoken to people who are involved in child welfare hearings, and if they receive the report only on the morning of, or the day before, the hearing, it wrong-foots them. That is especially the case if an individual feels that the report does not represent what they told the person who prepared the report. I did research around domestic abuse and found that quite often domestic abuse is not included in child welfare reports, for a variety of reasons.

I read welfare reports for the research that informed recent changes, and their quality was very good—only one or two were excessively long, in my opinion. Invariably, the recommendations in the reports became the orders that were made by the court. The problem is timing, which should be such that a child welfare hearing happens a week after getting the report, although that is difficult for the court to juggle because timing of hearings can be complicated.

Another practical issue is how to time things so that information arrives in time to inform both parties. That is about a person's fundamental right to know what they are dealing with when they go into court. Child welfare hearings are fairly informal to the lawyers and the judge, but they are not informal to the other parties, who feel quite awkward and often feel disadvantaged—especially women who have been in abusive relationships.

Rona Mackay: Before I ask my main question of Professor Sutherland, I will pick up on something that Dr Whitecross said about domestic abuse sometimes not being included in reports. What is the reason for that?

Dr Whitecross: Section 11(7A) to (7E) of the Children (Scotland) Act 1995 was introduced in 2005. At the time, it was not discussed with many lawyers; in fact, before it was introduced, Professor Eric Clive appeared before the committee and said that we did not need the provisions for domestic abuse, because abuse is already taken into account when making a section 11 order. It was seen at the time of its introduction as a potential avenue for women to deny contact with children.

Ten years after the provision came in, I did some research on it with members of the profession, and found that people who had been in practice beforehand said that it did not make any difference, but few of them had mentioned to their clients that the court has to take into account abuse or potential abuse, so their clients were not aware of it. Many lawyers suggest that their client should not raise domestic abuse in a child welfare hearing because, "You'll just be seen as being difficult".

Megan Farr used the word "culture" earlier. That is one of the things that we are trying to change. We need a deeper and better understanding of domestic abuse and what it means. Although the report is about the child, it is also about the wider circumstances in which that child is living—even if they are separated from the perpetrator.

One of the problems that I have with the bill is that, although we have provisions for parties and vulnerable witnesses, women do not always recognise that they are being abused. There are issues about raising the matter and seeking support: for example, lawyers might not want to raise abuse because it is difficult to evidence. Despite recent criminal legislation—the Domestic Abuse (Scotland) Act 2018—we still have the idea that domestic abuse is an incident, rather than a pattern of behaviour. We need to see it as a pattern of behaviour that impacts on the mother and the children. I should say that I am aware that there are men who are victims of domestic abuse, but we know that in Scotland the majority of victims are female.

I spoke to 20 women who had major struggles getting lawyers to accept and present evidence of domestic abuse. That might be why such evidence is not included in welfare reports. I have just been given research money to study child welfare reports and domestic abuse. Hearing anecdotal evidence from people whom I have interviewed is not quite the same as looking at the welfare reports in a case in which there has been domestic abuse. I do not like just to accept one particular perspective, so I will look at the issue in time to inform what is happening with the new regulation of child welfare reporters.

Rona Mackay: That is interesting: it seems that there is a surprising disconnect in relation to something fundamental.

Dr Whitecross: The disconnect is quite broad. I am working with Professor Jane Mair and Dr Alan Brown from the University of Glasgow to examine

the disconnection between domestic abuse in the criminal court and contact with children.

Rona Mackay: I will ask Professor Sutherland about delays in court cases and the new duty on the courts to have regard to

"any risk of prejudice to the child's welfare that delay in proceedings would pose".

In your submission, you say that

"Any lawyer worth his or her salt knows that delay can have an adverse impact of child welfare and ... That suggests that this provision is unnecessary."

Can you expand on that a wee bit?

Professor Sutherland: Certainly. For quite some time there has been growing concern about delays in such cases. We must step back a little and look from a perspective that considers the child's sense of time, which might be different to an adult's—although many of the cases, even from an adult's perspective, drag on interminably. Undoubtedly there is a problem with delays that has been highlighted by courts time and again. A particularly high-profile case that went on for an especially long time finally reached the Supreme Court.

My point is that we all know perfectly well that cases are delayed and that it is a bad thing. It makes me worry when we express things in statute, almost to make ourselves feel better: "There. Now that we've put it in the act we can stop worrying about it." Simply saying to a court that delay could have an adverse effect is problematic because it does not do anything to address the root causes of the delay. Like many of the issues that are raised by the bill, it is part of the bigger picture. The law, practice and court rules are separate, but need to be co-ordinated.

My concern is that simply articulating the problem in statute does nothing to solve it. Judges are well enough aware of the problem without being told about it through an act: they are the people who keep publicising concern about the problem. That is one difficulty with the provision.

11:45

The other difficulty that I have with the provision is that for cases that are incredibly complex I would be reluctant to create a climate in which there might be pressure for undue haste, when we really need properly to consider a child's life and what is going on it, and to take time to reach the best decision. Delay in itself is undesirable, but there are occasions when we need to take time to make the best possible decision for the individual child.

I know that there is separate work under way in the courts on case management and making the process more efficient. I become concerned when I see in statutes things that do nothing to solve a problem, but just make us feel better because we have acknowledged the problem.

On that point, another provision that will be in the bill—despite points that were raised in the consultation—stems from a problem in the Children (Scotland) Act 1995, which states that if judges are making an order that will require two people to co-operate, the judge must think about that. That is designed to address unco-operative parents in cases in which it has been flagged up that the people are not going to co-operate with each other because they have not done so thus far.

The provision tells judges that if they make an order, they must think about whether that is feasible or workable. I like to think that our judges would think about that anyway—I am absolutely convinced that they do. It is another provision that makes us all feel better because it says that we should think about a problem, but it does not tell the judges what to do with it. One of the most intractable problems is the very small number of high-conflict cases in which the parents—or one of them—will not co-operate.

Rona Mackay: I understand what you are saying, but could one argue, conversely, that the provision is in the bill as a sort of safety net that highlights the fact that delays adversely affect children? If so, what would be the harm in leaving it in the bill?

Professor Sutherland: You are right—the same could be said in respect of judges having to consider whether something is feasible. The provisions might not do any direct harm, but does it do harm for us to feel as though we have addressed something when we have not? I would not, however, go to the wire saying that the provision must go.

The Convener: Liam Kerr wants to ask a question about the enforcement of court orders.

Liam Kerr: Professor Sutherland, sometimes a parent will disobey a court order. In those cases, section 16 of the bill would impose a new duty on the court to discover why there has been that disobedience. Some of the evidence that we have says that that is a very important provision, although others would say that it does not add to the current powers or practice. I want to pick up on Rona Mackay's point. What is your view? Is there a risk that the provision has just been put in the bill and will be forgotten about? I think that you said that it does not add anything or do anything to solve the problem. Is it the right way to go?

Professor Sutherland: The courts already have extensive powers to deal with parents ignoring and disobeying court orders. I would like

to believe that any judge who deals with such a case will not just say that there is an allegation that somebody has ignored the order for contact, let us say, but that they will inquire a bit more fully into the reason. That would be part of the ordinary way of dealing with such issues in court. To tell the judges to inquire about it would be to instruct them to do something that one would hope that they are already doing—to ask about the reasons for the non-compliance.

Non-compliance can vary. Cases can involve a small misunderstanding over timing or something else that is genuinely quite innocent right through to ones in which someone has consistently been deliberately obstructive. There is a big range of non-compliance cases. Telling judges that they must look into the reason would do no harm, but I think that that is something that they do anyway. I rather like the idea of getting a child welfare report to explore the matter more fully. That at least would make a constructive suggestion to judges about how they should inquire further, beyond simply asking the parties and hearing evidence about how the non-compliance occurred.

My first point is to ask whether we need the provision, given that judges are doing that anyway. Moving on from that, I note that they have a battery of things that they can do over contempt of court. They can already fine or imprison parents—although, quite sensibly, the courts do not use the power to imprison lightly. It is very much a last resort, as it should be.

I am a little concerned about seeing in a statute the threat that the determination might be varied and residence might be changed because of non-compliance. We need to step back and say that the original decision about the child's residence and contact was made on the basis of welfare. Assuming that nothing has changed in terms of welfare, are we going to flip that decision and do something different with residence in order to punish a non-compliant parent? That would not really give paramouncy to the child's welfare, which was the foundation of the original decision.

I realise that, when courts talk to people about non-compliance, they sometimes threaten that they might change residence as a way of trying to make people more compliant, so that they do not then have to do something draconian, such as imprison the resident parent. At the end of the day, if the court imprisons the parent with residence, it will undermine the entire residence order, because the child—obviously—will no longer be able to live with that parent.

On non-compliance, I absolutely acknowledge that there are a small number of parents out there who are, for no particularly good reason, stubbornly ignoring what the court has decreed. However, we need to be aware that there might well be good reasons. That brings us back to something that Richard Whitecross alluded to. We should not suppose that domestic abuse is not occurring just because there is not a police report about it. An awful lot of the time, domestic abuse is not reported, and sometimes it is not even recognised by the victim. There might be good reasons for non-compliance on which it is difficult to provide evidence.

The other thing that gets missed is the big part of the puzzle about why children say that they do not want to go for contact visits. It is always assumed that it is because the parent with residence has put them up to it, but there is research that shows that, in times of family crisis—if we look at it from the child's perspective, we can see that a lot is changing in their life, because the family is breaking up and the child is feeling very out of control—children may refuse to participate in contact simply as a way of exerting control in a world in which they feel powerless, and it is nothing to do with the parent putting them up to it.

The Convener: Dr Whitecross, I see you nodding vigorously.

Dr Whitecross: I am sitting here nodding because I fully agree with what Elaine Sutherland is saying. The issue that we are discussing is an old one that sheriffs find it difficult to deal with. Having child welfare reporters going out to interview the child is a good move, because it might be the child who is saying that they do not want to go. I think that the number of adults who are not complying with the court orders is actually quite small. However, if we are not getting the information about abuse or other issues into the court at the first hearing or in the period leading up to the decision, the court will not make a fully informed decision. We need to ensure that the court is fully informed when the order is being prepared.

I think that imprisonment of the resident parent harms the child. It might seem to be fair, because the parent is not complying with the court order, but imprisoning the parent overlooks the needs of the child, and the child is the whole focus of the bill and should be the focus of the decision. It is a good idea for the court to investigate why there has been no compliance.

Liam Kerr: I am grateful for the detailed explanation. I believe that the Scottish Government consulted on the issue and has suggested possible sanctions for breaches, but no sanctions appear in the bill. Does either of you have a view on that issue? Would it be preferable if the bill explicitly said that imprisonment or a change of residence should not be used as a sanction for a breach of section 16?

Professor Sutherland: I would not put that in the bill explicitly. Imprisonment in that circumstance is not desirable, but it is part of the court's set of responses—its bag of tricks, as it were. It is sometimes more effective to threaten imprisonment than to use it in relation to non-compliance. In the very worst and most extreme cases—of which there will be a tiny number, years apart—it seems appropriate that courts should have all the powers that they would ordinarily have to deal with contempt. We can only hope that they do not find themselves using that particular sanction.

In the background papers, there are examples of other ways of dealing with non-compliance, such as community service orders. The problem with that solution is the issue of how it will work in practice. How will the resident parent, who might not have a lot of money, find the time to do that community service? Will the state pay for babysitting while they are doing it? A lot of the solutions are likely to have a disproportionate impact on people who are already financially struggling. Fining the resident parent is out, because taking money out of the household is not going to do the child any good, and requiring the parent to do unpaid work is difficult. How would they fit that in alongside the job that they already have, if they have one, and how would they get childcare to cover the time when they are doing that unpaid work?

One suggestion that is sometimes thrown out is that, if a parent has not complied with the court order, they should be sent to parenting classes to impress upon them why compliance is important. My concern with that is that I would like to see parenting classes as a positive thing that parents choose to do and which good parents go to because they want to become even better parents. I would not like parenting classes to be stigmatised as things that bad parents get sent to. I think that that would undermine the point of them.

The Convener: Would mediation be appropriate as a way through the impasse? Do you have any statistics on how many people have been imprisoned for non-compliance?

Professor Sutherland: I do not have systematic statistics. I was looking at that issue for a footnote for something that I was writing, and I came up with three or four cases over the past 10 years or so. Those were only reported cases, and not all cases are reported. However, because imprisonment is so unusual in that context, the imprisonment cases tend to get reported perhaps more than ordinary, run-of-the-mill ones. I cannot guarantee that this is correct, but I would speculate that perhaps there has been a handful of such cases over the past five to 10 years.

12:00

Dr Whitecross: I agree with that. Unfortunately, our civil justice statistics are not very broad or detailed. However, there is one of those cases every few years, and they make the media and are always reported.

To go back to the convener's question, the family law committee of the Scottish Civil Justice Council might be a more appropriate forum for making rules on that, rather than putting rules into the legislation. That committee could give guidance and advice to sheriffs.

The Convener: What about the question of mediation and ruling it out where there has been domestic abuse?

Dr Whitecross: For instances of a lack of co-operation, we would need to investigate the background. If there had been domestic abuse, mediation would not be appropriate. It should not be ruled out, but we need to understand why there is no co-operation. The cases that go to court usually involve a hodgepodge of different things not being explained and maybe someone not understanding what the court is saying to them. That is one of the big issues. If a sheriff is talking to a layperson, they may not fully understand what they are saying and its implications, particularly if they are self-represented.

The Convener: Is finance likely to come into it quite a bit? For instance, there might be resentment because someone is not paying enough or because someone is paying too much, and it might be taken out on the other parent in various ways. Mediation might be useful in such situations.

Dr Whitecross: It depends on the circumstances. Mediation can work where parents are separating but getting on quite well. However, when there is a high level of conflict, mediation becomes highly problematic.

Professor Sutherland: I agree with that. Aside from the fact that domestic abuse might be the reason behind the non-compliance—that would put it beyond mediation—they might be the worst cases to try with mediation and the ones in which mediation is least likely to succeed because the individuals are so entrenched in their positions or the conflict has risen to such a level that it is almost too late for mediation-type solutions.

Dr Whitecross: There is also the question of who is mediating. If the child does not want to go for contact and the mother feels that she cannot make the child go, do we try to mediate between the non-resident parent and the child? The situation can become quite complicated. I feel that we always come back to the adults on that, but it is really the children whom we are talking about.

We should look at why a child is not going for contact, rather than speaking to and maybe blaming the mum.

The Convener: I suppose that the idea would be to bring the child into the mediation so that they, rather than the differences between the parents, become the focus.

Dr Whitecross: One of the things that we have been talking about in Scotland for 13 or 14 years is collaborative law, whereby a range of different specialists come in to help to find a solution that works for a child and there is not just a focus on the adult relationship.

The Convener: Absolutely. Fulton MacGregor has a supplementary question. Is Liam Kerr finished?

Liam Kerr: Yes.

Fulton MacGregor: I have a scenario to put to the witnesses. I agree with everything that they have said so far on the issue. I feel that criminal justice responses to the situations that we have discussed are not appropriate, particularly the more punitive responses such as imprisonment. My question is almost a devil's advocate one. A situation that would be very rare but not impossible would be one in which the investigative work had been done on why there had been non-compliance with the court order but no domestic abuse or other circumstances had been identified, and the children wanted to see both the resident parent and the contact parent, but one parent said no to contact because their relationship with the other parent was so bad.

What would the best response be in such situations? Where can we go in such situations, other than making a criminal justice response? Should there be a duty to report to the children's hearings system or something like that?

Professor Sutherland: In the scenario that you described, in which there is no domestic abuse and the children want to see the contact parent, it is undoubtedly the resident parent who is obstructing the process and being dreadful about it for no good reason. That is the paradigm case that makes courts throw their hands up in horror. I am paraphrasing this, but an English judge said, "We can fine them, we can imprison them or we can just give up." She was expressing judicial horror at how hopeless that small number of really ghastly cases turn out to be. There just does not appear to be a solution in the case of a thoroughly stubborn person who is not putting the best interests of their child first. In such cases, it might be time to go back to court and try again, and to throw out the threat of changing residence or threats of prison and hope that the parent sees sense. However, I do not have a solution to those cases because, frankly, I am not sure that there is one.

Dr Whitecross: It is the sort of case that a sheriff hates to have to deal with. Let us say that it is the father who is the contact parent. There is a section 11 order and the contact parent is asking his lawyer to move the case forward. It has to go back to the court, a new child welfare hearing has to be opened and the case has to be set out before the sheriff. The sheriff can only do as Elaine Sutherland outlined. Such cases are a minority. Maybe it is for the sheriff to explain by saying, "I think it's best that your children have contact with their father. I'm therefore going to make the following order". What would civil imprisonment achieve?

I am also concerned about the effect on the reputation of our legal system if we start imprisoning such people. There will always be intractable people—we have all met people like that—but the court can do only so much. It might be that there has to be a new order giving contact to the other parent. If no abuse or harm is going to happen, that is fine. Unfortunately, though, these cases do arise, and they are the cases that sheriffs find really difficult to deal with. I am not sure that legislation will necessarily help. We perhaps need more guidance on it. Also, the lawyer of the mother who is not giving contact perhaps needs to explain things to her by saying, "You really should be giving contact. You should be obeying the contact order." The parties involved also have a duty to the court.

Fulton MacGregor: That is what I was trying to get at. Given the low number of such cases, such situations are maybe going to need a wee bit of out-of-the-box thinking. As I said at the start, I do not think that imprisonment or any punitive criminal justice response is appropriate in those cases either.

Dr Whitecross: I would be worried that having something in the legislation to deal with such a tiny number of cases would skew things in practice.

Shona Robison: I want to get the panel's views on whether the statutory regulation of child contact centres is desirable. If it is, what should its key features be?

Professor Sutherland: Child contact centres have the capacity to serve an incredibly valuable function. By providing for supervised contact and a safe place for the handover of children, they have a lot to offer.

My concern is that, the way that things are operating at the moment, we seem to be hoping that that resource will provide many things without being funded properly. Resources and regulation go hand in hand.

The centres should be regulated to ensure that they are safe places for everyone using them, that the level of supervision is adequate, and that the

people who are working there are properly trained. All of that is important, and it can be done by regulation, but we will continue to have that resource only if we fund it. Again, we come back to the subject of money. It is desirable that the centres are a high-quality resource. There are places where they are provided; they are just not provided comprehensively, right across the country, as they need to be.

It is not enough just to put regulations in place. We have to put resources in place so that the regulations can be met. In that sense, regulation is a good thing, because it sets the standard for what is expected. The negative thing that could come out of it is that, if we put regulations in place but not resources, we will find that contact centres start to close and are not available all over the country. So, I say yes to regulation and yes to ensuring really rigorous standards, but only if we can provide the resources that go with that.

Dr Whitecross: In my interviews, parents raised quite a large number of concerns about the running of a contact centre that had been nominated for contact with the non-resident parent. Regulation is important, but I totally agree with Professor Sutherland: provision must be fully funded and, more importantly, evenly available across the country—it is a bit of a postcode lottery. Regulation would be really good—it needs to be brought in, but it also needs to be a bit more coherent in terms of provision and financial support.

Women who have spoken to me have raised concerns about behaviours and about the security of going to a contact centre, particularly when they have been victims of domestic abuse. They raised concerns about taking their child or children there and encountering the perpetrator as they leave or enter the building. A range of things need to be considered, and regulation might help to ensure standard practice.

Shona Robison: You mentioned behaviours. Will you say a little more about that, and give examples?

Dr Whitecross: That point came up in a number of the interviews with women—although I could not follow it up and check it. They described being in a room, waiting to pick up their child at the end of contact, and hearing their child screaming and crying. When they asked someone to go and make sure that their child was okay, they were told "no", and that staff's role was not to interfere. For a woman who was quite distressed and was feeling quite anxious, that was quite hard to hear. I cannot verify that that happened, but it was the woman's impression, and I did not want to say that I did not quite believe her. That issue came up in a number of interviews with people from different parts of Scotland. The impression that they were getting from the staff was that they were just there to provide the service and the space and that they could not intervene. So, maybe regulation and some clarity over staff's roles and function would be useful.

Shona Robison: Given what you are describing, I think that there are elements that could be captured by regulation of qualifications and training. Some of that sounds a bit like practice, though—there might be issues of practice that need to be addressed.

Dr Whitecross: I think it is about that, as it is with a number of things in the bill. We are looking to what will be implemented after the act has been brought in, around such things as child welfare reporters and contact centres. There is other work to be done on practice and implementation.

12:15

The Convener: Who provides the bulk of the contact centres now? Is it local authorities or the voluntary sector?

Dr Whitecross: I think it is a mix. I have to admit that I do not really know.

The Convener: We know that Relationships Scotland does a lot of work.

Professor Sutherland: I was about to say that my understanding is that the bulk of the work is done by Relationships Scotland. My understanding is also that there is an issue about its funding at the moment, which is particularly worrying if it is providing most of those places.

The Convener: As part of its pre-budget scrutiny, the committee has looked at the funding of third sector and voluntary sector organisations, and here the issue is popping up again. Let us move on.

Fulton MacGregor: I want to ask the panel about the issue of vulnerable witnesses, given that the Parliament recently passed the Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019. Do you agree with the measures in sections 4 to 7 of the act for vulnerable people in the courtroom, both in principle and in the detail?

Professor Sutherland: There was a gap there and there is a need to provide protection for vulnerable witnesses in that particular setting. Broadly, yes, I support what the act provides for. Similarly, I support the expansion to child welfare hearings to hopefully provide some protection there, too. If we acknowledge that there is the need to protect vulnerable witnesses in the criminal setting, why would we not do it in this setting as well, where emotions might run particularly high?

Dr Whitecross: I welcome the measures. They are important, but it is about "vulnerable parties" and "vulnerable witnesses". My only concern is for the child welfare hearing. If, at present, the general practice is not to raise concerns over domestic abuse, at what point do we raise it and does it then lead to special measures being introduced? That is my one concern, because I have heard from too many women that they have not been able to raise their concerns on domestic abuse at their first child welfare hearing, whether because of advice from the lawyer or because they are not being told by the lawyer that domestic abuse can be taken into account when making an order. That is an issue. Yes, the court can then take steps if the issue is raised, but that is why I said that we need that cultural shift, so that lawyers flag up concerns before the first child welfare hearing. It should not be about whether there have been prosecutions or whether people have been found guilty. Those allegations are often hard to demonstrate.

One of the problems is that we do not tend to get to proof in those cases, for a variety of reasons, so what evidence would the court need to implement the special measures? A bit more thought needs to be given to how that can be brought in in those cases that require it. The legislation is going in the right direction, but we need more there to protect not just the child but the mother.

Fulton MacGregor: What do you think about the argument for extending those provisions to the children's hearings themselves? That has been argued for by Children's Hearings Scotland.

Dr Whitecross: I fully support that.

Liam McArthur: I declare an interest, as my wife is a mediator at Relationships Scotland. That does not touch on the question that I am about to ask, but it has come up in the evidence. I presume that you have seen the report that Dr Barnes Macfarlane prepared for the Justice Committee. One of the points that she made, in looking across the legal landscape at the moment, was that unmarried fathers' rights are unfinished business. She also made that point in her oral evidence; she suggested that the current law is outdated and said that she had hoped that the bill would have picked the issue up.

You might also be aware of the bill team's evidence and its justification for taking the view that, on balance, no changes should be proposed in that regard. The statistics show that the number of single-parent registrations in 2018 was 2,178, which is a relatively small number, as the bill team pointed out. Do the witnesses have a view on whether there was a missed opportunity or whether there were more downsides than upsides in trying to redress the balance in the bill?

Professor Sutherland: First, I should say that I have read Dr Barnes Macfarlane's excellent report—the committee is lucky to be so well resourced. Of course, I should also mention Sarah Harvie-Clark's briefing papers and the supporting documents, which show that the committee is particularly well informed.

To address the issue of the non-marital father, in about 4 per cent of cases the father does not register his paternity and therefore does not have automatic parental responsibilities and rights. We are therefore looking at a fairly small number of cases. I think that the bill team was correct not to simply give automatic responsibilities and rights to anybody who claimed to be the father, which would be very dangerous. For example, what about the fellow who is naive and mistaken? Even worse, what about the guy who is malicious? We surely cannot hand out responsibilities and rights on the basis of claims to paternity.

That brings us on to the evidence of paternity. I think that the bill could have done a bit more in relation to the power of the court to order DNA testing where paternity is disputed. As things stand, the court can order DNA testing of a child in the parentage area only when there is no one with the authority to deal with that or when such a person is unwilling to take the responsibility. That means that, where there are unmarried parents and the mother is the only person who has responsibilities and rights, because the father has not registered, she can refuse consent to the child being tested. She does not have to give any reasons but can just flat-out refuse. As things stand, the court has no power to overrule that mother and require testing. Reform on those lines has been mooted for quite some time and it is possible for the court in some jurisdictions simply to look at the circumstances and order testing in the face of the mother's opposition. The decision was taken not to include in our statutes a provision along those lines, but I think that that was a missed opportunity and that such a provision could have been helpful.

I should say that, when the court is considering its decision about the child's paternity, given that it does not have the best evidence that it could have—their DNA test results—it can draw an inference from the mother's refusal. Make of that what you will, but the court could say that she was refusing consent because she had something to hide. However, that whole area is kind of uncomfortable and fluffy. The simple solution would have been to say that, in the circumstances that I have described, a court can order DNA testing because the information is knowable and we should ensure that it is known and that we can be clear about the child's paternity. Thereafter, we can look quite separately at the whole issue of

registration and parental responsibilities and rights—that is the other way to go about it.

I should have said that this is not just about the parents' dispute; it is about a child's right to know about their identity, as guaranteed by the UN Convention on the Rights of the Child. We should have just simply put that into the bill.

Liam McArthur: Thank you for putting on the record our long overdue thanks to Sarah Harvie-Clark for the support that she gives to the committee—I will not spare her blushes.

Dr Whitecross, do you accept that although an automatic right might take the balance too far the other way, for the reasons that Professor Sutherland identified, the right of the child to know about their identity demands that the bill has a measure to address that anomaly?

Dr Whitecross: We are talking about the child in the bill, after all, so that should be included. I accept that there should be no automatic right. It would involve only a very small number, but the child will want to know about their identity, so I think that not having provision in the bill for that is a missed opportunity.

The Convener: Should there have been provision in the bill for greater use of specialist family sheriffs or for the creation of a specialist family court or tribunal system?

Professor Sutherland: I think that a dedicated family court would be wonderful and very doable. In fact, that is what happens in practice to some extent in the central belt, where there is a fairly dense population. A family court would be very workable, but the problem is that the number of cases in the more rural areas of Scotland might not be sufficient to justify having it there. However, it would be possible to have a floating family court, with specialist judiciary travelling around rural areas. The problem would be that it would not always be available for emergency cases. However, a mobile, specialist court could still deal with the bulk of the family work.

As the law gets more complex, it is desirable to have judges working in specialist fields where they have the opportunity to develop their expertise, as they do in Glasgow, Edinburgh and some other places, because they would be doing so much of that work. However, that is subject to the caveat that the judges doing that work must want to do it because they have a passion for family law, not because they have just got stuck in that area. I think, though, that we would have no trouble in finding enough of those judges.

Dr Whitecross: I did research for the Scottish Civil Justice Council a while ago on case management in sheriff courts for a section 11 order, and it was clear from the lawyers to whom I spoke that they like it when they have an experienced family law practitioner as the sheriff, because that person will know the legislation. I am not saying that other sheriffs do not know it, but it is about the quality of engagement.

We are a small country and, although the specialist courts in Glasgow, Edinburgh and—I think—Livingston are very good, how do we take that approach in rural areas, which often have quite complicated cases? The idea of a floating court is good, but if we are concerned about the delay in making decisions, how do we have a floating court going round often enough to make decisions?

There is a problem for family courts in the run-up to Christmas and new year because it is often one of the busiest times for the courts as people try to make arrangements for access over Christmas and new year. That activity peaks before Christmas, then goes down and peaks again after new year, so there are all sorts of practical issues. Having specialist judges is very helpful. I know from reading reports and research from North America that specialist family judges have been influential in the understanding of wider research on domestic abuse and in the promotion of its use for making better decisions in domestic abuse cases. They can develop that expertise that would help to change the culture and practice. I would be for it, but there are practical issues to do with having specialist judges.

Rona Mackay: I have a brief question. Should we be developing a way to do that remotely? Could we use technology to have the specialists go remotely to outlying areas? That must be in the pipeline.

Professor Sutherland: I am sure that it is the way of the future. There are examples of it being used in other jurisdictions. It is something to follow up on. It would be premature to go down that road now, because we do not have the infrastructure and we would have to be sure that the individuals who used the system remotely were well enough supported, that they had good technical support and other support, while they were attempting to log in. People find that situation fraught enough without having to worry whether they are pressing the right buttons and whether they will cut the whole thing off.

The Convener: That concludes our evidence session, which has been excellent. I thank Professor Elaine Sutherland and Dr Richard Whitecross for attending.

12:31

Meeting suspended.

12:32

On resuming—

Justice Sub-Committee on Policing (Report Back)

The Convener: Agenda item 2 is feedback from the meeting of the Justice Sub-Committee on Policing on 5 December 2019. I refer members to paper 4, which is a note from the clerk. Following the verbal report, there will be an opportunity for brief comments or questions. John Finnie will provide the feedback.

John Finnie: The sub-committee met on 5 December, when it held its second evidence session on its inquiry into the use of facial recognition technology by the police service in Scotland. The witnesses told the sub-committee that there is no specific legal basis for Police Scotland storing custody images and databases. Police Scotland currently accesses and matches images that are held in the United Kingdom police national database, which contains records of innocent people. The sub-committee heard that the practice could form the basis of a legal challenge. The witnesses said that, prior to introducing live facial recognition technology, Police Scotland needs to demonstrate that its use would meet human rights and data protection requirements and that there would be a clear legal framework.

The witnesses also raised serious concerns about the widely reported inaccuracy of the software and questioned whether the police service should invest in technology that is discriminatory and runs a high risk of misidentification. The witnesses felt that the challenges that are posed by facial recognition technology for policing should be a matter of priority for a Scottish biometrics commissioner.

The sub-committee agreed to write to the Scottish Police Authority on the Metropolitan Police Service's peer review of Police Scotland's anti-corruption unit's investigation of the former Scottish Crime and Drug Enforcement Agency.

The sub-committee will next meet on 16 January 2020, when it will continue to take evidence on its facial recognition inquiry.

The Convener: Thank you. That was a good report.

As there are no comments or questions from members, that concludes the public part of today's meeting. Our next meeting will be on Tuesday 7 January 2020, when we will continue our evidence taking on the Children (Scotland) Bill. I wish everyone a merry Christmas and a happy new year.

12:34

Meeting continued in private until 12:56.

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Published in Edinburgh by the Scottish Parliamentary Corporate Body, the Scottish Parliament, Edinburgh, EH99 1SP

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