OFFICIAL REPORT
AITHISG OIFIGEIL

Justice Committee

Tuesday 21 January 2020

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 21 January 2020

CONTENTS

JUSTICE COMMITTEE
3rd Meeting 2020, 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:

Duncan Dunlop (Who Cares? Scotland)
Ben Farrugia (Social Work Scotland)
Dr Louise Hill (CELCIS)
Alistair Hogg (Scottish Children's Reporter Administration)
Oisín King (Who Cares? Scotland)
Jackie McRae (Children's Hearings Scotland)
Graham Robertson (Scottish Government)
Humza Yousaf (Cabinet Secretary for Justice)

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Justice Committee

Tuesday 21 January 2020

[The Convener opened the meeting at 10:26]

Children (Scotland) Bill: Stage 1

The Convener (Margaret Mitchell): Good morning and welcome to the third meeting in 2020 of the Justice Committee. We have received no apologies. Our delayed start is due to the Cabinet Secretary for Justice, Humza Yousaf, having been unavoidably detained, so the committee has used the opportunity to discuss item 9—our work programme—in full.

In order to make best use of our time, we will go straight to agenda item 6, which is consideration of the Children (Scotland) Bill. I refer members to paper 3, which is a note by the clerk, and paper 4, which is a private paper. We will have two evidence sessions this morning. I welcome the witnesses on our first panel. Dr Louise Hill is the evidence and policy lead with CELSIS; Ben Farrugia is the director of Social Work Scotland; Duncan Dunlop is chief executive, and Oisín King is a member, of Who Cares? Scotland. I thank the witnesses for their recent submissions, which the committee always finds helpful. Let us move straight to questions.

Jenny Gilruth (Mid Fife and Glenrothes) (SNP): As the panel will be aware, sections 1 to 3 of the bill will remove the existing presumption that only children over 12 have the capacity to express a view on a decision that affects them. We have explored the matter in two previous evidence sessions, at which witnesses from the office of the Children and Young People's Commissioner Scotland and other witnesses—I know that some of today's panel agree—have expressed that all children should have that facility. Can the panel inform us why?

Ben Farrugia (Social Work Scotland): Social Work Scotland fully supports the removal of that presumption. The basis of our position is the understanding that some children under 12 are very able to form and give their views, so that should be reflected in the law. Although the current law does not prevent children under 12 from doing so, our understanding is that, in practice, 12 has become the age threshold, so we would like to see its removal.

The Convener: Witnesses do not have to touch the microphones. They will come on automatically, as if by magic, when you are going to speak.

Duncan Dunlop (Who Cares? Scotland): Who Cares? Scotland does uninstructed advocacy even for babies and toddlers; we give opinions or points of view from children's perspective from birth onwards. We do that from the position of an independent relationship, considering what is going on for a child in any instance and what matters to that child.

When that is done as a transaction, and someone from a court has a very brief conversation with a child or uses a form, as is currently the way of doing things, children can feel under pressure to give an opinion that a parent might hear, thereby potentially giving a side to the argument that is not a true reflection of what they want. That is not a good process.

As the committee will hear later, there are children from the ages of five to seven who can almost parent their brothers and sisters, so the matter of why they cannot have an opinion on what should happen to them, on their childhood, on where they should live or whatever is just down to the process through which we illustrate their views. The court must deal with that via someone who is independent of families—it must be someone who is in a relationship-based position, as far as possible. We can then see a true depiction of what the child feels most comfortable with.

10:30

Dr Louise Hill (CELCIS): The United Nations Committee on the Rights of the Child has always been clear that there should not be an age limit, because children have evolving capacity and ability to share their views. The CRC has made some clear comments to the United Kingdom Government about removal of a specific age limit. We refer to evolving capacity, which makes a real difference. That is a critical point.

When the Children (Scotland) Act 1995 was passed, using the age of 12 was seen as being almost progressive, because children below the age of 16 were not at that time having their views sought. For some sheriffs, the change to lowering the age might have been really positive.

In the current climate, in which there is recognition that children are independent rights holders with agency, we are in a different space from when the 1995 act was going through. There is a recognition that the age of 12 has become a sticking point, and there is an assumption that children below the age of 12 cannot express their views. That was never the intention. Many rulings have been clear that children who are younger than 12 can, of course, express views.

There is probably still a challenge regarding clarity in the Children (Scotland) Bill and the gap

that exists on the right of children to instruct a solicitor, which remains applicable at 12. There are still issues about compatibility with other legislation in Scots law, so quite a lot of work will probably be needed on that.

We can put other things in the proposed legislation, but the critical aspects are implementation and the culture change that will be required in the court system so that it recognises the place of children and their individual right to have their views heard on matters that directly impact on their lives.

Jenny Gilruth: On the practicalities of taking evidence from very young children, I heard Duncan Dunlop talk about taking the views of toddlers. In its submission, CELSIS talks about

"the views of babies and very young children, as well as children with special communication needs".

In its submission, Who Cares? Scotland says that there could be merit in the

"suggestion to bring the court to the child".

Do members of the panel have any views on how that should be done for very young children, in particular? It is a potentially difficult area. Social Work Scotland goes on to discuss potential challenges regarding the increased number of staff that might be required, including play therapists, for example.

Dr Hill: There has been some really interesting research on that. Work has been done with very young children on how their views can be sought—I am thinking of the work of Professor Priscilla Alderson. There are some lovely approaches, including what is called the mosaic approach. There is lots of stuff that we can share about how it can be done effectively.

It is important to note that individual children have evolving capacity to express their views. I have a two-year-old and a five-year-old: I certainly know that they have the ability to express their views to me regularly. They do that about different things at different times.

We now understand, from a research perspective, that children have much higher levels of understanding, appreciation and competency regarding their own family lives and the situations that they are in. When it comes to the experiences of children who are in some of the most difficult circumstances, we know of some good skilled practice and some sensitive ways in which we can work with them to find out what their views are on relationships with parents, or on seeing their wider family. It is more a question of how the information can be shared appropriately, sensitively and ethically with the court, as part of representing the child's view.

We are not talking about having children crawling around a courtroom, which none of us would think was appropriate. There is something about the culture of our courts and changing the system so that it is more open and reflects how children's views might be shared. There are many different ideas about how we can do that in developmentally appropriate ways, as children grow up through the system.

Ben Farrugia: I do not have much to add to that, other than the observation that this is not about breaking new ground on a map that has not been filled in: this is about bringing courts in Scotland up to the standards of best practice.

Organisations deploy every day the kind of mechanisms that have already been referred to—play therapy, skilled advocates, psychologists, and regular people including social workers and others—to ascertain the views of children under 12, even of those as young as toddlers, to feed in to other processes. If we wanted to, we could incorporate such practice into the courts.

Social Work Scotland made a point about resources, to which I will probably return: that we should never assume that, because something happens elsewhere, we can easily incorporate it into the court system. What we are discussing is complex work that requires skilled professionals who have undertaken specific education, and who have specific support and supervision, which is important in order to avoid their bias being brought into the process. The introduction of that practice needs to be thought through in respect of implementation, as Louise Hill said earlier; it needs to be considered carefully and then followed through. We cannot have a good implementation plan and just hope that it happens; we have to make it happen, over time.

Duncan Dunlop: When people actually use some of the processes to understand what a child thinks, wants and needs, they find out other things that have made the child feel secure and stable, beyond the relationship. Those might include wider family relationships, neighbours, and even physical places like playgrounds, nurseries and primary schools. All the network and infrastructure around the child are suddenly brought to life, rather than there just being a focus on the relationship. That has to be done in a child-centred way, however, and it takes time, because it relies on the child being able to trust the relationship in order to be able to express their point of view.

Oisín King (Who Cares? Scotland): While people are taking the opinions and views of infants, especially, they really have to keep in mind that it is not about manipulating them in order to get their views; it is about building the trust that the infant deserves.

Jenny Gilruth: On that point, you will be aware that, under the children's hearings system, the rules state that the child must be able to express their view in their own preferred manner. Legislation does not currently make provision for how the methods should be set in place for taking evidence from very young children. Witnesses have spoken about building trust; that could be difficult when taking evidence from a child in a court. Should the legislation be more specific about how views are taken from children? Does it need to be spelled out in primary legislation? Should the bill be prescriptive?

Ben Farrugia: I am instinctively nervous about the bill being too prescriptive, because things will evolve, and then we would be back with the committee again, discussing how the list needs to change. I hope that we are confident that sheriffs and their officials will have sufficient understanding of the mechanisms and processes, and will be able to create spaces for them, so that they can be used by the court.

Dr Hill: I agree with Ben Farrugia about not being too prescriptive. Legislation serves a particular purpose, but this issue is more about culture change and what goes on around that. We should think about good-quality guidance and then about a suite of implementation measures to support that practice. It is unfair to put on the statute books things that no one has any idea how to do. It needs to be carefully thought through.

A lot of our implementation work at CELCIS has taught us that there are no quick fixes, and that things take time. They require leadership, buy-in, resources and an approach and vision that involve thinking in the long term about how we will get to a particular position that we are not currently in.

To speak more optimistically, I note that some sheriffs' rulings show what they have done to seek children's views, but they might be the outliers and the more unusual cases, rather than the norm. We need to think about what the barriers and the enablers are.

I hope that the eventual legislation will be scrutinised by Parliament, in line with the commitment that the Government has made for full incorporation of the United Nations Convention on the Rights of the Child. A consequence will be that that will open up many more debates about how the views of children are heard in other processes. That will be a positive part of the culture change. The "how to" bit will involve a lot of support, as well as careful thinking and buy-in. There is an opportunity to consider the challenges and barriers: rather than just assume that sheriffs do not want to change their approach, we can consider what the practical issues are and how we work on and get round those.

Duncan Dunlop: The only thing that I would add is that the person who is getting the views from the child must be independent of the family. Child welfare reporters are normally solicitors. It is important that they have the skills to do the work but, at present, some reporters do not even ask the child for their point of view. It is a big shift to start to consider where the skill set will fit into court proceedings and who has the mandate from the court to do the work.

The Convener: Last week, the committee heard from a witness from Grandparents Apart UK, who suggested that grandchildren should have the right to see their grandparents. When pressed about why there should be a right rather than a presumption, she said that social workers' involvement with families has not always been positive for relationships between grandparents and children. More specifically and worryingly, in talking about the reason why Grandparents Apart wants such a right, the witness said:

> "There is no proper investigation of what is being said or of what a social worker puts in a report. If something is in a report and is presented to a hearing or a court, there is no opportunity to question that or have it changed if it is wrong."—[*Official Report, Justice Committee,* 14 January 2020; c 22.]

Will the panel comment on that? Mr Farrugia, would you like to comment?

Ben Farrugia: I was just pausing to cogitate on that.

My starting point is that we do not support the suggestion that there be a right for grandparents to be included. That is informed by the fact that a social work assessment of a child's best interests should be a dynamic process. At the time, a relationship and contact with a grandparent might be seen not to be helpful, although it might become so in the future. It is a highly complex issue and the process involves balancing many factors. If we assumed a right to contact and a relationship with a grandparent, the process would be made more complicated and it could be argued that other factors could be prejudiced.

If a social worker is trying to secure the child in a placement that will be secure and stable—especially a young child who might be moved through to permanence and adoption—there are extremely difficult considerations that involve balancing many legitimate interests. I would never imply that the issue is in any way simple; it is extremely complex and there are things that have to give when a social worker is trying to assess the child's best interests.

I do not have a direct response to the evidence that the committee has received, but I suppose that my reflection would be that, at the moment, social workers try to ensure that positive and

nurturing relationships for children are maintained wherever possible, within the capacity to do so. That point is reflected in our written evidence, and I concede that it is a limiting factor. However, within what is possible, social workers will try to maintain relationships.

The Convener: The substantive point that the witness from Grandparents Apart was making was that, if something in a report is factually wrong, or it seems that what is being suggested might not be in the child's best interests, there is no right of reply for grandparents. There seems to be a bit of a gap and some unfairness there, which is why Grandparents Apart has asked for a right rather than a presumption. Should consideration be given to introducing a right for grandparents to say that something did not happen, to provide proof or to set out the circumstances surrounding an issue?

Ben Farrugia: Without assuming that there should be a right, I will happily say that SWS would be part of a conversation on that. I am sure that my colleagues on the next panel from Children's Hearings Scotland and the Scottish Children's Reporter Administration will have views on that and on the mechanisms in the current system for ascertaining whether social work assessments are valid and correct. The system is always evolving, and necessarily so, and we are always open to being part of a conversation about how it should change.

The Convener: Do the other witnesses have views?

10:45

Dr Hill: I look at the matter through a slightly different lens. The next panel can speak about the opportunity for people to be identified as relevant persons in hearings procedures, but I was thinking more about the specific role of family group decision making and how useful it can be to create spaces prior to court proceedings that involve children.

The Children and Young People (Scotland) Act 2014 provided for family group decision making for children who are at risk of becoming looked after. In those kinds of proceedings—I am thinking particularly about kinship carers, around whom we have done a lot of work—that approach would create incredibly relevant and appropriate private family spaces for all views to be heard, using a strength-space model. The reports from children going through those processes have been positive, and grandparents are an absolutely critical part of that. Obviously, that sort of process happens prior to court proceedings—although not necessarily in the case of kinship care orders, which we could discuss later.

What happens in private court proceedings with grandparents, not related to children in the care system, is outside my sphere of knowledge, so I do not have a view on that.

Duncan Dunlop: My view is similar to Dr Hill's, because my organisation is involved only with children who are in the care system. Our view is that children should be placed as close as possible to their community or the network of people whom they know, and that there ought to be good justification—which is repeatedly reviewed—for removing them from those relationships, because moving a child into a stranger's care or a strange place has a significant negative impact on them. Their natural place would not be only with grandparents; it could be with neighbours or members of their community. It is sometimes presumed that we should try to place them with blood relatives, but we should bear it in mind that there might be other people in the community who might have just as strong a bond and who could be supported to take up the caring role. We would consider placing a child with someone they know and with whom they have a relationship and who can be individually assessed, and that person need not be part of the family.

The Convener: It certainly seemed to be that what Grandparents Apart is looking for is proper investigation of what is said by social work teams in reports. What you are suggesting would facilitate that.

Liam McArthur (Orkney Islands) (LD): I will take a slight tangent. Shared Parenting Scotland has drawn attention to examples in parts of Scandinavia where there is a presumption of shared parenting, which, again, always has to be informed by a consideration of the best interests of the child. In a sense, that approach levels the playing field at the outset and can avoid conflict that can end up in court. Is a presumption of shared parenting a positive model that might be pursued, through either the bill or some other means?

Ben Farrugia: I do not have a great deal of knowledge about that, but others on the panel might have a view.

Dr Hill: Shared parenting is not my area of expertise. I know that there is a lot of debate about that theme.

When it comes to the right to family life and support for children and families, we must recognise the importance of children's relationships with different family members and whoever has a caring relationship with them. From our research, we now know more about the diversity of families and who matters to children. In recognising the diversity of sibling relationships, the legislation acknowledges that there is not

really a homogeneous family unit, and that things are much more fluid and relationship based. There are real strengths in considering that.

Is the question about the transfer of parental rights and responsibilities so that they are shared?

Liam McArthur: One would presume that the concern arises from the fact that, because there is an assumption that, in any break-up, the child will be resident with the mother, there is an imbalance in the discussions around how contact and relationships are maintained.

Dr Hill: We have been doing some evaluations of a programme called lifelong links, which involves children in care maintaining relationships with the people who matter to them. Early findings have shown that children who enter the care system can quite quickly lose contact with their dads and the paternal side of the family. There is certainly some work to be done in that regard. The focus can be very much on mums and their parenting abilities, and other relationships might not be supported. I am not sure that that approach goes as far as sharing the various parental rights and responsibilities, but it involves thinking about which relationships are focused on. Children have said that they do not want their relationships with their dads and the paternal side of the family to be lost but that they are not supported. Later, we might talk about whether we frame it as contact or family time and how we ensure that we continue to support good, strong, loving and nurturing relationships that keep children in a safe place.

I am sorry, but I do not have a strong view on the question. It is probably more a question for the next panel.

Duncan Dunlop: I will come at the issue from a slightly different angle. We should be far more open minded to shared parenting, particularly for children who are in the care system. Often, the parental rights are with the birth family, but the child does not live with the birth family. That can cause big issues such as whether the child has a passport and can go on holiday somewhere. There are also huge issues in whether such children can come to give evidence in Parliament. A child might not live with their mother, yet the mother would hold rights over the child. We need to think about how we can have a different concept of shared parenting, so that, as well as the birth family, other people who live with a child at a certain stage can have parental rights over the child. That would make life much easier for a lot of children in the care system.

Oisín King: As someone who is in the care system, I know that there was a lot of uncertainty about me coming to Parliament to give evidence to the committee due to the fact that I do not live with my birth parents or any members of my blood family. I am transitioning into kinship care and, because it is considered a voluntary arrangement under the legislation, my mother still has parental rights over me. That affected my ability to come here and give the committee my views and opinions.

The Convener: We are very pleased that you are here today.

Oisín King: Thank you.

Fulton MacGregor (Coatbridge and Chryston) (SNP): I thank the witnesses for coming and for that last input.

Earlier, we talked about last week's evidence from Grandparents Apart. I agree entirely with what the panel has said. I do not think that such access should be a right; having a presumption is the better way forward. The complications have been discussed and, although grandparents are vital to many kids, other relatives are equally important in different situations.

I would like to hear the panel's views on my belief, which I explored last week, that there is almost a two-tier system. The lady from Grandparents Apart made a good point about where grandparents fit into the overall process. However, if social work or the children's hearings system is involved in the case, a full assessment is made in relation to grandparents, aunts, uncles and other people who are important. From being a social worker, I know that they will be taken into account. The issue is that there are no statutory services or children's hearings services for young people who go through the family court system. Have you any views on that? How can we ensure that children in that position get the services that children who are involved in the hearings process might get?

Dr Hill: I just want to make sure that we are on the same page. Are you talking about the recognition of grandparents for children who are not part of the children's hearings system?

Fulton MacGregor: Yes. I am talking about children who are going through the family courts.

Dr Hill: Right—that is a good question. My initial thought is that we should share some of our learning from our mediation work, the work that we do with Relationships Scotland and the work that is creating spaces for families to avoid their having to go into the courts, for example if the dispute involves grandparents' views. We would look at the opportunities through mediation and our work with families in acknowledging the relevant persons, in order to come up with good and safe plans for nurturing childhoods. I am sorry, but the question is a bit outwith my area.

Fulton MacGregor: Are you saying that that work is not being done in the family court system?

Dr Hill: It would be unfair for me to comment, because that is not my area of expertise.

Ben Farrugia: I have certainly heard examples of where that is the case. Your observation is spot on. In the child court system, in private matters, it is highly possible that there are situations in which grandparents and other significant relationships are not taken sufficiently into account. I think that that can be the default analysis sometimes; the idea has come up in the evidence that you have taken that social work should be imposed in those situations to overcome that, but I do not think that that would be the right approach. I think that this is about—the committee sessions are allowing us to do this—having a tighter focus on how courts operate and thinking about how we support courts to ensure that, through that process, all those relationships are heard.

I do not have an answer to how we do that, although I think that some things have been suggested even this morning in that regard. I think that some grandparents probably have reasonable cases, and there are examples of that. Our job should now be about thinking about how we can ensure in those private matters that their voices are heard, without imposing statutory services into the mix.

Rona Mackay (Strathkelvin and Bearsden) (SNP): Before we leave that topic, will you pin down what mechanisms would be used to explore the wider relationships that a child might have for the purposes of court and social work decisions? As a former children's panel member, I know that there are a lot of kinship carers and that a lot of grandparents are the primary carers. Obviously, the best interests of the child are paramount. Beyond that, when looking for a solution, how far do you go to find out what the child's relationship is with other family members?

Duncan Dunlop: Our view is that you should start with the child and look at their network. You can look at who, from a very young age, they have had a relationship with, who they feel secure with and where the stability is. Obviously, other formal services will be involved, such as nurseries or schools, and you look at that network, too. Teachers will know who comes to pick them up and who they have a friendship with at school. There is also a whole wider network—are other relations or neighbours involved?

Fairly intense work has to be done to map the network of support and the community around the child. A lot of that is already part of family group conferencing principles. However, the support is not exclusive to the family. This is about who cares about the child. Where the semblance of a loving relationship is present, it may well be that that can be invested in, so that the individual or family can give the support to the child, with support from others.

It is also about where a child feels secure and safe, because that is the best place for us to start from, rather than who ought to have a right to a family relationship because they have a birthright.

Rona Mackay: Does that approach happen enough? Is that the generally accepted practice, or does it not happen in some cases?

Duncan Dunlop: As it stands, there are probably a lot of barriers to that happening. If a person were to play such a role, what support would they get? How understanding is their wider community and workplace in supporting them to look after a child? How in-depth are the assessments that they are given? What suite of options do we have to enable them to do that? A lot of work needs to be done in those areas in the care sector.

Dr Hill: I suppose that I would agree with that. I have seen some amazing social work practice with children and young people. That high-quality work puts them at its heart; it looks at who matters to them, as well as the places and pets that matter to them. That is in order to build up a picture, which is known as mobility mapping.

We can also look at a family tree and share, as it were, family folklore and community folklore. That creates pictures. We know of one social work team that built up more of a relationship tree, because this is not just to do with a child's family, as Duncan Dunlop said; it is to do with all the different people who matter.

The challenge is that that work is incredibly time intensive. Sometimes, a lot of time is spent with children and young people to identify places, carers, neighbours, the good teacher and the paternal grandmother, but that very high-quality, skilled work needs to be done.

It was asked whether all children across Scotland are getting that support. With the numbers that we have, I think that we would struggle for that to happen.

We are learning more about and growing that practice. The challenge is making sure that that approach is not the exception. We should not be saying, "There are a couple of children here who have this amazing life story work, family tree and mobility mapping, and we've done all that great work with them," when, for many, that would not be the case. That is a resource challenge.

11:00

Rona Mackay: Does that same work go into adoption and permanence cases, or is there a different process?

Dr Hill: From a research perspective, some of the most advanced life story work is done on adoption. Obviously, children's experiences can differ across Scotland, but I have heard some amazing examples of good-quality work that is done with children and young people.

There is probably more of a focus on adults than older children who matter to children. We will hear later about how important brothers and sisters are—they have probably not been given the level of importance that they should have. Life story work has focused very much on adults in the birth family.

I also make a plug for the importance of friendships. Children's friendships matter, but they often get overlooked. When children get moved around a lot, there is nothing that protects the important friendships that they have had in residential children's homes or foster care settings—it might have been a friendship with the neighbour next door. The work that we do around that is important.

It starts with knowing the child and spending time with the child to understand their life story. Good-quality work can be done.

Ben Farrugia: I would like to come back to how complex and sensitive this work is. Individuals can respond to a decision in a way that shapes their thought about the assessment. An excellent assessment may have been done but, because it suggests a certain course of travel with which some are not happy, they feel that their views have not been taken into account sufficiently. That happens every day, but it does not mean that good-quality work has not been done.

Duncan Dunlop: Even if a child is not going to live with someone from their birth family and their primary carer is somebody else, they still want to know about their birth family. Knowing who you belong to and where you come from matters, and sometimes in our culture we are poor at understanding that. If you are a Dunlop, where are you from? Where is your family? Where are your roots? What is your history?

Knowing that would matter to a child, particularly if they are entering care and experiencing a fracture in what could be seen as the natural way in which someone would grow up—in their birth family. They still need to have a connection with their birth family. The child needs to feel in control of the relationship with their birth family and understand who they belong to, whether that is a grandparent or the community that they are part of.

John Finnie (Highlands and Islands) (Green): I will move on from grandparents to siblings, which you have touched on a bit. Section 10 will impose a new duty on local authorities. I know, Mr Farrugia, that that will be on top of the existing statutory duty to safeguard and promote the welfare of looked-after children, which is of paramount concern. Why do siblings find themselves being separated? Could changing the existing arrangements and implementing the new duty prove to be problematic?

Oisín King: Before I answer that, I will give you a bit of context about me and my life. My name is Oisín King. It is pronounced "Osh-een", but I know—it has already happened in this conversation—that some people will call me "Ocean"—probably Duncan Dunlop. [*Laughter.*] That is totally fine.

I am 15 years old and was accommodated when I was 12. I have been residing in what I call a residential unit, but members would know it as a children's home. Since going into care, I have lived in two residential units, and have been back and forth between the family home and the care system.

I was taken into care because circumstances at home were not what they were supposed to be. In those circumstances, I had to step up and become a parent for my younger sister, and had to care for her over long periods. I was only seven years old when I had to step up to that role, and she was six months old. I performed the role of parent for the next five years of our lives. When I was taken into the care system, I was separated from my sister after having looked after her for so long and building a really close and vital relationship with her. We did not see each other again until 18 months later.

I took the separation as a loss; it was something like a death. I went through a grieving process, but it never ended—I was stuck in a constant loop of blaming myself and thinking that it was my fault that we were separated, and that it was my fault that I was not good enough for her. But what seven-year-old would be a good parent? I was so confused, frustrated and angry about the fact that I had been taken into care without her. I was left feeling isolated and I was managing my emotions alone.

I would like to thank the committee for having me here today to express my opinions and views. I hope that you understand why the proposed changes to the law are so important to me. My experiences are similar to those of many other care-experienced people whom I know of. I have come here to help you to understand that we are just children who love our brothers and sisters.

To go back to the question, I would say that brothers and sisters are separated, especially in the care system, just because of resources, which is wrong. Brothers and sisters should be absolutely prioritised, because brothers and

sisters in the care system have a relationship that means that they depend on one another. That relationship could be the result of the parenting of their parents, who should have known what to do.

John Finnie: Thank you for that powerful testimony. It means much more than the reams of paper that we have in front of us to hear directly from someone like you. That was extremely helpful. Thank you for sharing that.

Duncan Dunlop: Was the question about whether the system can deliver?

John Finnie: We have heard graphically from Oisín King how siblings find themselves being separated. Are there other examples of that? How manageable will the new duty to be imposed on top of existing requirements be?

Duncan Dunlop: The severity of the problem is clear. Up to 70 per cent of children in care are split up from brothers or sisters when they enter care.

We take children into care for their care and protection. As you heard from Oisín, when a child and his or her sibling are surviving in a house, that child is the care and protection. Being removed from that relationship adds to a child's trauma.

There are occasional examples in which separation is for safeguarding reasons, but in the majority of cases it is not. Children in different age groups and at different levels of maturity have different needs. I can get adoption or permanence for a baby; that is more difficult for older children, so siblings get split up.

Sometimes families are complicated. Oisín is one of five half-brothers and half-sisters, which is not unusual for a family that is entering care. It is difficult to keep siblings together, but it is absolutely vital.

Last week, the Care Inspectorate produced a report listing the deaths since 2012 of people who had recently left care. In many cases, a common factor was that they had been split from their brothers and sisters. We see it time and again: the care system fails to deliver what it intends to deliver, which is to provide the child with the loving stability and security that they require so that they can thrive.

Does the system deliver that? No, it does not; it does not take into consideration enough what would make the child content and feeling stable and secure. Whether the system can deliver that is another question. In its current state, I do not think that it can deliver for all the children for whom it ought to deliver.

John Finnie: Will the current challenges be compounded by the further requirement that will be imposed by section 10?

Ben Farrugia: The new requirements in section 10 are about contact between children rather than placement together, although that is, appropriately, a live conversation. It was a strong theme throughout the independent care review, and it is overshadowing the conversation on the bill slightly, because in a few weeks we will have a new vision for Scotland's care system and I suspect—and hope—that the subject will be a strong part of it.

In my time working with Louise Hill and Duncan Dunlop and at Social Work Scotland, I have not spoken to social workers who do not want to place siblings together when it is safe and appropriate to do so, and who do not, when it comes to contact, want to maintain good, positive and nurturing contact between siblings when they must be separated. Whether our system can accommodate that is an issue.

Whether the statistics are from the Care Inspectorate or from somewhere else, in most cases the reason why children are not being placed together and why contact can be difficult is that we have to find the most appropriate placement for each individual child, which means that they cannot always be placed together. We also do not have many foster carers who are assessed as being able to take five children. That is a big ask and, under statute, people need particular skills and infrastructure in their house to do that.

To come back to my theme, I say that the situation is complex and dynamic. The interests of children also change. What is right for a child today when we take them into care will not be right for them in six months, let alone in three years. There is a constant need to consider what is appropriate, safe and best for the child so that they grow up nurtured and loved.

Dr Hill: I echo those sentiments. The international research is very clear on how important relationships with brothers and sisters are. They create love, nurture, security, stability and belonging. We have a huge amount of evidence to show how important they are.

I credit the Parliament for considering that, because it is important: it has been overlooked and has not had the level of attention that it deserves. I particularly recognise the Stand Up For Siblings coalition, and Dr Christine Jones from the University of Strathclyde for her work on developing a research base on that for Scotland.

There are challenges with what is proposed in the bill and in the proposed amendments to the Looked After Children (Scotland) Regulations 2009. The challenges include co-placement. Implementation is also a challenge, as is the reality of our system and the infrastructure that we

have in place at the moment. There is, however, a vision in the bill.

We will soon hear from the independent care review. At the moment there is a huge mismatch between what we hope to achieve and how we can create that. We need bold and creative thinking about developing a very different system that can support and nurture loving relationships between siblings. That is an important step, although it is but one part of the jigsaw. We have to achieve many other things.

Ben Farrugia: One of my least favourite phrases, which I hear a lot in our work, is "It's not rocket science". Children need relationships with their brothers and sisters, but I cannot think of anything more complex than making a decision about a group of siblings and where they can safely go. Social workers, children's panel members and the rest of the system have to make that decision. I cannot think of a more complex task than that, particularly when the interests of all the children are not aligned; we cannot assume that the interests of one child are aligned with those of their siblings. We try to make decisions that are best for all, while also having to take individuals' needs into account.

If we are making changes to the system in the interests of children—many of the proposals in the bill go in that direction and are to be welcomed—the implementation point will be very important. How will we ensure that, where possible, we maintain safe contact when we have to consider all the competing interests? Do we have the necessary social worker time to ensure that it is done properly?

Duncan Dunlop: It is possible; we just need the ambition to do it. We must involve all Scotland and we must look at the matter very differently. The results of the independent care review will be announced in a couple of weeks, but we can and must do it. We are not yet there in our thinking, practice and culture. It is up to Parliament and the committee to set the ambition that the change must be realised. It will be difficult, but it must happen.

Oisín King: I cannot stress that enough. It was 18 months after my younger sister and I were separated before I saw her again. That happened in a thing called "contact"; I want the committee to have it in mind that I did not see my sister until contact became a thing for us. I did not see her on family-oriented holidays—Christmas, birthdays, Halloween or Easter. That was because of lack of resources, but resources should not come between brothers and sisters. Sometimes I would be given hope that I might see my sister on her birthday, which was massive for me because birthdays were always very important in our family, but that hope was cut away from me due to lack of resources.

11:15

On the days when contact went ahead, the first thing that I would do when I woke up was go to the office in my unit and a staff member would inform me that I would have contact with my younger sister that day. Again, however, that contact was possible only when a driver and a room where the contact could be facilitated were available.

If that worked out, staff would drop me off at the place where the contact would take place, and I would wait in the waiting room for my sister to arrive. In that time, I would be given a run-through of the agenda, which outlined what my sister and I would do that day. It would usually involve sitting in a small room, either drawing or playing with Barbies and a doll's house. Neither my sister nor I were given a choice about what to do, and the day was very structured, which made natural conversation difficult.

While we were playing, a supervisor wrote down every interaction and word spoken. When I say "every", I mean just that—they wrote down everything. After contact, my sister would leave and I would be brought in by the supervisor, who would proceed to question the interaction that my sister and I had just had. It was as though I was a threat to my sister and should not know anything about her, so I should not even ask simple questions. The supervisor instructed me not to ask such questions again.

For me, contact was stifling. Love was crowded out by process, concern and uncertainty. I know of other care-experienced people who have just one hour of contact a month, which works out as half a day in a year—12 hours. How can you build a relationship in 12 hours? That amount of time is completely unfair. The only thing that happens in your relationship in that one hour is that you watch you and your sister or brother grow further and further apart.

I think that contact, as we currently understand it, does not create the vital space for the love between brothers and sisters to flourish and develop.

John Finnie: Thank you for that, Oisín. It is helpful.

Mr Farrugia, we have heard from the Convention of Scottish Local Authorities about the cost implications of the financial memorandum for local authorities. I understand that Social Work Scotland does not disagree with the principles that have been talked about today but says that,

"without significant, more fundamental changes in the structure and resourcing of the care system, realising the policy aim may be difficult."

What is it about the structure that makes the proposal challenging?

Ben Farrugia: I have already mentioned the independent care review, a fundamental plank of whose work has involved considering whether the current formulation of the components of the care system enables or inhibits the kind of loving and positive spaces for every child that Oisín King spoke about. That is what we need to do. I admit that our comment was ambiguous, but it was informed by the view of some members of Social Work Scotland—which they have fed into the independent care review, too—that, currently, the care system contains barriers to that goal and has created perverse incentives. There are situations in which we have children placed in residential units with highly skilled, highly experienced and incredibly nurturing and loving members of staff, but it is also true that we have children in places that perhaps do not have such a culture.

That comes back to the fact that, in children's services in general, and in looked-after children's services in particular, the coat is cut to match the cloth. That is understandable—that is how public services work—but, largely, we get what we pay for. In that context, decisions are taken to ensure that we can deliver the service that we are required to deliver, and the thing that sometimes gives is quality. The kind of experience that Oisín King described is not the kind of experience that people are aspiring to provide, but it is sometimes the reality. We want to move away from that reality to one that meets every individual's need.

On that point, I stress that it is critically important that the considerations around contact and relationships are different for every child. We have necessarily developed a utilitarian system that says, "This is the model of contact that you will experience." If we do not want that and instead want a system that is highly individualised and person centred, we must recognise that that is a completely different system, which would also need to have a different structure. The system would have to be able to accommodate much more autonomy for social workers and to manage that risk.

I am excited and also a little nervous. I will learn about what is coming in two weeks. If we want to achieve the best outcomes for looked-after children and children more generally, some fundamental points will have to be made about Scotland changing its attitude to how it funds, resources and supports children's services in general. That picks up on Duncan Dunlop's point from before. Politicians are important agents in that, but it is for Scottish society to own and welcome that change.

Liam McArthur: I accept the complexity of many of those decisions, but I want to come back to the overarching principle of what is in the best interests of the child. We have heard from Oisín King very vividly how the best interests of those two children were failed by the way in which those decisions were taken. I accept the point around resources—with more resources, more can be achieved. However, even in that case, being able to make clear to the individuals involved that those supporting them aspire to do something different would at least give a degree of confidence that the situation is just for now and that it might develop in ways that are more nurturing and supportive of that sibling relationship. It seems that the decisions are more transactional; that is, they are based on someone saying, "We can get this child placed, but this one is going to be more problematic." That means that it is not really about the interests of either child in respect of their relationship but is a calculation that is made. Leaving aside what will come out of the bill, I think that that is a worrying message to be transmitting to the Parliament.

Ben Farrugia: I will own it. It is not a situation that I want to say is the reality, but I am not going to defend some current social work practice. I am keen for the committee to gain a deep understanding—and so far, the bill process and attendant activities have not satisfied this—of how these things have come about. People often tell me that there is a culture, but that is meaningless: cultures emerge and are sets of learned and adapted behaviours among workers, which have come about because of their environment. People have to adapt to their situation. If we really want to change culture, we have to attend to the things that create the culture. Having really large case loads and having limited spaces to facilitate contact arrangements and so on all inform how we work. Unfortunately, that means that, in some cases, it becomes transactional. We have to remember that we are talking about a minority of cases—I hope—and that, in the main, it is done really well by skilled and empathetic professionals.

I will not pretend; in some cases it has become episodic and we are looking at the situation as we see it in front of us and trying to make the best judgment right there, rather than taking a long-term, life-course approach, in which we are constantly thinking, evolving, adapting and building around the individual. We are asking a system to perform in a way that we do not resource and empower it to—and those two things are related, but different.

Duncan Dunlop: Who Cares? Scotland and its members called for the care review several years

ago. One of the main reasons—and I remember this well—was that our number 1 advocacy issue on contact for those in care was that people wanted to see their brothers and sisters. Oisín King talked about the feeling of anxiousness about being to blame and thinking, "It is my fault that my sister is not okay," or, "It is my fault that I am not with my sister." One of the main reasons why we called for the review was our understanding that the outcomes for care-experienced people are among the worst in our society; we are looking at the biggest home-grown human rights violations happening in our country today—they are hidden in plain sight.

I will never forget going to Polmont young offenders institution about 10 years ago when Governor McGill was in charge. About 1.5 per cent of the Scottish population is care experienced, but Governor McGill reckoned that 80 per cent of the young offenders in Polmont YOI had had experience of care. Officially, they say that it is about 40 per cent at the moment. Official statistics do not even track what is going on for that care-experienced population. The indicators are that contact with siblings is the biggest issue for people in the care-experienced community, who are saying, "Please let us be with our brothers and sisters." They do not want that for 12 hours a year or an hour every month; they want to live with and be with their brothers and sisters and have a natural lived experience with them that is combative but absolutely understanding.

A key indicator of whether a care system is working as the sort of natural process that our children might have had or that we might have had in our childhoods is whether children get to have that organic space. It is not a process like going to hospital to have a procedure; it is about having a relationship with a brother or sister, with ups and downs. It is about sharing experiences and the highs and lows of emotions along with those so that, when you grow into an adult, you are not left with a void.

Members might have heard Theighan on a Radio 4 documentary last Tuesday night. Theighan had a little sister and was parentified, but they were split up. She wrote to her sister every birthday with a card or letter to say, "I still care for you." The little sister, who was only four when they went into care, had made Theighan into an imaginary friend and did not realise that she existed but, later on, her mother told her that she had a biological sister. They were apart for 12 years.

What we are doing is adding trauma to children. That is only one example of sibling separation, and it just does not work. That is a clear indicator that there has to be wholesale reform in this space. It is key for the committee, the Parliament and the Government to consider how we are progressing on that issue. If siblings are together as much as possible—or, for those who are 10 years apart, if they have contact with their 18, 19 or 20-year-old brother or sister—that is a key indicator of the health of a care system, so we should scrutinise that.

We were in the Parliament in 2014 when it passed a bill that raised the care leaving age to 21. However, six years on, the average age of leaving care is still 17, people who work in the system still do not know that children should be allowed to stay in care until they are 21 and children do not know that they have that right.

Even more recently, the Parliament passed corporate parenting legislation, under which corporate parents have a duty to report every three years to the Parliament on what they are doing in their corporate parenting plans. However, some corporate parents do not even have a plan, far less report to the Parliament, because they are not held to account.

Recently, there was a bursary for care-experienced students to go to college or university, and we found that Who Cares? Scotland members were having the bursary taken off them as rent while they lived in residential units. That practice had to be overridden by the cabinet secretary, John Swinney, who wrote a letter saying that that was not the intention of the bursary.

We have to look at the issue differently. The current situation is one indicator of a system that does not and cannot work under the current premise and with the constraints that are put on the many good people who work in it. We have to look at it differently.

Ben Farrugia: If I may, I will end this important set of contributions on a fairly minor point, although it comes back to the bill. Although there are policy aspirations on contact with siblings, given that the financial memorandum states that there will be no impact, it seems that, so far, the bill will simply change the law. If we want things to change for children, there has to be a much deeper analysis of what the barriers are and we have to attend to removing them. Ultimately, that will require money and power and, no doubt, political capital to be spent in some difficult conversations. At present, in our opinion, the bill will possibly change only people's expectations of what they should receive and experience, but not the reality.

Duncan Dunlop: It might change the reality if we could hold to account those who are given the duty to look after our children and if we properly look at the feedback loop. In the current system, children do not have power. They do not even

have the right to access advocacy, so they do not have a voice to tell you how it is going. Oisín King is a rare example of someone who gets to speak on a platform such as this one. If we are going to do things differently and if the Parliament is going to have expectations that local authorities will use their budgets differently, we have to follow through and make sure that that happens.

Oisín King: Before we move on, I want to expand on what Duncan Dunlop said and on what Ben Farrugia said about adapting and how kids in care have to adapt to the system and to processes. The reason why the change in the law is so important to me is the protection that it can offer for brothers and sisters. The fact that, as a 15-year-old, I am sitting here in Parliament giving evidence to the committee shows that something is really wrong. It is obvious what is wrong. We have a situation in modern-day Scotland where children are having to speak up just to see their family. For many care-experienced people, compliance with the decisions that adults make is part of survival. I worry about the number of people out there who will never get to the Parliament to talk about these issues, and about the number of people who think that it is their fault, just as I did.

11:30

In many ways, I have adapted to the care system. For example, I got used to referring to the adults who brought me up in my residential unit as "staff". I did not call them by their names. I sign a form that explains to new staff members who come into the residential unit the types of restraints that they can use on me if I have an outburst. I use a fob key, as people do in a hotel, to get into my room. I have to ask to be let into the kitchen to get a drink of water or to be let into my living room—my own space. When I was brought into care, I was told that I would be in the unit for only 12 weeks. However, I was not told that until the second week. Four years later, I am still in the care system.

I have adapted to the care system, but I will not adapt to not being able to see my little sister. There have been occasions when it has felt like the people who look after me have also had to comply with the system processes and protocols. However, I do not believe that someone goes through all the bother of training to be a social worker, registering as a foster carer or working shifts in a children's unit just to restrict children from doing things they love and seeing people they love. Somewhere along the line, the system and its culture have made people nervous of doing the right thing and using their natural instinct to know what is right and wrong. This law clarifies that it is right for brothers and sisters to be together and to see each other.

Rona Mackay: In response to Oisín's experience of contact with his sister, I do not diminish the challenges of resources but, in that case, it was about process and practice. He did not want an agenda in order to play with his sister. He did not want to be interviewed after it. He just wanted normal contact. Should the professions not look at creating a fix to stop that kind of process?

Ben Farrugia: We cannot separate those things into different columns. They are all the same. They emerge and intertwine with each other. As I said earlier, the approaches are developed to deliver the best-quality service within what we can do. In the residential unit, there might not be all the people, skills and time to provide the kind of relationship time between siblings that people would want. Therefore, they cleave down to what they can offer. That is worrying and it should concern us all, but that is the context. It is not that there is poor practice. There will always be individuals in any profession who can do better, but we must view that in its entire complexity and not put issues into boxes of resources, practice or culture.

The Convener: I am allowing a lot of discussion time, but we are pressed for time. It is an important area, so I want to hear fully from all the witnesses.

Dr Hill: What has happened in social work is a risk paradigm, which is about seeing everything framed in terms of risk. Unfortunately for Oisín and his little sister, the framework was that there was risk rather than a basic issue of relationships. We are trying to have a more social model of understanding and protecting children—not seeing parents as a risk but having a more compassionate, understanding, strengths-based family support approach, so that we can work in a closer way. Sometimes, the risk paradigm for children who have experienced abuse and neglect translates into the assumption that it is the same for relationships between brothers and sisters. That is flawed and incorrect. The evidence shows that brothers and sisters are a risk to their siblings in only a small number of cases.

From a children's rights perspective, it is an unfair position for children. The wrong theoretical model, with risk as a dominant theme, is being used around sibling relationships. We have to challenge that, unpick it and think about it in a different way; otherwise, we will have scenarios such as Oisín's, who has to have supervised contact with his wee sister.

Duncan Dunlop: It can be very simple. There are examples of foster carers who know that they are looking after two siblings from the same birth

family saying, “Hey, I’m going to the park—do you want to meet up?” and then the siblings meet in the park. That is often in the grey economy of care—is something like that allowed? Has it gone through all the formal notifications that are necessary? Not necessarily, but that is what should be happening. We should trust the person who the child lives with to make decisions that are right for the child.

The Convener: The points have been powerfully made that there needs to be a fundamental look at the system to see what is necessary and what has not even begun to be looked at, and that resources should not be the dominant factor in determining contact, as seems to have been the case in so many instances.

Shona Robison (Dundee City East) (SNP): Dr Hill has answered my question in part. I was going to question what Mr Farrugia said about it being about resources. Oisín articulated the resource-intensive time that was spent in taking detailed notes during contact and following up afterwards, instead of staff allowing two siblings to have time together in a natural way. Dr Hill answered that by saying that it was about the risk paradigm. Is that established practice? If so, where has that come from?

Dr Hill: Is that question for me?

Shona Robison: Yes.

Dr Hill: I will not go into theoretical thinking, but some good work has been done on shifting the curve in the way we think about child protection and supporting families. The risk paradigm has come about after a number of high-profile tragedies in which children experienced the highest level of adversity possible. As a consequence of that, the professionals around children have become incredibly risk averse, which has meant a loss of the relationship base.

Shona Robison: I am sorry to interrupt, but that surely ignores any risk assessments that might have been done showing that there is no risk.

Dr Hill: For me, the paradigm can just feel like the culture that exists. It is things that might have been used to assess parents’ relationships with children. That is what we know has happened.

There is some new thinking and a social model for understanding the support of families and protection of children that flips it in a completely different way. It is incredibly helpful and looks much more at the strengths of sibling relationships. All the research about brothers and sisters tells us that they are a huge strength and resilience factor for other children. Our understanding of that has got a little distorted.

The Convener: We could have had a whole session on that subject.

Liam Kerr (North East Scotland) (Con): I will stay on the same subject area. I echo John Finnie’s thanks to Oisín. I have found your words very powerful, Oisín, and I suspect that the committee has, too, which is why I want to drill into this a little further.

John Finnie started by asking about section 10, which provides for a new duty on local authorities to promote

“personal relations and direct contact”

between siblings. However, there is a caveat to the provision, which is about the extent to which it is “practicable and appropriate”.

I am interested in the panel’s views on that caveat. The committee had evidence from the Faculty of Advocates that said that that is a useful qualification to the duty. However, another thought is that it could be a potential threat to the policy aims, because the term “practicable” could mean that contact is prevented on resource grounds.

Duncan Dunlop: In Oisín’s experience of care—like roughly 9 per cent of children in the care system, he lives in residential care—he is looked after by people for whom doing so is their job. To a degree, those people treat it as a job, but there is also the other space in which, as staff members, they try to be quasi-parents. Whether the two positions are compatible is an interesting question.

As Oisín said, he wants to see his little sister at the weekend, when he is not at school and on Christmas day and her birthday, but there may not be as many staff on duty at those times—there may be a skeleton staff, or there may be a need to use relief workers or whatever—so the contact will not necessarily happen.

The “practicable” caveat is a problem. The only reason why it is there is that, to cover sibling contact, the Government has just copied and pasted what is in place for parental contact. The caveat should not be there.

Liam Kerr: You believe that it should be removed.

Duncan Dunlop: Yes.

Dr Hill: I echo the concern about that. The caveat could be interpreted in such a way that it was used to inhibit children’s rights to see their brothers and sisters. I return to my point that we have to do things that are implementable and provide them in such a way that the necessary supports exist for the carers.

Duncan Dunlop gave the practical example of foster carers knowing one another and children being able to see one another at the park. There are some good examples of that approach. There is an amazing service called Siblings Reunited, or

STAR, which provides a space for children who are placed all over the country to come together and spend time as siblings. That is a tiny resource in the scheme of things, but such approaches can work incredibly well.

The challenge might be to do with how we interpret whether something is practicable. If children live 20 miles apart, is it practicable for them to see each other regularly? I am concerned that the distance could be reduced and reduced so that, eventually, people would say, "Well, it's not practicable, because they live two bus rides away." Children have the right to see each other.

Liam Kerr: Would you remove the caveat as well?

Dr Hill: Yes, but with recognition of the challenge that that poses, given the discussion that we had earlier.

Liam Kerr: Mr Farrugia, do you wish to comment on that or shall I move on?

The Convener: I ask everyone to be as brief as possible, please.

Ben Farrugia: We were consulted on the language to be used and we were comfortable with that being included, largely for the reasons that we have discussed. It reflects the reality that there will always be assessment of whether something is "practicable and appropriate". The language reflects the reality of how these things will be addressed.

Liam Kerr: I understand that.

I have a final question. I will be brief, convener. Section 10 does not extend to children who have previously been looked after, but the Children and Young People's Commissioner Scotland has suggested to the committee that it should extend to them. Do you take a view on that?

Dr Hill: I certainly do. We must start from what matters to children and young people. We often go down the route of discussing which legal orders exist and what their status is, but this is about children being able to see their brothers and sisters, whether they have been adopted, they are in foster care or residential care or, as will be the case for a huge number, they live in kinship care as an extended family.

I am not skilled enough as regards the technical aspects to say what is required in legislation to allow that to happen. There is a huge challenge to do with children who have been adopted being able to see their brothers and sisters, so there are real challenges around the legal stuff that needs to happen. However, we should start from the perspective of what matters to children and young people, and take a strong rights perspective. We should be providing for children no matter which type of placement they are in. As long as it is safe and in their best interests, which it will be in the vast majority of cases, there should be such contact.

Liam Kerr: So section 10 should be extended to include previously looked-after children.

Dr Hill: Yes—absolutely.

Ben Farrugia: The principle applies of ensuring that we locate the child at the centre of our planning and provide them with all the relationships that are meaningful to them, and we would fully sign up to that.

As I have said repeatedly, we are unlikely to achieve the extent of change that is hoped for and planned. Adding more things would create more expectation that we could not deliver on. That must be a priority for the committee and the Parliament. Let us not add further expectation-raising things, even though they are fundamental to good practice, without taking a proper look at why they are not happening now and what we need to put in place to achieve them.

I do not have any objection in principle to what the children's commissioner seeks. It is absolutely right that, if there is a meaningful and powerful relationship with somebody who is no longer a looked-after child, we should try to maintain that if it is safe to do so. However, the mechanism for that is not simply to add it to the bill.

Liam Kerr: That is interesting. Mr Dunlop, do you want to comment?

11:45

Duncan Dunlop: We started using the phrase "care experienced" about six years ago and it has been accepted globally. There is recognition that someone who has experienced the care system will require rights and opportunities throughout their life, and it is welcome that the Government has extended to people who have been in the care system, whatever age they are, the ability to get a bursary to go to college or university.

We will probably also need provisions to give people who are care experienced but technically no longer in care rights to see their brothers and sisters. Oisín's issue is that, technically, he is on a voluntary order, so he would not necessarily be seen as a looked-after child. Some of the rights would therefore not necessarily be afforded to him, if we were to tie it around some of those definitions.

Liam Kerr: I understand. Thank you.

Shona Robison: Section 21 says:

"When considering a child's welfare, the court is to have regard to any risk of prejudice to the child's welfare that delay in proceedings would pose."

Do you have any views on that new duty on the court in relation to delays in cases? Is it a satisfactory solution or are further measures required?

Dr Hill: I was really pleased to see that in the bill. In our permanence and care excellence programme, we have done a lot of work to try to reduce drift and delay in decision making for children. I think that we have now worked with 27 local authorities across Scotland.

Delays have a huge impact. We know that a six-month delay in an adult's life is very different from a six-month delay in a child's life, so time matters. All our research shows that we should reduce bureaucratic delays or any other unnecessary delays because they are not in the child's best interests, so we welcome the inclusion of that provision in the bill.

However, we recommend that permanence orders be included as well. The current wording excludes permanence orders, which come under the Adoption and Children (Scotland) Act 2007. One of the strengths of permanence orders is that, because they are created for the unique set of circumstances of each child, they allow a much more positive approach to relationships with kin and siblings. The omission of those orders is a shame, and we believe that including them would tighten up the bill. That is the only addition that we would make. Otherwise, we believe that the bill is positive and can make a difference.

Ben Farrugia: In view of the time, I simply express my full support for those comments.

Duncan Dunlop: We have to end the hinterland of drift and delay for children. Oisín said that, when he came into care, he realised after two weeks that he would be there for 12 weeks, and that he has now been there for four years on various non-permanent grounds. It is very discombobulating for children who are in that situation, and they are well aware of it.

The Convener: That concludes our evidence session. It has been a powerful and helpful session and it will inform our scrutiny of the bill. Thank you all very much for coming.

I will suspend the meeting to allow a change of witnesses and a comfort break of a maximum of five minutes.

11:48

Meeting suspended.

11:53

On resuming—

Subordinate Legislation

Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment Order 2020 [Draft]

The Convener: Agenda item 2 is consideration of an affirmative instrument. I welcome Humza Yousaf, the Cabinet Secretary for Justice, and his officials: Philip Lamont, who is head of the Scottish Government's criminal law, practice and licensing unit, and Douglas Kerr, who is a legal adviser at the Scottish Government's legal directorate.

I refer members to paper 1, which is a note by the clerk. I also refer members to the late submission from Police Scotland. I invite the cabinet secretary to make a short statement on the instrument.

The Cabinet Secretary for Justice (Humza Yousaf): Thank you, convener. Please accept my apologies for the delay in getting to the committee meeting this morning. Thank you for rearranging some of your agenda to allow me to come at a later time than scheduled in order to speak to this draft affirmative order. I will briefly explain the policy behind the order, and then I will explain what the order does. After that, I will be happy to answer any questions that members may have.

The overall policy objective is to ensure that the backgrounds of constables, potential constables, police custody and security officers and armed officers are appropriately vetted in Scotland. It is of course important to maintain public confidence in the integrity of those undertaking such roles. The order provides increased flexibility for Police Scotland, and other police forces operating in Scotland, to use a greater range of information relating to a person's previous offending behaviour when they are being vetted.

That will aid the decision-making process in relation to the appointments for such roles, as well as decisions made in relation to disciplinary proceedings against serving constables. Ultimately, it is to ensure that those who wish to serve as constables and police custody and security officers are fit to serve, and to ensure that constables continue to be fit to serve. It will also mean that the vetting of armed forces police will be treated in the same way in Scotland as it is in England and Wales.

In more detail, the order will allow all spent convictions that are received at any age, and all spent alternatives to prosecution when a person was aged 18 or over, to be considered as part of disciplinary proceedings against a police constable

who is appointed after the date of commencement, and also in disciplinary proceedings against an existing police constable for convictions or ATPs given on or after the date of commencement. It will also allow all spent convictions received at any age, and all spent ATPs given when a person was aged 18 or over to be considered when vetting constables, police custody and security officers, persons appointed as police cadets to undergo training with a view to becoming constables and naval, military and air force police.

There are saving provisions that mean that the changes in the order do not apply in respect of a person whose application for recruitment is being considered at the time when the order comes into force. The changes in the order also do not apply in respect of existing convictions of police personnel. Where the saving provisions apply, the law as it is today will continue to apply.

The Scottish Government has discussed the changes with Police Scotland, which is keen for them to be made. We believe that the policy changes contained in the order reflect the reasonable expectation of the public that those charged with the substantial responsibility of upholding law and order should be held to a higher level of conduct and integrity.

I am happy to answer any questions that members may have.

John Finnie: I am fully supportive of the proposals, but there is a significant "however" to that. Does the cabinet secretary acknowledge that, as the proposals stand, they do not recognise the current operation of the Scottish police service? The highest standards will apply to constables and those providing custody arrangements. However, given that support staff are involved in highly sensitive functions such as criminal intelligence, forensics, forensic accounting and information technology, and that there can be direct entry at chief officer level, the order covers only a portion of those who do sensitive work in Police Scotland.

Humza Yousaf: I know that Mr Finnie will understand my views on this, given his experience. I speak with Police Scotland regularly to decipher where gaps may exist and it has told me that, after the changes that were made a number of years ago, certain gaps need to be filled. I think that Police Scotland has directly responded to the committee to say that.

John Finnie's point is important, and I am happy to take it away and reflect on it. As he suggests, that issue is not something that the order will address, and he is absolutely right about the sensitivity of the information that is available to support staff. However, it is not only about the sensitivity of information. The reason why it is important to introduce the measure for constables and the others who I have mentioned is because of the powers that they have—in particular, the warranted powers—which support staff do not have. There are differences, but I am generally happy to reflect on Mr Finnie's point.

John Finnie: I have a couple of further points to make.

There does not seem to have been consultation. The cabinet secretary says that there have been discussions, but why was there no consultation with the Scottish Police Federation or the Association of Scottish Police Superintendents? Surely, it would be good to get their ringing endorsement. Similarly, there are no impact assessments. A human rights impact assessment would have been an important element of the proposal.

Humza Yousaf: I am satisfied, as is Police Scotland, that the order is within human rights obligations and, in particular, article 8 of the European Convention on Human Rights.

Correct me if I am wrong, but my understanding is that neither of the organisations that John Finnie mentioned has written directly to the committee. They had the ability to do so if they had concerns. Equally, they could have approached me about any concerns that they had about the order, but they have not done so.

12:00

John Finnie: I would be astonished if they took exception to it. For completeness, do you acknowledge that what has taken place is not consultation? There have been discussions.

Humza Yousaf: There have been discussions, if we are getting into the semantics of it.

From my conversations with the organisations that John Finnie mentioned, I know that they have a shared endeavour in ensuring that the police force has the best people. It is important to say that, if the order is approved, it will not introduce a blanket ban. If somebody has previous alternatives to prosecution or convictions, the order will simply allow those to be part of the consideration. It does not mean an automatic barring from the police service. To get a holistic picture, the order is important. I often have differences with the Scottish Police Federation, but I think that we share a desire to see the best people possible in what is one of the most trusted jobs in the country.

John Finnie: You say that the transitional arrangements will ensure that there is no retrospective application. However, it will be difficult to ensure that that is the case and that, for instance, retrospective reference is not made in some future misconduct hearing.

Humza Yousaf: The saving provisions will help to protect from that scenario. In future, if someone is convicted after the date of commencement, or if there are disciplinary proceedings, of course they can be taken into account at that time. The saving provisions protect people from the scenario that John Finnie mentions.

James Kelly (Glasgow) (Lab): I am supportive of the order. However, I am interested in exploring what has brought about the need for change. Police Scotland's background checking and clearance are extensive, so I expect that it would have access to any spent convictions. You mentioned in your answer to John Finnie that there are gaps and those are behind the need for the order. Can you give more detail on the reasons why the change needs to be made?

Humza Yousaf: It is a good question. One of the easiest ways to do that would be to give you an illustrative example, to help to spell it out. Police Scotland was helpful in checking that this illustrative vetting example is accurate—I stress that it is illustrative. Say that an applicant is 37 years of age and that the police information reveals that, at age 17, the individual was convicted under the Criminal Law (Consolidation) (Scotland) Act 1995 for possession of an offensive weapon, and received an admonishment. At the age of 20, they were convicted of perjury and got six months' imprisonment. At age 21, they were convicted of assault and fined £500. At age 30, they received a fixed-penalty fine for antisocial behaviour and breach of the peace, and the fine was unpaid. At the age of 33, they got an antisocial behaviour and breach of the peace fixed-penalty fine, and again that was unpaid.

All that criminal history that I have just outlined is spent and the convictions are protected. As such, the applicant does not need to disclose any of that history, nor, under the current regime, could the applicant be penalised for it. That is an illustrative example of a considerable criminal history, and none of it can be taken into account because of the changes that the Scottish Parliament agreed to making to the Rehabilitation of Offenders Act 1974 that covered employment as a whole. As I have said, over the years, gaps that are similar to the one that I have suggested became apparent when Police Scotland approached us.

James Kelly: Are you saying that, in the illustrative example that you gave us, the background checks that Police Scotland would carry out might not bring that information to the fore?

Humza Yousaf: My officials can correct me if I am wrong, but my understanding is that the frustration for Police Scotland is that, although it would have access to and know that information from its criminal history databases and the police national computer and so on, legally, because of the decisions that Parliament has made to change the Rehabilitation of Offenders Act 1974, Police Scotland would not be able to use that information in consideration of an application.

We would all agree with that illustrative example. That is just one example; I could give many more. I think that we would all agree that the well-understood threshold that we have for other employment is probably not the correct threshold for employment by Police Scotland.

James Kelly: Are you saying that the information would be available, but that the police would not formally be able to use it as part of the decision-making process?

Humza Yousaf: I am saying that legally—not formally—the police would not be allowed to use it as part of the vetting process. If they did so, they would be contravening the law as passed by Parliament.

I should say that there are checks and balances. I look to my colleagues to correct me if I am wrong but, if somebody is rejected by Police Scotland, they can appeal the decision and it can be looked at again by a senior officer to check whether all the consideration that took place was appropriate. Potentially, there could be a legal challenge if the police had used such information.

James Kelly: If somebody was rejected and they believed that they could demonstrate that Police Scotland had used such information to inform the decision to reject them, there might be an issue.

Humza Yousaf: Potentially.

Liam McArthur: As John Finnie and James Kelly have done, I confirm that I am supportive of the proposed changes.

To an extent, cabinet secretary, you have already addressed the issue of the proportionate use of the power, which I had intended to ask about. Although we are not talking about people automatically being debarred, the lack of prior consultation is regrettable, as John Finnie highlighted. You are absolutely right that the Scottish Police Federation and others could make representations, but leaving it up to organisations that might have concerns to spot that secondary legislation is coming through and raise concerns with the committee does not appear to be good practice.

You have said that you will reflect on the matter, and I strongly encourage you to do that, because an assumption appears to have been made that everybody is on board and therefore that due diligence has been done. We will see how the measure is applied. It is true that there is an

appeals process but, given the potential human rights implications, that due diligence could probably have been done better.

Humza Yousaf: I take the points that Liam McArthur and John Finnie have made in the spirit in which they were intended. We will reflect on those points.

John Finnie: I am not in a position to argue with the list of offences that you outlined, but I am sure that that is a very extreme example. Would such a criminal history not already be picked up?

Paragraph 65 of the Government's memorandum on the order states:

> "Further, all their decisions are recorded; applicants who are refused vetting are informed of the reason for this (where police operations and the data protection rules allow)".

That is an important caveat. The reality is that, as with refusal on the grounds of criminal intelligence, the reason for refusal would not be disclosed to the applicant. If they had a string of convictions, the police would just decide that they were not suitable because of their conduct, and that would be the end of it.

I support the tidying-up exercise that is proposed, but I think that the Government is gilding the lily a bit.

Humza Yousaf: Although I am not from the legal profession, I recognise that any potential for legal challenge needs to be addressed. In the scenario to which John Finnie refers, all that it would take would be for one applicant to think that they had been discriminated against because of an alternative to prosecution. I can see scepticism in Mr Finnie's eyes. However, it would take only one such case.

As someone who has been a minister for seven and a half years, I say to Mr Finnie in all seriousness that, whenever there is a vulnerability that means that there is a possibility of a legal challenge, it is a minister's responsibility to tidy up the legislation, where that is appropriate and necessary. I would not necessarily disagree with Mr Finnie's assessment of the order as a tidying-up exercise, but I think that it is necessary and I look forward to receiving his support for it.

The Convener: Agenda item 3 is formal consideration of the motion on the draft Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment Order 2020. If necessary, we can have a formal debate on the motion. The Delegated Powers and Law Reform Committee has considered and reported on the order and had no comment to make on it.

I invite the cabinet secretary to move motion S5M-20332.

Motion moved,

That the Justice Committee recommends that the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment Order 2020 [draft] be approved.—[*Humza Yousaf*]

Motion agreed to.

The Convener: We will have a brief suspension to allow for a change of Government officials.

12:10

Meeting suspended.

12:11

On resuming—

Restriction of Liberty Order etc (Scotland) Amendment Regulations 2019 (SSI 2019/423)

The Convener: Agenda item 4 is evidence on a negative instrument. I refer members to paper 2, which is a note by the clerk.

The Delegated Powers and Law Reform Committee considered the regulations at its meeting on 7 January and agreed to write to the Scottish Government to ask for more details on why they were brought into force just three days after they were laid, thereby breaching parliamentary rules. Details can be found in annex A of the clerk's paper and in the response from the Cabinet Secretary for Justice at annex B.

I welcome back Humza Yousaf, Cabinet Secretary for Justice, and his officials. Graham Robertson is the Scottish Government's electronic monitoring policy manager, and Craig McGuffie is a principal legal officer. I invite the cabinet secretary to make some short opening remarks.

Humza Yousaf: As members probably know, there is an existing legislative requirement for Scottish ministers to prescribe the equipment that can be used for electronic monitoring. We are obliged to specify that equipment in a Scottish statutory instrument as one of the stages of parliamentary oversight of the electronic monitoring service. In practice, we discharge the obligation by setting out in regulations a brief description, with, as members can see, the model numbers and equipment that can be used.

We always intended to produce regulations in January 2020 as a result of the introduction of new equipment in the forthcoming new electronic monitoring contract. This was a planned stage in preparation for the five-year contractual period. Before Christmas, however, we had to move to prescribe equipment faster than we had initially planned to, and we brought forward the regulations in breach of the 28-day rule. That was

driven by the increased number of court orders that G4S was receiving for which there had to be electronic monitoring. At the time, we saw the highest level that we had ever seen in Scotland of electronically monitored court orders, such that, even with the decrease in the number of home detention curfew licences, which are monitored, there was potential pressure on equipment stock levels.

Our acting to prescribe a broader range of equipment meant that the stocks of new equipment that G4S had ready and waiting to deploy for the new contract would be used earlier, in conjunction with the current equipment. We believe that acting to prescribe that equipment was necessary and that it was a prudent contingency to ensure continuity in this important service, particularly in light of recent changes to HDC.

The regulations have no impact on the move towards the introduction of GPS. They do not enable any equipment to be used for GPS at this stage; rather, they allow for a slightly updated set of home monitoring units and tags with different model numbers to be deployed to carry out the same radio frequency monitoring that already takes place.

As the convener said, the regulations are subject to the negative procedure, which requires an instrument to be laid before Parliament at least 28 days before it comes into force. In order to bring the regulations into force ahead of the Christmas recess, we had to breach the required 28-day period. There is precedent for such an approach to be taken where there is a pressing reason for it. Of course, a breach of the 28-day rule does not affect the validity of the regulations, and the committee has a 40-day period in which it can annul them.

We wrote to the Presiding Officer to explain why we were unable to lay the regulations 28 days prior to their coming into force and, as I said, we informed the committee. I am more than happy to take questions from committee members on the regulations.

12:15

Liam Kerr: I understand the case that you make, cabinet secretary, but it is a question of parliamentary oversight. The DPLR committee says that it is

"still ... unclear when exactly the Government were made aware of the potential shortage".

Are you able to help the committee understand when precisely before recess the Government became aware that there would be a shortage, and how much time elapsed after that date before it first informed Parliament of the situation?

Humza Yousaf: I must correct Liam Kerr on a couple of points. First, there is no shortage of stock. The stock was supplied by G4S, but staff were unable to use it because the model numbers were not prescribed in regulations. The new regulations include the updated unit numbers.

I have been told about the technology and why the new tags are different from the tags that are currently used. They are not new technology—they do not use GPS technology per se. There is no shortage. The issuing of court-mandated restriction of liberty orders was at its highest-ever level, and we faced a situation in which, although the stock was in place, the model numbers of the devices were not prescribed in an existing SSI—as members can see, the SSI that is before them literally specifies the unit and model numbers—so G4S staff were unable to use them.

In answer to Liam Kerr's substantive question, I have here a table that shows the percentage change in the number of individuals who are under the electronic monitoring regime. The number of those under home detention curfew in November, December and January remained relatively static, in the 30s. The largest increase came as a result of court-mandated RLOs, where there were increases of 4.1 per cent in November and 7.4 per cent in December.

Liam Kerr: Forgive me—I know that the committee is tight for time. My question is simply this: do you recall when you were made aware of the potential shortage?

Humza Yousaf: I am getting to that. My point is that the changes that I described started to become known in November and December. A submission was sent to me on 10 December seeking to have the regulations brought forward and laid on 17 December. We laid them on 17 December, and they came into force on 20 December.

I should say that officials had a regular contract meeting with G4S in mid-November. It was at that meeting that they were told that it looked like there was already an increase in November. Of course, it was prudent to wait and see whether that increase continued for the next few weeks. It did, which is why, in early December, I received a submission seeking to have the regulations laid sooner.

Again, I emphasise that that approach was prudent. I do not accept that there has been any attempt—as has been spun by members, Liam Kerr included—to evade parliamentary scrutiny. As I said, I am happy to appear before the committee, which is of course able to annul the regulations in the 40-day period if it wishes to do so.

Liam Kerr: Thank you. I am not sure that I suggested that you were attempting to evade parliamentary scrutiny; I appreciate that you have come forward to address the matter. Perhaps we can discuss that another time.

You told the DPLR Committee that the increase was unexpected, and I understand the argument that you have put forward. However, by way of example, I highlight that the presumption against short-term sentences was brought in last summer. One would have thought, given that the stated aim of that legislation was to increase the number of people who are out on electronic monitoring, that if that legislation was effective, there would be more people coming out and requiring these pieces of equipment. Was the situation therefore entirely unexpected, or could it have been better planned for?

Humza Yousaf: Again, I go back to the figures. To some extent, the substance of what you say is not incorrect: that the introduction of a presumption against short sentences would lead to a potential increase in the use of alternatives to custody. However, I have two points to make. First, we can look at the months immediately following the introduction of the presumption against short sentences. Although we saw an increase in August, September and October, it was nowhere near on the same scale as the increase that we saw in November and December. There was a much higher increase during those months.

It is really a question of a prudent balancing of risk. We knew that revised HDC guidance was coming through. HDC numbers are still low—there are 29 people on HDC this week. However, there was a concern that if the numbers continued to grow over the festive period at the rate that they grew in November and December, and if the revised HDC guidance made a significant difference to the numbers—which it has not yet done—we could be in a position where G4S's stock, which would be needed, could not be used. I do not think that we could have predicted the increase in November and December. That is potentially something for us to reflect on in the future.

However, when we choose to commence certain provisions in the Management of Offenders (Scotland) Act 2019, we will not have to go through the process of prescribing the serial and model numbers in the future. I hope that we will not be in this position again.

John Finnie: I am supportive of the regulations and welcome the number of court-mandated restriction of liberty orders. I am interested in schedule 2. Was it a requirement of the contract that the company that won the contract should provide its own equipment?

Humza Yousaf: I may look to my officials to answer the question about the discussion that took place when the contract was awarded on the type of equipment that would be used. I reiterate that the equipment is not a new type of technology. Having asked about the technological difference between what is being prescribed in the new regulations and what is in other regulations, my understanding is that the new regulations simply prescribe an updated version of the equipment—for example, the frequency that it uses can go through thicker walls.

John Finnie: I am very cynically trying to see whether there is any likelihood of the situation happening again. What is the lifespan of a tag? Do we know?

Humza Yousaf: I could not tell you off the top of my head.

Graham Robertson (Scottish Government): The regulations prescribe several different bits of equipment. The tags last for a good few months before the battery expires and they have to be swapped out. The home monitoring units are plugged into a power source, so their lifespan is a bit longer.

John Finnie: Is it longer than the duration of the contract?

Graham Robertson: Yes, home monitoring units are able to continue between contract periods.

John Finnie: If the contract is renewed—if the work is not taken back into the public sector, which would be a fine idea, cabinet secretary—will the fact that G4S Monitoring Technologies manufactured the equipment and devices influence the contract decisions?

Humza Yousaf: No. When we take the tenders forward, it will be for those bidding to demonstrate that they will be able to provide the necessary equipment. There are no favours given to any company. A company will not be looked on favourably just because they can supply their own equipment. I will pass over to my officials, who have more knowledge of the contract.

Graham Robertson: During the procurement exercise, we set out the standard to which the equipment must be manufactured and providers come forward and bid for the contract. Some bidders supply the equipment in-house and others partner up with other people to supply it. We are looking for both the service and the equipment.

John Finnie: Can you explain why regulation 2(2)(b) says:

"omit the entry for 'Serco Geografix'"?

Graham Robertson: That removes equipment from the previous contract. Prior to 2013, Serco

provided the equipment. That is when the regulations were updated.

John Finnie: Is there a relationship or connection between the holder of the contract and the equipment that can be used in that contract?

Graham Robertson: Yes.

The Convener: Does that answer your question, Mr Finnie?

John Finnie: No, convener, it does not. That means that it is a contractual requirement that the company that provides the monitoring service also provides the equipment.

Graham Robertson: They must provide equipment to do the monitoring, but they do not have to produce it in-house and can partner up with other people to provide it. In this case, G4S provides the equipment and the service.

Humza Yousaf: When I was Minister for Transport and the Islands, we expected that, whether a contract related to the railway or ferries, companies would have all the necessary equipment to bid for and successfully run that contract. I am struggling to see where this one—

John Finnie: Maybe not, given that you have train-leasing companies. I am trying to establish—

The Convener: Let the cabinet secretary finish. Cabinet secretary, please be brief. We have fallen behind and have another important panel to hear from. If everyone could be brief, that would help.

Humza Yousaf: It would be helpful if John Finnie could get to the crux of his concerns, so that we can address them.

John Finnie: Is the entry for Serco Geografix omitted because it is obsolete or because there is a new contract?

Graham Robertson: Serco has no role in the current contract, so the legislation has been updated to remove equipment that is no longer used.

John Finnie: Thank you. Perhaps I will write to the cabinet secretary on that point.

The Convener: That is appreciated, Mr Finnie.

James Kelly: Cabinet secretary, for three reasons, I do not accept your explanation that you could not have foreseen the circumstances that required the regulations to be brought before Parliament earlier than planned. As has been mentioned, the presumption against short-term sentences was coming into play. In your letter, you indicate that, in December, administrative changes to HDC were coming in, which would increase the number of people released on HDC. Further, if we look at the trend through August, September, October and into November, the table provided shows increases in HDC. There are three clear reasons for an increased trend. It is a glaring oversight that, with all that evidence in play, you and your officials were not able to anticipate that the regulations would require to come before Parliament earlier.

Humza Yousaf: Mr Kelly's attempts to spin the situation into being the result of our lack of foresight is mistaken for a number of reasons—largely down to his misunderstanding of a few of the things that he mentioned. I will take them one by one.

I already mentioned the point about the presumption to Liam Kerr. The table that I provided demonstrates that, compared with the previous months, the increase in November and December was unprecedented.

There are two further substantial and important points. The table that I provided also disproves James Kelly's HDC theory. In every month from April, the HDC trend decreases. From October to November, there is a slight fluctuation of two, from 36 to 38. However, HDC levels remain at among the lowest levels that we have seen since the regime came into place. That disproves his theory that we should have had that foresight because of changes in HDC. HDC numbers in November and December were far lower than they were in July, August or September. The trend was decreasing—not increasing—so he is wrong on HDC.

There is, at best, ignorance of how the contract works. It would not have made sense to bring in the regulations before the award of the contract. Is James Kelly even aware of the award of the contract at the end of October? The conversations around the regulations took place in November. If he was aware of that, he could not have made the point that we could have brought in the regulations in September or August. Was he aware?

James Kelly: One of the astonishing—

The Convener: I must stop you. We have another panel to hear from. Members might want to recommend that we write to the cabinet secretary on the matter. However, for the moment, I thank the cabinet secretary for attending.

12:29

Meeting suspended.

12:30

On resuming—

The Convener: Item 5 is consideration of the Restriction of Liberty Order etc (Scotland) Amendment Regulations 2019, following the evidence that we heard from the Cabinet

Secretary for Justice. I invite members' views on whether they wish to make any recommendations in relation to the regulations.

Members seemed to have a lot more questions to ask, so I suggest that we write to the cabinet secretary. We should liaise with the clerks and members should decide what questions they want to ask. We do not have to decide on the regulations today if members do not wish to do so and if they want further information. The committee has until 3 February to report to Parliament on the regulations.

I am in members' hands. Do members want to make any recommendations to delay the regulations and get further information, or are they happy not to make any recommendations in relation to the regulations?

Rona Mackay: I think that we are going over old ground. The questions that are being asked are about the process; I do not think that anyone has an issue with the substance of the regulations. I think that we should let the regulations through.

The Convener: Does anyone not agree with that proposal?

James Kelly: I do not disagree with the measures in the regulations. However, it is extremely unsatisfactory that the session was cut short. Certain things that the cabinet secretary said in response to me were incorrect, and I was not able to correct the record.

The Convener: We can write to the cabinet secretary and you can ask him exactly what you would like to ask him. We have another panel ready to give evidence on the Children (Scotland) Bill, and they have been inconvenienced—they should have been heard more than an hour ago, and it is already likely that their session will be cut short.

On that basis, do members wish to write to the cabinet secretary to get further information? I am happy for us to do that—we have the time to do so. We can revisit the regulations on 3 February. If anyone has any questions, please give them to the clerks. Do members agree with that procedure?

John Finnie: I am happy to agree. Members should also write separately.

Members *indicated agreement.*

The Convener: Are you content with that, James?

James Kelly: Yes.

The Convener: Thank you.

Are we agreed that the committee does not wish to make any recommendations in relation to the instrument?

Members *indicated agreement.*

12:32

Meeting suspended.

12:33

On resuming—

Children (Scotland) Bill: Stage 1

The Convener: We move to further consideration of the Children (Scotland) Bill. I refer members to paper 3, which is a note by the clerk, and paper 4, which is a private paper. I welcome our second panel today: Jackie McRae is practice and partnerships lead at Children's Hearings Scotland; and Alistair Hogg is head of practice and policy at the Scottish Children's Reporter Administration. Thank you very much for your written submissions. I apologise for the delay in hearing your evidence. Given that we are under such time constraints, I ask for both the questions and the answers to be as succinct as possible.

We will move straight to questions.

Jenny Gilruth: As the panel will be aware, sections 1 to 3 of the bill remove the current presumption that only children over 12 are able to express a view regarding decisions that are made about them. What are the panel's views about the removal of that presumption? Are you supportive of that change in the first instance?

Jackie McRae (Children's Hearings Scotland): Thank you for the opportunity to talk to the committee. Children's Hearings Scotland is in favour of the removal of the presumption that only children aged 12 and over are sufficiently mature to give their view. The children's hearings system is premised on children's views being at the heart of decision making about them, and our guidance and training to children's panel members is that they should ensure that they are aware of the views of any child or young person who is brought before the panel.

Alistair Hogg (Scottish Children's Reporter Administration): From an SCRA perspective, I agree with those comments. We are in favour of removing the age of presumption, because we think that it is unhelpful in the children's hearings system. We have always operated on the basis that a child of any age is capable of giving a view; what is important is how we are able to obtain that view. Of course, those views have to be given consideration—that is a statutory requirement of a children's hearing. The stated age of 12 is an unhelpful barrier to the collection of children's views in other forums.

Jenny Gilruth: On the practicalities of taking views from young children in particular, we heard evidence in the previous session from a representative of CELCIS, who talked about ensuring that the views of babies and young children are listened to. We also heard from Who Cares? Scotland about the importance of listening to the views of toddlers. Do any of the witnesses have any comments on how the views of young children can be taken into account? What is the best way to go about getting that information from young children?

Jackie McRae: In respect of children's hearings, panel members have a variety of options at their disposal. With slightly older children, there is direct communication through their attendance at hearings, and there are often direct written contributions from children and young people, although the quality of those can be variable. Children may instruct a solicitor to act as a legal representative.

A lot of new technology solutions are currently being used in the hearings system. In Midlothian, a communications app called Mind Of My Own is used—there are different versions of the app for older young people and for younger children. In Fife, Barnardo's Scotland has also been working with technology, using avatars to enable children to provide their views to a number of different decision-making and planning forums, including children's hearings.

Panel members are given limited training in how to talk to children in hearings, but it is fair to say that, as lay decision makers, they often rely on information from others such as skilled professionals, family members and carers. There are challenges in taking views from very young children. We were very interested to hear NSPCC Scotland's written evidence to the committee regarding the work of its GIFT—Glasgow infant and family team—project, and the comments from Duncan Dunlop in the previous session.

For very young children, hearings currently rely on the use of appointed safeguarders. Those can be skilled professionals such as the child's social worker, or a specialist child psychologist can be appointed in certain circumstances.

Alistair Hogg: I will keep my answer concise by saying that I associate myself with those remarks. There are a lot of new innovative and creative ways to obtain the views of children, and very young children in particular. The important thing is to recognise that a child is capable of providing a view no matter what age or level of maturity they have reached. It is just the way in which they are able to express their view that changes.

To add to the list of potential approaches, there are a variety of adults who can be involved in obtaining those views and providing them to a children's hearing. We have heard about safeguarders such as the child's social worker, legal representatives or family supporters. In addition, the committee will be aware of the introduction of advocacy workers from—it is hoped—April this year, which will provide another

level of support and enhance the ability to project a child's views for the hearing.

Jenny Gilruth: Can I just check something? In your written evidence, you say that the

"Court should determine the 'best' way to elicit the information they need—including a child's view."

Does that apply to sheriff court proceedings or children's hearings?

Alistair Hogg: The comments in our written submission relate to court proceedings rather than children's hearings.

Jenny Gilruth: As Jackie McRae will be well aware, the rules for children's hearings state that a child must have the ability to express how their view is taken, and it must be done in the manner that the child prefers. The legislation does not currently specify how that should be done. Does it need to be more prescriptive about how views are taken and listened to, or should it be open to interpretation depending on the circumstances of each child?

Jackie McRae: We welcome provision that would enable hearings to work with the child to enable them to give their views in the way that is most effective for them. On whether there should be a prescriptive list of methods by which that should be done, I think that there are some risks in that because, the greater the level of prescription in the law, the more restrictive some approaches to implementing that might be. There would be merit in having detailed statutory guidance for professionals about the options that are available to them.

Rona Mackay: Are you supportive of the proposed measures in sections 4 to 7 to offer greater protections to vulnerable people in the courtroom? Does the bill go far enough or should something more radical be suggested?

Alistair Hogg: The court setting is probably more part of the remit of the SCRA in relation to this discussion. We welcome the proposals in sections 4 to 7, which we think are helpful. In particular, we welcome the restriction on personal cross-examination of a vulnerable person in the proceedings. We have long hoped for that power and it will be helpful.

Overall, in relation to the proposals, you will be aware of what is in our written submission. We tried to convey the point that, in looking at the vulnerability of witnesses and parties going to court, it would be helpful to look at children through a separate and different lens and to consider what supports, protections and measures might be most helpful and appropriate for children. That might be a more helpful and clearer process.

Under the Vulnerable Witnesses (Scotland) Act 2004, anyone under 18 is, by virtue of their age, considered to be a vulnerable witness, so that protection is in place. However, we think that it would be helpful and clearer to state a position in relation to children in the court process. The committee will obviously be aware that the Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019 came into force yesterday. The SCRA would support the transfer of some of the measures relating to certain High Court proceedings to our proceedings, too. As children's reporters, we have to appear in court under different sets of rules, depending on the grounds of referral. It would be helpful to have one clear statement in relation to children when they are involved in proceedings.

Jackie McRae: Children's Hearings Scotland suggests that the bill has perhaps missed an opportunity to think about the child's and family's experience as they move through different sets of connected or sometimes related proceedings. Since 2013, there has been a real focus in the hearings system on realising the human rights of everybody involved. Some of the procedures that have been introduced are framed with a view to ensuring that the child's and their family members' article 8 rights are properly respected. That means that there are stringent tests, which mean that the child and their family members have rights and duties to attend hearings and that the circumstances in which relevant persons or their representatives may be excluded from hearings are limited, even when there is a concern that they may present a risk to the child or other parties in the hearing room.

In some respects, there is a need for greater protection for the child and for adult victims of abuse in the setting of children's hearings. It is not uncommon for adult perpetrators to be brought from custody in handcuffs into a children's hearing room, with children—sometimes very young children—present. The SCRA does an excellent job of trying to gather intelligence about risk and to consider beforehand how best to manage complex hearings and make arrangements to keep all the participants safe, but that cannot always be relied on. We cannot even necessarily rely on police presence when violence is anticipated.

In those circumstances, we consider that children's panel members should have greater scope to manage hearings when there is evidence of risk and potential violence. That could include: providing information to the hearings in advance and greater information exchange between different court proceedings; greater participation by videolink so that the participants do not necessarily have to be in the same room together; and the capacity to enable panel members to make a decision to involve relevant persons in

hearings separately. There is the possibility of excluding relevant persons, but the current test for those relates solely to the risk of distress to the child and to prevention of the child expressing a view. Those thresholds are quite high, in practice.

12:45

Rona Mackay: Thank you. I would like to ask about more, but I know that we are short of time.

John Finnie: A lot was said about siblings in the earlier part of the meeting, and I am aware that you were present for that. A number of organisations have proposed that siblings' rights and family places, including measures affecting the children's hearings system, should be included. I will run those rights past you for your comments on them. They are the right to be notified of proceedings; the right to attend hearings; the right to make representations; and a right of appeal or review. What effect will the proposals have on the operation of the children's hearings system, and what challenges could they pose?

Alistair Hogg: That is a live issue because, as committee members will be aware, a Supreme Court decision on siblings' rights in children's hearings is awaited. The list of rights that you outlined will be considered by the Supreme Court, and we will know fairly soon what its position is.

Your question was about the impact of the proposals on the children's hearings system. The SCRA supports the direction of travel on the general issue of siblings' rights. There is a gap around the involvement of siblings in proceedings but proportionality is required, because we must always remember that the most important person at a children's hearing is the child for whom the hearing has been arranged. The rights that you listed are the equivalent of the rights that a relevant person would have during children's hearing proceedings and the rights that the child would have.

In relation to the debate that took place in the Supreme Court, the SCRA supports the greater participation of siblings in hearing proceedings. We recognise the powerful issues that the committee heard about earlier this morning, but there needs to be a balance and that involvement needs to be proportionate. The most important person is the child who is at the centre of the hearing.

Participation could take many different forms. It does not necessarily mean attendance at the hearing, for example; it could mean that you have the opportunity to present your views to a hearing in different formats. There could also be participation and rights in the form of an ability to seek a review if the position is detrimental to your position. The granting of the full range of rights would, however, be disproportionate to the issue that we are considering.

Jackie McRae: I echo what Alistair Hogg has said. Given the focus that is emerging from research findings on the importance of contact and the relationship between siblings, Children's Hearings Scotland has been working on additional direct and online training for panel members, to ensure that they prioritise in a hearing the consideration of relationships that are important to the child. Those go beyond the relationships with parents to the relationships with brothers, sisters and other family members. We have a test for change planned in one of our support team areas, in which panel members will ensure that they gather information about the situation of the child's brothers and sisters and consider the impact of those relationships on the child in every hearing.

John Finnie: I would like clarification on one small point. You mentioned the wider family, including siblings. For the avoidance of doubt, would that include grandparents?

Jackie McRae: Yes, it would include grandparents.

James Kelly: I want to ask about delays in the children's hearings system. The bill provides for the court to "have regard to" the effect that delays might have on children. Should anything specific be included in the bill about the measures that courts could take to mitigate delays that might have an adverse effect on children's welfare?

Jackie McRae: Our focus has been on the hearings system. In general, delays in the hearings system relate to administrative problems, a lack of reports or important people not attending hearings, which often makes it difficult for panel members to make decisions as promptly as they would wish. That is why we consider it critical to retain the focus on the child's welfare in a hearing, in the current legal tests. An additional consideration for panel members over and above that would not add anything, as panel members should already be focused on considerations around delay and its impact on the child.

Alistair Hogg: Delays in children's hearings are always in the minds of children's panel members. They are well aware that delays in making decisions are particularly unhelpful for the children and young people who are at the centre of the hearings.

The SCRA very much welcomes the measure in section 21 of the bill, which relates to court proceedings. It will be helpful to have it in statute, because our proceedings at court—particularly our proof proceedings—can often be delayed significantly. Cases can take several months or, sometimes, even longer than a year to conclude.

There might be particular reasons why that is the case, but the impact on the child is hugely significant. A year in the life of a child is proportionately much more than a year in the life of an adult of my age, for example.

As I said, we very much welcome that measure being placed in statute. It might be helpful if some narrative or guidance around it was provided to guide the decision makers in relation to the impact of delay and how to reduce delay. It is a helpful addition that might enable and empower us to avoid delays in court.

Shona Robison: Let us turn to appeals in the children's hearings system, which are dealt with in sections 17 and 18. Does the panel want to comment on the Law Society of Scotland's view that the function of the principal reporter is to ensure the effective conduct of a children's hearing and that appealing a decision on relevant person status, as is proposed in section 17, would not be consistent with that role?

Alistair Hogg: I understand that what is proposed will allow the principal reporter to appeal a sheriff's decision on that matter rather than to appeal a decision that the hearing has made, which I agree would be inconsistent with our function. We very much welcome the ability to appeal a sheriff's decision on deemed relevant person status because, at the moment, we see many cases in which decisions are made and in which other parties to proceedings who would have a right of appeal are unable to exercise that function for personal reasons. We are unable to pursue that and, therefore, shape the test relating to deemed relevant person status, which can have a big impact on not only individual cases but more generally if precedents are set.

Jackie McRae: I endorse Mr Hogg's comments.

Shona Robison: Do you have any comment to make on the Faculty of Advocates' view that, unlike what is proposed in section 18, it is important to retain a direct line of appeal from the sheriff court to the Court of Session?

Jackie McRae: No.

Alistair Hogg: No. I do not have any particular view on that.

The Convener: That concludes our questioning. However, when we review today's evidence, members might think of further questions that they would like to ask you, and we would be very grateful if you would provide further information, if it is requested. In the meantime, I thank you for a very concise and helpful evidence session.

Justice Sub-Committee on Policing (Report Back)

12:56

The Convener: Agenda item 7 is feedback from the meeting on 16 January of the Justice Sub-Committee on Policing. I refer members to paper 5, which is a paper by the clerk. Following a verbal report, there will be an opportunity for questions.

John Finnie: The meeting was on 16 January, when we held our third and final evidence session for our inquiry into the use of facial recognition technology by the police service in Scotland. The sub-committee heard from Police Scotland and the Scottish Police Authority. As the convener said, members have a feedback note on the meeting in their papers.

Police Scotland outlined the process for photographing people at the point of being charged in the custody process, including how those images are uploaded into the Scottish criminal history system and the United Kingdom police national database. It was confirmed that the Scottish criminal history system contains custody images only but that the UK police national database also contains "intelligence images" from a number of sources such as CCTV.

Police Scotland confirmed that it has no plans to test or introduce live facial recognition technology in Scotland at this time. It is aware of the concerns about human rights, privacy and data protection, as well as the issues with the reliability and accuracy of the software, which includes in-built bias.

The witnesses confirmed that the procurement and introduction of any such system in Scotland would require several key elements to be met. Those include a strict necessity test under the general data protection regulations; consideration of proportionality, ethics and protection of human rights; robust assessment of the credibility and reliability of the new technology; and assessment of value for money and business cases for any new technologies.

The witnesses felt that the challenges that facial recognition technology poses for policing should be a matter of priority for a Scottish biometrics commissioner. They also said that they would welcome a legal framework for the use of retrospective and live facial recognition technology, perhaps through amendment of the Criminal Procedure (Scotland) Act 1995.

The Scottish Police Authority spoke of its intention to introduce a more structured approach to the delivery of Police Scotland's 10-year strategy.

The next meeting of the sub-committee will be on 30 January, when we will consider a draft report of our inquiry.

The Convener: As members have no questions, we will move into private session.

Our next meeting will be on Tuesday 28 January, when we will continue our evidence taking on the Children (Scotland) Bill.

12:59

Meeting continued in private until 13:04.

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

All documents are available on
the Scottish Parliament website at:

www.parliament.scot

Information on non-endorsed print suppliers
is available here:

www.parliament.scot/documents

For information on the Scottish Parliament contact
Public Information on:

Telephone: 0131 348 5000
Textphone: 0800 092 7100
Email: sp.info@parliament.scot

The Scottish Parliament
Pàrlamaid na h-Alba