OFFICIAL REPORT
AITHISG OIFIGEIL

Equalities and Human Rights Committee

Thursday 23 January 2020

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

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EQUALITIES AND HUMAN RIGHTS COMMITTEE
1st Meeting 2020, Session 5

CONVENER

*Ruth Maguire (Cunninghame South) (SNP)

DEPUTY CONVENER

*Alex Cole-Hamilton (Edinburgh Western) (LD)

COMMITTEE MEMBERS

*Angela Constance (Almond Valley) (SNP)
*Mary Fee (West Scotland) (Lab)
*Fulton MacGregor (Coatbridge and Chryston) (SNP)
*Oliver Mundell (Dumfriesshire) (Con)
*Annie Wells (Glasgow) (Con)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Christina McKelvie (Minister for Older People and Equalities)

CLERK TO THE COMMITTEE

Claire Menzies

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Equalities and Human Rights Committee

Thursday 23 January 2020

[The Convener opened the meeting at 09:00]

Female Genital Mutilation (Protection and Guidance) (Scotland) Bill: Stage 2

The Convener (Ruth Maguire): Good morning, and welcome to the first meeting of the Equalities and Human Rights Committee in 2020. I ask that everyone ensure that their mobile devices are switched off and put away.

Item 1 is stage 2 consideration of the Female Genital Mutilation (Protection and Guidance) (Scotland) Bill. Members should refer to their copy of the bill and to the marshalled list and groupings of amendments.

I welcome Christina McKelvie, the Minister for Older People and Equalities.

We will begin our consideration of amendments. Everyone should have with them a copy of the bill as introduced, the marshalled list that was published on Monday and the list of groupings of amendments, which sets out the amendments in the order in which they will be debated.

There will be one debate on each group of amendments. I will call the member who lodged the first amendment in a group to speak to and move that amendment, and to speak to all other amendments in the group. Members who have not lodged amendments in the group but who wish to speak should indicate that by catching my attention in the normal way. I ask anyone who speaks to be succinct and to ensure that their contributions are relevant to the amendment or amendments that are being debated.

I remind members that this stage is not a rehearsal of arguments about the general principles of the bill. Members will be able to comment on the merits or otherwise of the bill in the stage 3 debate in the chamber.

The standing orders give any Scottish minister the right to speak on any amendment. I will therefore invite the minister to contribute to the debate just before I move to the winding-up speech.

The debate on each group will be concluded by my inviting the member who moved the first amendment in the group to wind up. Following debate on each group, I will check whether the member who moved the first amendment in the group wishes to press it to a vote or withdraw it. If they wish to press it, I will put the question on that amendment. If a member wishes to withdraw their amendment after it has been moved, they must seek the committee's agreement to do so. If any committee member objects, the committee will immediately vote on the amendment.

If any member does not want to move their amendment when it is called, they should say, "Not moved". Please note that any other MSP may move such an amendment. If no one moves the amendment, I will immediately call the next amendment on the marshalled list.

Only committee members are allowed to vote. Voting in any division is by a show of hands. It is important that members keep their hands clearly raised until the clerk has recorded the vote.

The committee is required to indicate formally that it has considered and agreed to each section and schedule of the bill, so I will put a question on each section at the appropriate point.

Section 1—Female genital mutilation protection orders

The Convener: Amendment 23, in the name of Oliver Mundell, is in a group on its own.

Oliver Mundell (Dumfriesshire) (Con): Thank you, convener. Subject to the guidance that you have just given, I will first make a general point about my amendments, because I think that it will speed things up throughout the proceedings. At stage 2, there are always two choices: to try to put things that are perfect into the bill, or to use the stage as an opportunity to put things that are important into the bill and thus create an incentive for the Government to work with members across the committee and the Parliament at stage 3 to get the technical drafting correct.

With that in mind, amendment 23 is designed to be a simple amendment to give voice to concerns that the committee heard throughout our evidence gathering, and which I heard on our visit to the Multi-cultural Family Base, where a number of people whom I spoke with were concerned about what teeth the protection orders will have. I had the feeling that they needed to see practical support in place immediately.

For me, the most important word in amendment 23 is "may", where it says:

> "the court may include in a ... protection order a requirement to provide ... practical support".

The amendment does not say that the court must do so and it does not interfere with responsibilities that are already set out. It is an additional provision. I think that there are circumstances in

which it would be appropriate for the court to be prescriptive and to place such a duty on public sector bodies and, potentially, individuals. The nature of the offence and what we are trying to do in the bill are so important that there is a public policy incentive to put that special provision in place. I hope that members across the committee will agree with that.

I move amendment 23.

The Convener: Do any other members wish to contribute?

Mary Fee (West Scotland) (Lab): I will comment briefly on amendment 23. I am minded to support the amendment, because support for victims will be crucial to the success, or otherwise, of the protection orders. Throughout the evidence sessions, the committee heard that the support that victims will be provided with will be crucial.

I have only one point to make, and I would be grateful if the member could clarify these things when he winds up. I would like to know what he envisages that that support would look like, who would provide it and who would fund it. The wording of the amendment could be considered quite broad, so some clarification of what he views that support to be would be helpful.

Alex Cole-Hamilton (Edinburgh Western) (LD): I echo Mary Fee's comments. I also support the amendment, for a number of reasons—not least because there is a symmetry between amendment 23 and the process in the children's hearings system.

It may be that, by definition, the people who would be subject to the orders do not have a lot of interface with the public sector or the state, and they may miss out on opportunities for support when they are in need.

There are other examples, elsewhere in law, of the court making such provision. Therefore, I support the amendment.

Angela Constance (Almond Valley) (SNP): I approach this with many years of front-line experience of going to courts and tribunals to ensure that vulnerable people receive support and protection. I know that I am not alone in having done that—there are many others on this committee who have front-line experience.

I recognise that the motivation for lodging the amendment comes from listening to people talk about their real-life experiences and from a desire to do something in response to hearing about those heart-wrenching experiences.

However, where my view differs from Mr Cole-Hamilton's is that I think that there is a theme, in amendment 23 and in other amendments in Mr Mundell's name, of attempting to cut out a separate set of arrangements for one particular set of victims. Although there are some parallels with what happens elsewhere in law, there are also some differences. The important thing is that information should come from the professionals who are on the ground. In child protection orders, parole reports and many other examples, the information is gathered by those professionals and presented to the court. It seems that, under amendment 23, the court would be empowered to make very specific decisions that would not fit well with the rest of the system.

I would like to hear from Mr Mundell more of the specifics on stakeholder support. The committee received feedback from the minister, who has tried to take things forward, but there are mixed views. I am concerned that we will end up with legislation that is not implementable and that becomes meaningless or, in the worst-case scenario, causes providers to be criminalised.

Oliver Mundell: I am interested to know why the member feels that amendment 23 would make the legislation unworkable when it is a stand-alone provision in addition to what is already in the bill. I do not think that it would prevent the bill from doing anything that it currently would do.

It is an additional provision that would be open to the courts to use. They would not have to use it. It would not prevent them from doing anything that the Government intends the bill to do; it would just allow them to require the provision of practical support if they thought that that was necessary. I think that Scottish courts are considerate, mindful and used to dealing with complex situations, so they would be able to decide when it was necessary to confer that specific obligation.

Angela Constance: The member has made a few points, and I appreciate the opportunity to respond to them.

The information and the expertise are meant to come from the ground up, not from the court system down. If Mr Mundell wants to see more mandated support, that would need a whole-system review or change across the adult and child protection systems. I also draw Mr Mundell's attention to Mary Fee's comment about what he means by "practical support".

I am keen to hear more from the minister about her specific deliberations on the practicalities of the amendment and whether she can offer Mr Mundell or the committee something to improve matters and take things forward. Also, having been around the houses a few times with various pieces of legislation, I am a wee bit concerned that, although stage 2 amendments do not have to be perfect, they do have to be bottomed out and at least subject to reasonable stakeholder consultation and support. Do we know the views of

the Scottish Courts and Tribunals Service, for example? The minister might be able to offer a way forward that will help the committee as a whole.

Fulton MacGregor (Coatbridge and Chryston) (SNP): I broadly agree with what Angela Constance has said. I get where Oliver Mundell is coming from. He has shown the committee that he always provides thoughtful and appropriate interventions—and, in this case, amendments. However, I also note that the minister has acknowledged that there is a need to expand this area and has offered to work with Oliver Mundell. That is the right approach, because we need to be careful.

My background is similar to that of Angela Constance. I worked in the child protection field for eight years and attended many child protection committees. I fully believe that that is where these decisions should be made, not in the courts. Amendment 23 would almost draw us into a battle to decide whether the courts or the agencies and services that work with children, young people and vulnerable adults are best placed to make these decisions. The committee will know what side I come down on. The reason for that is that workers in those fields are trained in person-centred approaches.

Oliver Mundell: Will the member take an intervention?

Fulton MacGregor: No problem.

Oliver Mundell: I am happy to stand corrected if I am wrong, but my understanding is that, where the bill says "the court", for a children's hearing that would mean wherever the case was being heard. It is just the language that is used in the bill—it does not mean one or the other.

Fulton MacGregor: That brings me to a point that I am worried about. The court might make one direction and the professionals and agencies might say that it is not right, because they know the family.

Alex Cole-Hamilton: Will the member take an intervention?

Fulton MacGregor: I will finish this point first. The professionals know the family, but the person might have to go back to court, which means that vulnerable folk might be put back through the court system. That is what we are trying to avoid.

Alex Cole-Hamilton: I accept what Fulton MacGregor says about the expertise of our stakeholders, particularly around children, and the agencies, social work and the rest. However, Mr Mundell's amendment explicitly says that the practical support that could be offered by the court is for the purpose of reducing any on-going risk of FGM to that person. That is a very specific risk and not one that those agencies and social work departments are used to coming up against. There is a focused power for the court.

Fulton MacGregor: I understand that point, but it brings me back to my opening remarks. The matter needs to be handled very carefully. Alex Cole-Hamilton makes his point well, but there could be many unintended consequences. That is why we can all get behind the minister's approach of working with Oliver Mundell, going into stage 3, as the most sensible way forward. I am quite surprised to hear that Mr Mundell is considering pressing amendment 23, because, on my first reading of it, I thought that it would be a probing amendment.

09:15

The Minister for Older People and Equalities (Christina McKelvie): I will take time to go through all the issues that are presented by the amendment. I also have a proposal. There are not many amendments, so I hope you will indulge me by letting me go through each of my points about Mr Mundell's amendment. We all want to create good, competent legislation.

We all agree on the importance of supporting women and girls, and their families, when there is a current or future risk of FGM. It is right that those who need that support should have access to it. My approach to tackling FGM through our strategy, through our preventative work in communities and through the bill is to support vulnerable girls, to ensure that we have the person-centred approach that everyone has referred to. The committee is committed to that, as am I.

However, I cannot support the amendment, as I believe it would have unintended consequences. Those are fourfold, and I will run through them all to help the committee to understand my thoughts.

The bill already allows the court to consider the provision of support. The explanatory notes set out what a court might consider it appropriate to require a relevant local authority to do as part of an FGM protection order. Members will recall that, in my evidence session with the committee, we explored what services might be needed to support those who are most affected. That is combined with the power that the bill gives ministers to bring forward statutory guidance that will be applicable to those bodies that would provide that support.

When it is published, the guidance will set out clear expectations of the response of those bodies to women and girls who are at risk of, or who have been subject to, FGM. Those steps will ensure that the necessary framework is in place, so that women and girls can benefit from targeted,

bespoke support to meet their needs. That is the person-centred approach that we all agree on.

Oliver Mundell's amendment 23 risks disrupting the balance of competencies and expertise that exists between the court and the service providers. Inviting the court to be precise and directive could risk removing both the benefits of a professional assessment of need and that tailored, individual support. I am sure that the committee agrees that that work is best carried out by people who provide complex support packages every day. Support is generally provided by a range of organisations from the public and third sectors. Those organisations are unlikely to have the opportunity to make representations to the courts, and a court might set such precise conditions that an organisation would not be able to meet them.

Angela Constance asked about the Scottish Courts and Tribunals Service. The service has indicated concerns about to whom the order might apply and about how the court could be informed about the support that might be available. It is clear that Mr Mundell's amendment creates a targeted requirement that is not limited to the public sector but could also capture charities and even private persons. That creates the potential for a public or third sector body to be in breach of an order, and potentially to be liable to criminal sanction. I am sure that none of us wants that outcome.

There are also issues with how "support" is defined in the amendment and about what "practical support" actually means. The term is not defined, which could pose problems if the court was not guided by the bill on the types of support that it could mandate. There is a risk of a disconnect between the court's order and what a body can do within its statutory powers and limits. In some cases, a court could inadvertently order something that might be impossible for a body to lawfully provide.

Alex Cole-Hamilton: The minister makes a very strong case about the potential problems with the amendment. I take her back to Oliver Mundell's original comment about how the value of stage 2 may sometimes be in signalling to the Government that it is the will of the committee or the Parliament to have something in a bill changed. An amendment can be subject to drafting changes or to clarification in the bill or through statutory guidance. Although the minister's points are valid, they do not negate the value of the amendment.

Christina McKelvie: I was coming to that very point, and I will answer it for you. However, to continue on the point about what the courts could do, mandating precise support in the order would form part of the conditions of the order, and that would have a real effect. It would require repeated applications for variation or extension whenever the person's prescribed care package needed to be changed. That could result in multiple applications and visits to court, even just to bring about the more straightforward changes, and would further formalise the experience and perhaps alienate the very women and girls whom the order is designed to protect and support. Variations could even be sought by individuals who are not the protected person, which could unhelpfully interfere with that individual's care package. There could be a multitude of ways in which an order could be varied or changed, involving multiple court appearances, which is not the way that we want to go.

Although it is possible that such variations could be resisted—we know that they can—the mere need to attend court or to acknowledge that the court will review the support package could cause further distress. In my opinion, that is exactly what would happen. It is simply not desirable if an individual who is already vulnerable is repeatedly required to attend court for that purpose.

To respond to Alex Cole-Hamilton's question and intervention, the third issue with the amendment concerns the reference to "reducing any ongoing risk". Mr Cole-Hamilton picked up that point. The amendment does not take into account any future risk. If there is no on-going risk but only a future risk, the support requirement cannot be mandated. We would not be ensuring that any future risk to a girl or woman would be taken into account.

Oliver Mundell: Does the minister not recognise that that would not affect what happens under subsections (4) and (5) of proposed section 5A of the Prohibition of Female Genital Mutilation (Scotland) Act 2005, which allow future risk to be considered when it comes to support? Amendment 23 concerns on-going risk, which is much more immediate. That is what justifies the court making specific requests of people to provide something. I do not consider my proposal as being about everyday matters or on-going care packages; I see it as being used when the court thinks that something urgent and exceptional needs to be put in place.

Christina McKelvie: A protection order is about protection, which could involve on-going or current risk. We have to ensure that all of that is covered in the bill, but Oliver Mundell's amendment 23 limits that.

To continue, there is, fourthly, a real question about the signal that the court might send to a public body should it decide not to deal with support, for whatever reason, within an FGM protection order. There is a possibility that the public bodies with responsibility for helping a person or family might feel that, because the court

was silent on the issue—if it does not direct anything—there is no need for support to be provided. I think that that is a dangerous route to go down.

As I have said, I have seriously considered all the issues that are covered by amendment 23 in detail and taken into account the views of the committee and of stakeholders as expressed at stage 1. In keeping with what I have said, the bill has been drafted to allow some form of support to be considered by the court, while respecting the balance of competencies and expertise that exists between the court and service providers.

I will lodge an amendment at stage 3 to expressly provide, under proposed new section 5B of the 2005 act, that the courts may include a requirement in an order for a named public body or bodies to consider providing support. Such a requirement would direct those with the relevant expertise to actively consider what support could be required and would allow input, such as was needed, from support professionals on the precise form that the support would take. Again, that is a person-centred approach.

Social workers and other front-line professionals are best placed to make such complex assessments of need and appropriate care. Fulton MacGregor and Angela Constance referred to their own professional experience, with a view to ensuring that the particular needs of individuals are addressed in the circumstances. That cannot easily be determined by a court, which, by virtue of its role, is not intimately involved with the family or with providing the appropriate forms of available support.

The issue that we are facing is an incredibly sensitive one. As a former social work professional, I know about the complexities of people's lives and the need to work with people as part of an on-going relationship to design and provide a package of support that is tailored to their individual needs. Oliver Mundell's amendment 23 rides roughshod over that person-centred approach, which we talked about earlier, by giving responsibility for the details of that support to the wrong public body—the court. That responsibility should not lie with the court.

My proposed stage 3 amendment would have the advantage of almost completely avoiding any unintended criminalisation of public bodies as a result of failing to meet the more onerous condition in Oliver Mundell's amendment, which could be impossible for some bodies to do in some cases, while ensuring that support is explicitly referenced in the bill in a way that is consistent with the purposes of the bill to protect individuals and prevent FGM from happening. It would also be my intention that the statutory guidance would spell out clearly to the public body the seriousness of the order and the steps that it should take in order to comply with it.

In order to keep to the spirit of the committee's stage 1 recommendations, I urge the committee to vote against amendment 23 and to vote for the amendment that I intend to lodge at stage 3.

Oliver Mundell: I thank the minister for those comments, some of which were helpful. However, we have a fundamental disagreement about whether it may be necessary, on occasion, for courts to put a specific measure in place. My experience as a member of the Scottish Parliament is that public bodies are not always very good at following the directions of ministers and that they do not always get things exactly right. I think that the court is the right body to have such a power. Courts are the ultimate guarantors of our human rights and are responsible for ensuring that things do not slip through the net.

Fulton MacGregor: You have mentioned the Scottish Courts and Tribunals Service; other people have also mentioned its role. Did you have any consultation with it before drafting amendment 23? If so, what are its thoughts on that amendment?

Oliver Mundell: I did not consult the Scottish Courts and Tribunals Service because, ultimately, I think that its job is to implement the laws of Parliament and to listen to the will of MSPs. I understand that the SCTS is uncomfortable with the amendment and does not like how it is currently drafted, and that it does not necessarily like some of the sentiment. However, given the very serious nature of FGM, the difficulty that we have in getting people to come forward and the particular vulnerabilities of the women whom the issue affects, I believe that there is a policy reason for this step.

The Convener: I know that you are coming from the position of wanting to do the best for women. When you wind up, will you address the points about flexibility of support and victims having to go back? We were both at Multi-Cultural Family Base, and we heard about women, girls and families who are quite far away from the establishment and about how difficult it was for them to engage. That is my biggest concern. If we are to be person centred, we want any support to be able to adapt to meet the needs of the women and girls.

Oliver Mundell: That is a legitimate concern. I think that it is very unlikely that the court would act silently and that it would be unlikely to come up with provisions of its own accord. I am happy to look at the drafting of the amendment and to work with the minister on a similar amendment that would include something that would allow provisions to be varied.

The Convener: We heard about families in quite complex situations and other forms of domestic violence. It is important that, as things change and improve, the support that is provided to such families can change, too. I am not suggesting that people would blindly offer a package of support without consultation; I am specifically asking about how it would work in practice if the support for the family needed to change as their lives changed.

Oliver Mundell: It is perfectly open to the court to impose time-limited measures and review mechanisms—the court has discretion to do that. I am also open to working with other people to come up with the right amendment.

I am concerned when I hear the minister talk about a different amendment that she will lodge at stage 3, which will require bodies only to "actively consider" support. In those cases, that is not good enough. We want a guarantee for people who come forward under the mechanism that specific things could be fulfilled for them.

09:30

Angela Constance: Do you accept that, given everything that has been discussed today and everything that the committee has heard, many of the problems and sensitivities that we are trying to navigate and the problems that we are trying to solve cannot be navigated or solved in splendid isolation, and that it is not right—not just for you but for any of us—to approach the matter as if we have the solution. I do not downgrade your motivations, ideas or suggestions, but we will land in the right place only if there is good working with others.

Given the fact that the minister has offered to come back with an amendment at stage 3, do you consider that there is still an opportunity for you to protect your position by not pressing your amendment? You can come back with the same amendment or a similar or better amendment at stage 3 with the minister's amendment. You are trying to do your best, but I am concerned that your amendment is in splendid isolation. How will you work with others to get support for the right solution that is based on evidence of what will work?

Oliver Mundell: I thank Angela Constance for that advice. However, my experience in Parliament of working with the Government is that we get far more support on technical drafting and exploring ideas and points of view if we already have something in the bill. If I was interested only in preserving my position, I would have accepted a handout amendment from the Government for stage 3. You see amendment 23 as a probing amendment but, for me, a point of principle is at play, which is that the court should—not that it must in every circumstance—be able to put specific measures in place for a very vulnerable group of women. I accept that the drafting might not be perfect, but I am not tied to that wording.

Angela Constance: Can you cite evidence that what you propose will work?

Oliver Mundell: It is easy to see how something like that could work. Notwithstanding the issues that the convener has raised, I do not think that there are any major issues involved. The court would easily understand what is meant, even if the amendment was not changed, although it could be changed and improved. It would be possible to add a provision to allow for things to be done by regulation and guidance.

It is difficult to see why members are so resistant to the court being able to put specific provisions in place. We all know that public bodies do not always move quickly or get the right support in place. That applies to housing and the provision of aspects of medical support and assistance—for example, counselling or advice. My broad experience of issues as serious as that is that, even when courts have placed general obligations on public bodies, things do not always move quickly for people once they are in the system. It is important that the courts have the power, in limited circumstances, to make specific requirements of public bodies to support people.

Fulton MacGregor: You raise an issue about what public bodies generally do and do not do. However, as Angela Constance said, you are doing this off your own back. What we have heard is not what we have heard at committee and is not my experience of the issue, and it is a wee bit dismissive—I know that this is not your intention—of the child protection agencies and services that are out there working with children and vulnerable adults.

You have acknowledged that, although you have not spoken to the Scottish Courts and Tribunals Service, you understand that it would not be happy with amendment 23. Despite that, you are pushing on with it. Please do not take this the wrong way, but it seems to be the case that the view that you are putting forward is Oliver Mundell's view and Oliver Mundell's view only. If we had heard more evidence on the issue, we might be in a different situation, but that is not the case.

Oliver Mundell: I understand that Fulton MacGregor has a different view on amendment 23, but I recall the provision of support being a significant concern for people during our evidence sessions. That is reflected in the *Official Reports* of our meetings.

The Convener: I fully acknowledge that the support that women and girls need is absolutely central, but I come back to my concern that that support needs to be centred around them. Given the cultural sensitivities and the environment that the women and girls who need protection from FGM are likely to be in, I think that the people who are best placed to decide on the package of support are the specialist third sector and charitable organisations that we heard from and professionals on the ground, rather than the courts. For me, that is key.

Oliver Mundell: While I reflect on that, I will take an intervention from Mr Cole-Hamilton.

Alex Cole-Hamilton: I am very grateful to Mr Mundell for taking yet another intervention.

Although I absolutely accept what the convener has just said, the point that she made does not address the immediacy of the need for support. If a protection order is being issued, that means that there is a real and present threat that the person will be taken somewhere and mutilated. Amendment 23 addresses the immediacy of that need. Sometimes the bodies that the convener mentioned cannot operate at that speed and cannot put in place support or assess what is required in that timescale. Giving the court the power that is proposed in amendment 23—it is a power, not a duty—would address that.

The Convener: May I make a brief comment on that intervention?

Oliver Mundell: I am reflecting carefully on Mr Cole-Hamilton's intervention, so I am willing to take another one from the convener.

The Convener: All that I would say about what Mr Cole-Hamilton has just said is that the specialist third sector and charitable organisations that work with women and girls day in and day out might not have the ability to act quickly. Therefore, if we impose a legal duty on them to do so, how will that help them to act more quickly? Surely that risks punishing them.

Oliver Mundell: I would answer that by saying that, in circumstances in which legal duties exist and people could, as the minister said, be held responsible for failing to deliver on a court order, people are usually much more inclined to act quickly. Such a requirement can cut out some of the bureaucracy. That is why the law is there. Its most important role is in ensuring that people's rights are upheld.

I think that that is why people in the courts and tribunals system recognise that amendment 23 would change the status quo. Although it might require them to make changes, I think that any such changes would be positive, and I hope that members will feel able to support me and to work with me to get drafting help from the Government to make sure that the concerns that have been raised today are taken into account and that we guarantee that a power for the court to make specific provisions makes it into the bill.

I therefore press amendment 23.

The Convener: The question is, that amendment 23 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Cole-Hamilton, Alex (Edinburgh Western) (LD)
Fee, Mary (West Scotland) (Lab)
Mundell, Oliver (Dumfriesshire) (Con)
Wells, Annie (Glasgow) (Con)

Against
Constance, Angela (Almond Valley) (SNP)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)
Maguire, Ruth (Cunninghame South) (SNP)

The Convener: The result of the division is: For 4, Against 3, Abstentions 0.

Amendment 23 agreed to.

The Convener: Amendment 24, in the name of Oliver Mundell, is in a group on its own.

Oliver Mundell: Amendment 24 has been designed as a belt-and-braces amendment to ensure that the bill includes the ability for ministers to make regulations to ensure that at least a basic level of legal advice is available to people who are considering applying to the court for an FGM protection order.

I have excluded public sector bodies, the police and the Lord Advocate, who should be able to access the relevant advice; my amendment is focused on members of the public who would be coming forward. I understand that the minister has written to the committee since I lodged the amendment. However, as I think that everyone would accept, that letter arrived quite late in the day, so there was not a huge amount of time for detailed consultation around the issue.

Notwithstanding what is said in the letter, I do not think that there is any harm in putting the provision in the bill, because it still allows for the general rules of legal aid to be updated. It simply ensures that, regardless of what happens with that, there would be advice in those very specific circumstances. That is set out for the avoidance of doubt in proposed new subsection (5B). That is the only reason that amendment 24 is allowed, because it would otherwise likely be outwith the scope. It does not interfere with any other legal aid provisions that might be made.

Angela Constance: When you were drafting the amendment, what consideration did you give to the wider work that is going on to reform the

legal aid system? In addition, could you specifically give us a flavour of who you engaged and consulted with and perhaps say which stakeholders support your endeavours today?

Oliver Mundell: In answer to the first point, I am aware that there is on-going work around legal aid, but there is pretty much always on-going work around legal aid. It is a difficult system for the Government to operate. In practice, it is not an easy thing to deliver across the country and across a wide range of areas. However, as with my previous amendment, there is a special case here, given that we are trying to encourage people to come forward and use the protection order. Having this additional provision as a back-up is an attempt to take forward concerns that were raised in evidence with the committee about how easy it would be to access legal advice and support.

If there are specific concerns about the wording of the amendment, I am open to looking at that. However, I think that there is a difference of substance in the debate, in that the Government will say, "We are already doing this. Don't worry about it. There are no problems here," whereas I take the view that it is better to guarantee specific provisions for this very limited set of circumstances, and to include them in the bill. If the Government has a different idea and gives us details of a proposal that satisfies members ahead of stage 3, this amendment could come back out of the bill or something else could replace it. However, I think that it is important for people who want to bring forward an application for a protection order to be able to access advice before doing that.

I move amendment 24.

Angela Constance: Once again, I heard Mr Mundell use the phrase "a special case". However, although there is undoubtedly some uniqueness around FGM, I am also conscious that there are many victims and survivors of horrendous sexual violence, and I think that carving out a different set of arrangements for one set of survivors as opposed to another—albeit for understandable reasons—is problematic. I reiterate what I said earlier: if people want to see wholesale change, then it is wholesale change that is required, particularly when it comes to our legal system and the legal aid system.

I have not heard whether any specific stakeholders support Mr Mundell's amendment—I accept nonetheless that he, as an MSP, has a right to pursue it. Further, I have not heard about the specific engagement that he has undertaken with others around the detail of amendment 24. Perhaps he could address that in his closing remarks.

09:45

Fulton MacGregor: I see exactly where Oliver Mundell is coming from with amendment 24. We heard concerns about legal aid during the committee's evidence sessions. I do not necessarily disagree with the amendment in principle. Indeed, when we took evidence on the matter, every committee member agreed that women and girls going through the process should get legal aid if they need it. However, I did not hear any suggestion from anyone at any time that they would not get legal aid, and I note the minister's remarks on the matter.

My concerns are the same as those of Angela Constance. As members know, I sit on the Justice Committee as well—as Oliver Mundell did previously—and I know that the issue of legal aid comes up across the board. Recently, the committee dealt with the Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill and heard some harrowing accounts in relation to that.

I would have liked us, as a committee, to speak with one voice in our input to the debate around legal aid reform, rather than lodge something that is specific to this piece of legislation. I ask Oliver Mundell not to press amendment 24, and to work with the Scottish Government—and, indeed, all of us—as we go into stage 3, so that we can take a collaborative approach that gets the right message across.

Essentially, I share Angela Constance's view that wholesale change is better than making one specific change in this legislation.

Mary Fee: The process of applying for legal aid is not simple or straightforward. The award is not made on the day that someone turns up and says that they need legal advice and legal aid. We are talking about a small number of very vulnerable people who are in a very difficult position.

I welcome Oliver Mundell's comments about the belt-and-braces approach. The amendment is about ensuring that a group of extremely vulnerable people have almost immediate access to legal advice and support at the point that they need it and not after they have gone through a process of filling in application forms and waiting for the legal aid board to say yes or no, which can take three or four weeks and sometimes longer. It is about providing immediate support for people who are in desperate measures and need it there and then.

The fact that people require or feel that they need access to legal advice was raised in evidence on a number of occasions. For that reason, I am minded to support amendment 24.

Christina McKelvie: We all agree that access to justice is something that we particularly want for

the most marginalised and powerless people in our society. It is a central tenet of our legal system and one that we are incredibly proud of. From speaking to Oliver Mundell, I understand that his amendment is about establishing a bespoke service for individuals seeking an FGM protection order, and the effect of the amendment is to require the Scottish Government to make regulations for that to happen. It is unfortunate that his amendment does not say that and focuses solely on legal advice.

First, we already have a system in Scotland through which individuals can seek support for access to legal advice—it is called legal aid. As I said to the committee in November 2019:

"In 2018, the independent strategic review of legal aid, "Rethinking Legal Aid", highlighted that Scotland's current legal aid spend is the third highest per head in the European Union ... In Scotland, about 75 per cent of people are financially eligible for some form of legal aid, compared to only about 25 per cent in the rest of the UK. We think that we have a robust system. Given that individuals as well as local authorities can apply for protection orders, we think that we have the right measure of support and understanding. I suspect that people will get the support that they need to take forward a case."—[*Official Report*, *Equalities and Human Rights Committee*, 14 November 2019; c 14-15.]

Although it might be the case that bespoke services are needed in England and Wales, the Scottish legal aid system is more expansive and better funded. We do not need a parallel system here for the provision of advice.

Secondly, as I set out in my response to the committee, in future funding arrangements for work to tackle violence against women and girls I will explicitly call for bids that focus on providing a specialist initial point of contact for individuals who seek to apply for FGM protection orders to work with stakeholders to raise awareness in our communities and with public bodies to ensure that they are aware of the availability of such orders and their potential role in seeking them. For public bodies, in particular, that process will inform and connect with the statutory guidance to be made by ministers under the bill, which will bring all that work together in one place.

Thirdly, and most importantly, I turn to an issue that Mary Fee raised. I said that I was committed to ensuring that the automatic grant of legal aid for cases of special urgency is extended to those seeking FGM protection orders. We do not need an amendment to the bill in order to do that. Through secondary legislation made under the Legal Aid (Scotland) Act 1986, we already have the power to make legal aid available in such cases.

I said that I would update the committee on this issue ahead of stage 3, and I am happy to do so now. I confirm that we will include FGM protection orders within the scope of existing regulations, which will ensure that those seeking such orders will automatically have access to legal aid. That will also ensure that anyone who has sufficient grounds for making such an application in the first place will automatically have access to civil legal aid to enable them to do so urgently. I hope that that approach will answer some of the questions that Mary Fee raised. That change to regulations will apply to all types of applications, including those for interim orders and those to vary or discharge existing orders, provided, of course, that they concern urgent matters.

We expect that, in cases in which an individual—as opposed to a public body that is listed in the bill—is legitimately applying for an FGM protection order, they will do so with a degree of urgency. We can all agree that such cases are likely to be urgent. The change to regulations will mean that they would have access to legal aid at the very point of application and would not have to wait for weeks on end, as some had feared.

In light of what I have said, I believe that Oliver Mundell's amendment 24 is unnecessary, as we are already ensuring that there will be ample access to legal aid for those who need it. In my opinion, his proposal would not represent an efficient use of resources. In addition, there are issues with the amendment as it is currently drafted, which mean that it would not necessarily achieve its intended purpose.

Alex Cole-Hamilton: Will you expand on your comment that Oliver Mundell's amendment does not represent an efficient use of resources? Which resources are you referring to?

Christina McKelvie: It would not be efficient to have a bespoke parallel service, as opposed to people having access to legal aid for urgent cases. I hope that we will have remedied that problem through the approach that I have described.

Oliver Mundell: Given that it will be for the Scottish ministers to make regulations on the arrangements, would it not be open to them to consider what they might be? I said not that I wanted a bespoke service but that there could be ad hoc provision and support within an existing service. I do not know why the Scottish Government would not want to make that a permanent feature of the support that the bill will offer people.

Christina McKelvie: When Mr Mundell and I had a conversation yesterday, I explicitly asked him whether he was talking about a bespoke, point-of-contact service. He said yes. If his position is now different from what it was yesterday—

Oliver Mundell: Perhaps our recollections are slightly different. I said that I envisaged that there might be a bespoke point of contact on FGM as a result of the bill, and that such a provider would be able to help individuals to access ad hoc legal advice. That is not the same as creating a bespoke legal advice service—the two are slightly different.

Christina McKelvie: We will have to disagree on that: I think that what you are asking for is a specific service. Our existing legal aid functions and regulations, and the new regulations that I will make, will address all those issues.

Angela Constance: So that we are all clear about the facts—I think that you did mention it, but I just want to keep us on track with regard to this important issue—did you give a timescale for the introduction of regulations?

Christina McKelvie: After stage 1, the committee asked me to consider how we could ensure that we provide for urgent cases and for regulations on the availability of legal aid in FGM protection order cases. I worked on those issues with my counterpart minister, Ash Denham. We explored a few ways in which those aims might be achieved, and we realised that the power to make regulations or to extend the current legal aid regulations currently sat with ministers. We have instructed colleagues to start work on the regulations now, so that they will come into play when we need them to, in parallel with the bill. Legal aid will be available when the bill is enacted.

Angela Constance: Will the regulations that you and Ms Denham have instructed come into play in parallel with the bill coming into force?

Christina McKelvie: The plan is for the Scottish statutory instrument to be in place for commencement of the bill, so they will come into effect at the same time. I considered the issues and thought that that approach was better than staggering them.

My other issue with Mr Mundell's amendment 24 is that it is limited to arrangements for advice only for persons at risk of FGM or who have had FGM. We want to consider an expansive and system-wide approach that can include, for example, the parents or guardians of those who are at risk and can deal with unexpected issues. Amendment 24 would cut across ministers' general power to do so, limiting our ability to provide a wraparound solution.

I therefore ask Oliver Mundell to consider seeking leave to withdraw amendment 24. What I have proposed will meet the intention of Oliver Mundell's amendment about providing legal aid without enshrining provisions in legislation in a way that could unnecessarily complicate matters in the middle of a significant review of the legal aid system. We took that into account when we instructed the work on the regulations.

Oliver Mundell: I will make a couple of points about matters that have been raised in the debate. I have no issue with making specific changes in specific bills. A false argument that comes up far too often in this Parliament is that it is too difficult to put bespoke provisions in place for individual offences—indeed, we have just heard from the minister a firm commitment to put a bespoke arrangement in place in this very case. It is an odd argument to say that we cannot make bespoke provisions because they are too problematic.

My heart goes out to all victims of sexual offences—and victims of all crime—but the idea that we cannot change things for one group without changing them for everyone at once is not the correct policy approach.

Fulton MacGregor: Will Mr Mundell take an intervention?

Oliver Mundell: Not at this point.

It is better to consider changes in each piece of legislation. As law professors are fond of saying, the law is like a ship at sea: you change the planks one at a time rather than dismantle the whole ship.

The provisions that we have heard about from the minister are welcome. My only concern is around limiting the advice to cases that are considered to be urgent. In bureaucracy, there is always a risk that one person's "urgent" is not the same as another's. I ask the minister to consider ahead of stage 3 whether it is possible to provide automatic legal aid when people identify a risk, rather than when a case is considered to be urgent. Risk should be the deciding factor, not urgency. For the individuals concerned, every case will be urgent. The one time they ask for legal aid might be the only time; if they have to wait, they might not take the matter forward.

We have heard all the bold statements about legal aid in Scotland. The system is good and it works for some people but, given the major review that is on-going, we would be kidding ourselves if we said that it works perfectly every time. With something as serious as the subject that is dealt with by this bill, lowering the threshold for the automatic right would be welcome.

Angela Constance: Would Mr Mundell accept that the minister has made a commitment on the record to doing not what I asked for but what he asked for? I know that he has welcomed it, but does he take some heart and comfort from the real and practical commitment that was made by the minister today?

Oliver Mundell: Naturally, I do—I am pleased that the minister has responded to the concerns that the whole committee has raised. However, I

do not think that that precludes me from asking for a little bit more ahead of stage 3. I am certainly not asking for it for myself. It is about the threshold for when that automatic provision kicks in, and the purpose of requiring regulations that will go through Parliament is that they will be subject to scrutiny. There is a strong case for lowering the threshold, and I want to put that on the record.

I thank the minister for outlining the actions that the Government intends to take. I do not intend to press my amendment.

Amendment 24, by agreement, withdrawn.

10:00

The Convener: Amendment 1, in the name of the minister, is grouped with amendments 2, 3 and 18.

Christina McKelvie: Amendments 1 to 3 and 18 are technical in nature. They are to provide that local authorities have the power to apply directly for an FGM protection order in cases where the order will cover a class or description of persons, as opposed to an individual person, and to allow a local authority to use its local court for an application in such cases.

As the committee knows, the bill allows for an FGM protection order to prevent and protect in relation to an individual—a "protected person", as named in the bill. It also allows for protection of any person falling within a particular description. That could be, for example, a local community or faith group whose members might be at risk.

We have sought to use these amendments to put beyond any doubt that a local authority can intervene in that way. We recognise the importance of these matters being dealt with locally and in a person-centred way, so we seek to amend the bill to ensure that a local authority can submit an application to its local sheriff court.

I move amendment 1.

Amendment 1 agreed to.

The Convener: Amendment 25, in the name of Oliver Mundell, is in a group on its own.

Oliver Mundell: I think that amendment 25 is the most substantive and probably the most controversial and complicated of my amendments, although amendments 23 and 24 have perhaps called that into question. It is certainly the one with the most drafting issues, but I should say that I engaged with the chamber desk and took its advice on how to give voice to policy intent.

Even if the Government does not want to work with me on the amendment, if it is agreed to today, I will certainly make some changes to the wording myself to ensure that the new section that it inserts applies only to people who are protected by an FGM order and includes a provision for public and other relevant bodies to share such information as is necessary with other people, to ensure that support or other aspects of the order can be fulfilled.

It is important that we get anonymity in the bill at stage 2, to give the Government the opportunity to work with committee members and the Parliament to come up with a workable provision. I was convinced by evidence that we heard that something extra needed to be done on anonymity. Blanket anonymity would not be the right approach, but the person at the centre of the protection order—whose life would be intimately affected by it—should have the expectation that a court will grant them anonymity and take reasonable measures to ensure that their identity and personal information do not make it into the public domain.

The Government did not bring forward an amendment on anonymity. It said that the proposal on anonymity had a mixed response from stakeholders, but I think that 75 per cent of respondents to the Government consultation agreed with it. Notably, the Law Society of Scotland and the Scottish Human Rights Commission believed that it was necessary to do something on anonymity and that the proposal was helpful. I think that people should have the right to anonymity, unless there are really exceptional circumstances, because otherwise we will struggle to get people to come forward and use FGM protection orders.

I move amendment 25.

Alex Cole-Hamilton: Subject to the assurances that Oliver Mundell has given the committee about drafting, I am minded to support amendment 25.

Ideologically, I am generally in favour of more anonymity for victims across the board. I said as much in the stage 1 debate, whereupon you intervened on me, convener, to make the fair point that that issue involves a discussion that goes much further than the specifics of the bill. However, as there is no proposal before the Parliament for anonymity for victims of crime in general, we must take opportunities where we find them to extend that anonymity incrementally, and this is one such case. The crime that we are discussing is of such intimacy and privacy that it is a good place to start to extend the reach of anonymity for victims or potential victims.

This is a robust amendment, subject to the drafting changes that Oliver Mundell has committed to, and I support it.

Fulton MacGregor: As others have said, we have heard mixed views on anonymity. Good arguments were made on both sides of the

debate. I know that you have instructed us not to rehash the general principles of the bill, convener, but we could go through those particular arguments all day, to and fro. As many members said at the time, we heard one argument and thought that it made sense, and then we heard an argument on the other side and thought that it made sense, too.

Oliver Mundell made a good argument for amendment 25, but he also acknowledged that there is a lot of work to be done on it. It is fine to have a commitment to change X, Y and Z at stage 3 but while there is a risk that potential perpetrators could get anonymity, too, I do not feel that, as responsible MSPs, we can agree to the amendment.

Like everyone on the committee, I am open to the idea of anonymity. However, I would like to see something more substantial at stage 3 that would protect only the victim.

I had more to say but, to be honest, I think that Oliver Mundell made the argument for me when he said that he knows that there is more to be done. I know that he does not want unintended consequences to occur, so my question to him is, why press amendment 25 today?

Mary Fee: I will be brief, because many of the points that I wanted to make have been made by Alex Cole-Hamilton. Oliver Mundell gave a full explanation of the reasoning behind amendment 25. I fully accept the concerns around unintended consequences, but I come back to the point that was made by Oliver Mundell about the number of people who, in their responses to the consultation, said that there should be provision for anonymity.

Throughout our evidence sessions, we heard about the need to protect victims, and 75 per cent of the people who responded to the consultation agreed that the bill should provide for anonymity, and said that that would enhance the dignity of victims and encourage reporting of the crime. Surely, that is what the bill should do.

Angela Constance: I will be uncharacteristically brief. Oliver Mundell honestly acknowledged that this is the amendment that needs the most work done on it. I point to the fact that you do not need a messy stage 2 amendment to get commitments from the minister as a stepping stone to reaching the best way forward or the best solution. It is important to state that the minister's explanation and any commitments that she makes will be on the record. Sometimes, that is a better path than lodging a complex amendment.

The Convener: Before I bring in the minister, I just say that the issue with amendment 25, which Oliver Mundell highlighted himself, is the potential for perpetrators to receive anonymity.

There might well be a debate about whether accused perpetrators of sexual violence should be anonymous, but I am really uncomfortable with that. Obviously, there is the aspect of anonymity for victims of all crime and how helpful or otherwise that would be. However, I accept the points that members are making about where we make changes in that regard.

Minister, we have heard in evidence that victims can already receive anonymity, but it would be helpful for me to hear how that works from the victim's perspective. What actually happens? What can the court do already to protect a victim's identity?

Christina McKelvie: I am happy to go to my comments on amendment 25 and answer your question as we go along, if that is okay with you, convener.

Again, I hope that you will give me a wee bit of time to set out my thoughts on amendment 25 because—believe me—I have given it a lot of thought. I hope that I can convey my and my bill team's deep concern about amendment 25. I expressed my concerns to Mr Mundell yesterday and I want to ensure that the committee is fully aware of them.

We all know that individuals might wish to be anonymous for a number of reasons, whether because of media coverage, protection from an abusive partner or fear of retribution. The needs of the person who seeks protection from harm will always be at the heart of everything that I do, and that is unshakeable. I will be absolutely clear right now: the issue is not about people not having anonymity or my expressing in any way that I am against anonymity; it is about making laws that do not run counter to the Scottish justice system and the trust that we place in our courts.

My argument has always been that the courts already have powers at their disposal to make an order of anonymity. They take that matter seriously and courts are well capable of exercising that order-making power.

Oliver Mundell: Will the minister take an intervention?

Christina McKelvie: I want to make my argument first, if the member does not mind.

Although I believe that this long amendment lodged by Mr Mundell is unnecessary, the reason why I am opposed to it and why I strongly urge the committee to vote against it is that I believe that amendment 25 would be very damaging if it was passed. I will explain that further.

When amendment 25 was published, the Scottish Courts and Tribunals Service contacted my officials immediately to express its concern that amendment 25's provisions would be

unworkable. In particular, the SCTS noted that the amendment's blanket approach would cause problems for authorities and third sector bodies providing support, as the anonymity would mean that they could not be advised of someone who was subject to an order. That seems ironic, considering that we have heard that, through amendment 23, Mr Mundell wants the courts to be prescriptive about providing for support. Amendment 25 would cut across that approach.

In my opinion, amendment 25's provisions step clearly over a boundary into being overtly intrusive and could produce unexpected outcomes. Although I appreciate that amendment 25 provides for discretion in "exceptional circumstances", it is not in any way clear what such exceptional circumstances would be. Amendment 25 provides that any person affected by the order could apply for anonymity; I am deeply concerned that that would cover perpetrators or potential perpetrators, because the court would be in no position to refuse a request for anonymity from such people.

Of course, the court currently has the power to anonymise a parent perpetrator if not doing so would identify the victim. However, if amendment 25 were agreed to, a perpetrator could rely on the provision to demand anonymity, even if revealing their identity would play no part in revealing the victim's identity. Protecting the perpetrator is not an outcome that I can ever support, in any case. That outcome would run counter to one of the key innovations that we have introduced in the bill: FGM protection orders. They are solely perpetrator focused and will therefore reduce risk. However, amendment 25 would allow a perpetrator to demand anonymity even where there is no victim, which is absolutely unacceptable.

Alex Cole-Hamilton: Will the minister take an intervention?

Christina McKelvie: I want to continue my argument, because it is incredibly important.

In addition, amendment 25 is prescriptively focused on applications by protected persons or those who have permission of the court, so it would not apply to applications by local authorities, the police or even the Lord Advocate, which is a glaring omission. That is probably one of the reasons why Oliver Mundell agrees that amendment 25 needs work.

Given those outcomes, particularly in relation to the suggestion that the court be obliged to grant anonymity to a perpetrator or potential perpetrator of FGM, I am sure that none of us wants to pass such provisions into law. We all want to ensure that we deliver open and accessible justice, so we need to apply a consistent approach to doing that.

Amendment 25 also suffers from a lack of foresight in terms of the complexities that the court would have to consider. For example, how long would anonymity last? What would be the precise limits? Could it be applied for when an order was varied or extended? What would happen to anonymity when an order was discharged? Could a decision not to grant anonymity be appealed? Could the court grant anonymity on its own initiative? As far as I can see, all those questions have not been given sufficient consideration and no answers have been provided.

10:15

Oliver Mundell might say that he will fix all those issues at stage 3, but amendment 25 is fundamentally flawed and damaging. Such a change does not require an amendment—it needs not to be part of Scottish law.

When we, as parliamentarians, approach the task of making law, we need to take serious care to avoid unintended consequences. With regard to the untried and untested approach that amendment 25 sets out, we simply do not know the answer to the questions that I have just posed—and neither does Mr Mundell, which is a real worry. The amendment does not stem from a recommendation by the committee; it has been drafted without any consultation—never mind any agreement—with the Scottish courts, or, it seems, with stakeholders.

The consequences could potentially cause harm to vulnerable girls, and members have noted in their contributions the issues raised by people who responded to the consultation. I draw to members' attention two comments that the committee had from, respectively, an individual and a person who represents a group. Dr Ima Jackson said:

"communities welcome the Scottish Government not bringing forward legislation on anonymity of victims."

Jan MacLeod from the Women's Support Project said:

"On anonymity, our view was that it is not helpful to pick out FGM when we do not have similar legislation about child sexual abuse, incest, rape and sexual assault."—[*Official Report, Equalities and Human Rights Committee,* 12 September 2019; c 6-7, 32.]

Those are compelling arguments from people who work in the field every single day of the week.

If we passed amendment 25, Parliament would be sending a message to our courts and our justice system that the current broad suite of powers that the courts have at their disposal is insufficient for the purposes of granting anonymity. The convener made that point well during the stage 1 debate. She said that anonymity was an issue that should be considered across the justice system and that, as Jan MacLeod has suggested,

a whole-justice-system approach should be taken, rather than using protection orders. The deputy convener also positively acknowledged that view in his comments.

Finally, convener, I go back to my central point. It is acknowledged at the highest level, in judgments by the Court of Session and the Supreme Court respectively, that courts are already bound to withhold a person's identity in circumstances where someone faces

"a threat to life and limb",

and, further, that they will do so where it is

"in the interests of justice to protect a party to proceedings from the painful and humiliating disclosure of personal information ... where there was no public interest in"

doing so. That applies, in particular, where there is a threat that a person will not proceed with a case when there is a risk of such disclosure. FGM falls squarely in the category in which both those examples of court powers and duties would be fully engaged.

I draw the committee's attention to a specific case from 2007—HMA v Mola—which concerned the use of the power to anonymise the alleged victim of someone who was accused of deliberately infecting the victim with HIV. The court set out its justification for both clearing the court using its powers and prohibiting the reporting of identifying details through the existing powers in the Contempt of Court Act 1981. That is a practical example of where a court has exercised existing and well-acknowledged powers.

In addition to the range of inherent common-law powers, there are clear and specific statutory protections in place for adults and children to support the courts in protecting and supporting vulnerable persons and preventing the disclosure of their identities. I have already provided the committee with detailed information on that point. It is vital that courts apply the law in discharging their functions, but they should have the discretion to consider all the particular facts and circumstances in coming to a decision. They can choose who is made anonymous; that can already include providing anonymity for parents where it is necessary to protect a child. They can also choose who is bound by anonymity to allow some information to be passed to key people who are involved in welfare and protection, in order to make support available—a provision that the committee has supported today in agreeing to amendment 23.

Amendment 25 would mean that courts would no longer have a choice in how they provide for anonymity in such cases. Perpetrators would be able to demand anonymity even where no victim was identified or where the victim was far removed from them. It would also risk limiting the court's ability to share information with key people, thereby presenting a risk to the support available to victims and their families, which I do not think that any of us wants to see. That could undermine the wider actions of our public bodies when encountering this hidden and pernicious crime.

In amendment 23, Oliver Mundell asked us to trust the courts, but he asks us not to trust the courts in amendment 25. I cannot understand that dichotomy or where he is coming from. I am strongly against amendment 25 and its damaging consequences. I strongly urge the committee to vote against it.

Oliver Mundell: I intend to press amendment 25. As we have heard, the Government appears to be strongly opposed not just to the content of the amendment but, for a variety of reasons, to the principle of giving an automatic right to anonymity for victims of FGM as far as possible. Notwithstanding the very serious issues with the amendment, if it is not agreed to and the provision is not added to the bill, there will be no incentive for the Government to come up with something that is technically sound and addresses those issues at stage 3.

Alex Cole-Hamilton: In relation to what we just heard from the minister about her concerns about the unintended consequences of the right of anonymity for perpetrators, does the member agree that we have now heard from all parties represented on the committee that the Parliament has no will for that to happen and that that element would be resoundingly rejected at stage 3, should amendment 25 be agreed to this morning?

Does the member also agree that, although the minister said that amendment 25 had not been consulted on, stage 2 amendments are never subject to consultation, and that the amendment was lodged in response to the 75 per cent of people who felt that anonymity should be extended through the bill?

Finally, the minister cited stakeholder groups who said that we should not be extending the provision when anonymity is not provided for in other areas of child sexual abuse or exploitation, such as incest or rape. However, does the member agree that those of us who want to see anonymity extended to victims of such crimes, and who have been waiting for a wholesale change in the law, which has not been forthcoming, consider that amendment 25 could lead change incrementally, which would be a good start?

Oliver Mundell: I accept all those points. My understanding when looking at the work that the chamber desk did on my behalf to come up with a form of words for the amendment was that someone who is "subject to the order" means a person who is protected by the order. Following

my conversation with the minister yesterday, I understand that there are issues, but that was the first that I had heard of it, because no one had proactively got in touch with me.

Alex Cole-Hamilton is right that amendments at stage 2 are not usually subject to wholesale consultation. Given how easy it is to contact me, as a parliamentarian, because my details are in the public domain, I find it unnerving that a body such as the Scottish Courts and Tribunals Service had specific concerns about my amendment but did not choose to share them with me directly and chose only to communicate with the Scottish Government. Given the line of accountability, I can understand that, but in the interests of making good legislation, perhaps the SCTS should be mindful of the need to work with members.

I have heard what the minister said. I am pleased that she is confident that anonymity is already provided for, but when I look at what the experts have to say, it worries me. The Law Society of Scotland, in response to the Government consultation, said:

"we have concerns that the current statutory provisions may not be adequate to ensure anonymity for all victims of FGM".

It concluded, on balance, that some provision for anonymity is needed.

I highlight that the Equality and Human Rights Commission supports the proposal to provide anonymity to victims of FGM. Indeed, the minister herself said in a letter to the committee at the start of the bill process—and it is also in the Government's consultation analysis—that the Government is willing to listen to what the committee and Parliament think. I hope that by agreeing to amendment 25—albeit that the amendment is poorly drafted—the committee will demonstrate that it believes that there should be as close to a right to anonymity as is possible.

I agree that there is a better path for doing such things, and in respect of amendment 24 on legal aid, I was happy to accept the guarantee that was made on the record. However, I did not hear in the minister's remarks today a willingness to engage on the issue; instead, I heard simply that the Government does not support the principle.

Angela Constance: I hear Mr Mundell's concerns and worries. Does he accept that some of us also have a worry that, even for the short period of time between stage 2 and stage 3, the Parliament, in a bill, might set out for perpetrators of FGM the ability to apply for anonymity, and the courts would have nothing to do with it? I am concerned about the reputation of this place, and the message to survivors and women's groups.

There will indeed be an opportunity at stage 3 to come back to the issue of anonymity, but does Oliver Mundell accept that, if his amendment is passed today as it is worded, that would give out the wrong message? The Parliament's legislation should not advance the rights of perpetrators, notwithstanding that the issue would be rectified at stage 3.

Oliver Mundell: We are not passing legislation today, we are amending a bill that has not yet been passed; there is another stage to come. It is on the record today that anonymity for perpetrators is absolutely not my intention. We have it on record from members of all parties on this committee that the provision would be changed at stage 3.

My problem is that the better path is not available on this occasion, because the Government does not support the principle of providing anonymity to victims; it wants to leave that decision to the court in each individual circumstance. I think that the balance should be the other way. As we said in the committee's stage 1 report, there should be an expectation up front—almost a presumption—that it would be the other way round.

Christina McKelvie: I ask Oliver Mundell to be absolutely clear here that he is happy for the Parliament to send that message about perpetrators being protected.

On his other point, is he also happy with the idea of using stage 2 as a pilot scheme to change legislation across the board? I have grave concerns about that.

I also have grave concerns about sending the message that, although the courts can be trusted to deliver a detailed care package, as is provided for in amendment 23, they cannot be trusted to deliver anonymity for people who are at risk. That cannot be rectified unless Mr Mundell changes position from amendment to amendment. His whole approach is completely inconsistent.

Oliver Mundell: I will answer the last point first, as it is really very simple. Amendments 23 and 25 do two different things. One is about the court stepping in to put provisions in place on behalf of the victim. The other is about the rights of the victim. I do not see that as a lack of trust in the court; I see it as a symbolic statement in the legislation, so that people know for sure that, subject to exceptional circumstances—"exceptional" is a word that is well known to the Scottish courts—they are entitled to anonymity. It is not about not trusting the courts; it is about identifying the right person to make the decision. When it comes to something as intimate as FGM, that is the person who is affected. They should not have to go round applying to people for anonymity.

The minister has not answered my point about the concerns of the Law Society. She did not

intervene to clarify what conversations she has had with the society about its concerns over the current statutory provisions. It just seems that arguments have been cherry-picked.

I absolutely do not accept the point that the minister made at the start. I have said it three times and I will say it a fourth time: I do not think that perpetrators should have the right to automatic anonymity.

10:30

I accept that there are some difficulties with the drafting of amendment 25, but anonymity for victims is so important in FGM cases that I really want to see it delivered and I want the Government to work with me on it. Given the lack of support for the principle that anonymity should be as close to automatic as possible, stage 2 is the chance to make sure that the provision is at least in the bill—the stage 2 process is how we get the Government to move on issues and work at making them workable. If I withdraw amendment 25 and come back with another amendment at stage 3, it might be subject to the same technical difficulties. The advantage of the provision being in the bill is that the Government will be more likely to work with me to fix the concerns.

I do not have a problem with FGM being a pilot area for such a provision. This would be a good opportunity to test some of the points that Alex Cole-Hamilton made, because it is likely to apply to a relatively small number of people. There would also be plenty of opportunity to review how it works in practice.

We need to do more for victims. We need to make sure that they are put at the heart of our justice system and, when it comes to protecting very intimate details about their private lives, it is reasonable to expect that to be delivered.

The Convener: I put on record my grave concern about something leaving our committee that has the potential to give anonymity to perpetrators. If we think about the practical implications for victims, does that mean, for example, that if somebody is in another jurisdiction, their conviction would not show up on a protection of vulnerable groups check?

I know that none of the justice spokespeople have ever put forward a case for anonymity for alleged perpetrators of sexual crime, but if the bill leaves the committee with that provision in it, it is then open to the rest of the Parliament to do that. As strongly as you feel about anonymity for victims—which I have huge sympathy for—it is really hard to get past the point about perpetrators. There is a risk in that regard if the bill leaves the committee with your proposed provision in it.

Oliver Mundell: With all due respect, there is only a risk if you do not trust that the rest of the Parliament shares the views of the committee. If that is the case, it would be open to other members of the Parliament to lodge all sorts of odd, unusual and perverse amendments to the bill at stage 3. If you do not think that there is a majority of members to tidy up my amendment at stage 3, maybe there is a bigger problem.

The Convener: I do not want us to get into a to-and-fro, but I wonder why you do not just come back at stage 3 with a really tight amendment that does exactly what you want it to do and does not include that risk. It is open to you to do so, as it is to all members.

Oliver Mundell: I acknowledged, when I made my opening remarks about amendment 25, that it is a very complicated area. The issue of anonymity has been addressed elsewhere in the United Kingdom under a different proposal and in other jurisdictions, and anonymity operates in some sense in the Scottish legal system, so it is not a new concept.

Provided that the committee agrees with the principal driver behind my amendment, the issue would be better addressed by there being a provision that deals with anonymity for FGM cases. I would want the drafting help and support of the Government, and if the provision is on the face of the bill because the committee has demonstrated support for it, there will be an incentive for the Government to work with me.

Fulton MacGregor: Will the member take an intervention?

Oliver Mundell: We are hearing about a better path: I would have preferred it if the minister had said that she took my views on board and was going to come forward with a proposal. That is not what we heard, however. We heard that this is not an area that the minister wants to go into, because she does not think that FGM should be used as a pilot for this type of right. I disagree.

I will take an intervention from Alex Cole-Hamilton.

Alex Cole-Hamilton: Oliver Mundell makes the point that amendment 25 is complex, which it is. It is a complex and very sensitive area of law. Does he agree with me that the parliamentary process for passing legislation affords that stage 2 is the point at which principle is established, and that Opposition members, who might not have had the support of the Government in producing amendments, can get things into the bill as a point of principle?

This meeting is not in camera—there are people all over the country watching this—and we can clearly state our intent. Had Oliver Mundell not

made his assurances to the committee at the start, and had his proposal just been to have a blanket extension of anonymity to perpetrators, I would not have been able to support amendment 25. However, I know Oliver Mundell and his values, and he would never want to do that.

The risk of our withdrawing such a technical amendment now is that similar provisions might be beset by other technical difficulties at stage 3 and might not make it into the bill at all. For those of us who support the principle of extended anonymity to victims, that would be something of a defeat and a missed opportunity.

Oliver Mundell: I understand that Fulton MacGregor also wanted to come in. In the interests of politeness, I will allow him in now.

Fulton MacGregor: I thank Oliver Mundell for that. I thought that he had forgotten me.

My point follows on from what Alex Cole-Hamilton said. I think that Oliver Mundell is saying that he recognises two risks. He has bravely recognised that there is a risk in amendment 25, and he does not want its provisions to pass at stage 3, because they could lead to perpetrators being granted anonymity, which I know is not his intention—I have grave concerns about putting the provisions in the bill at all. That is weighed against the risk that the Government might not go with him if he lodges a similar amendment at stage 3. I suppose that I am asking Oliver Mundell which of the two things is more important—and that was not a direct question to other members who might be thinking about supporting amendment 25, although they could perhaps think about it.

I cannot believe that we are even talking about this—it is an absolute no-brainer. We cannot agree to something if, at stage 3, the Parliament might pass legislation under which a perpetrator could potentially seek anonymity. Of the two risks, which is more important?

Oliver Mundell: To give a simple answer to Fulton MacGregor's point, by doing some basic arithmetic, if everyone in the Government party plus the Opposition members at the committee today supported the amendment, that would be enough to ensure that the provisions could be taken out of the bill. I am happy to give that commitment.

Alex Cole-Hamilton: Could I make a further intervention?

Oliver Mundell: I will take a brief intervention, convener—

The Convener: I think we are coming to a natural end at this point—but yes.

Alex Cole-Hamilton: This is a democratic institution. If, at stage 3, Parliament makes a decision, regardless of how bizarre it is, that will be the will of the Parliament. We talk about risk, but all the political parties that make up the Parliament have expressed a view at this table—I know that I speak for my party when I say that we do not want to have blanket anonymity for perpetrators, which I think is true of every party represented at this table. Were we made up of parties that had a policy of extending anonymity to perpetrators, that would be the democratic will of the Parliament. I do not think that we should talk about the risk of handing the matter over to the full Parliament for further amendment at stage 3. That is not a risk; it is an opportunity to improve, enhance and polish the bill. That is why the process of legislation is as it is.

Oliver Mundell: I thank the member for that intervention. I think I have said everything that I have to say. Amendment 25 is not about perpetrators; it is about victims. I hope that members will feel able to support that principle and to use the parliamentary processes available to ensure that that is what comes out when the bill in its final form is passed into legislation and becomes the law of this country.

The Convener: The question is, that amendment 25 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Cole-Hamilton, Alex (Edinburgh Western) (LD)
Fee, Mary (West Scotland) (Lab)
Mundell, Oliver (Dumfriesshire) (Con)
Wells, Annie (Glasgow) (Con)

Against

Constance, Angela (Almond Valley) (SNP)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)
Maguire, Ruth (Cunninghame South) (SNP)

The Convener: The result of the division is: For 4, Against 3, Abstentions 0.

Amendment 25 agreed to.

The Convener: Amendment 2, in the name of the minister, has already been debated with amendment 1.

Christina McKelvie: I thought that we were moving on to group 5, convener.

The Convener: I will suspend the meeting briefly while we check that for you.

10:40

Meeting suspended.

10:40

On resuming—

The Convener: I welcome members back. We will dispose of amendments 2 and 3 before we move to group 5.

Amendments 2 and 3 moved—[Christina McKelvie]—and agreed to.

The Convener: Amendment 4, in the name of the minister, is grouped with amendments 16 and 17. I call Christina McKelvie to move amendment 4 and to speak to all the amendments in the group.

Christina McKelvie: Thank you, convener. You threw me a bit there, but we are back on track.

Group 5 contains minor technical amendments that tidy up the bill in relation to amendments 16 and 17. They amend proposed new section 5M of the 2005 act, which requires the court to advise the police and the relevant local authority when it is dealing with a matter relating to an FGM protection order. The bill sets out that, when an application to vary or discharge an order is made under proposed new section 5J(1) of the 2005 act, the court must notify the relevant persons of its decision.

Amendment 16 clarifies that, where the court makes such a decision without having received an application, it must also issue a notification.

Amendment 17 similarly amends the bill's provisions in the case of a decision to extend a protection order.

I move amendment 4.

The Convener: As no member wishes to contribute to the debate, I ask the minister whether she needs to wind up.

Christina McKelvie: I think that the amendments in the group speak for themselves, convener.

Amendment 4 agreed to.

The Convener: Amendment 5, in the name of the minister, is grouped with amendments 6 and 7.

Christina McKelvie: Since the bill was introduced, my officials have had further discussions with the Scottish Courts and Tribunals Service on the workings of FGM protection orders. Proposed new section 5G of the 2005 act provides criminal courts with the power to make FGM protection orders on sentencing relative to an FGM criminal conviction. The bill also provides that an order that is made under that section is to be treated for all purposes thereafter as if it was made in civil proceedings.

We took that approach because FGM protection orders are designed to be living orders that can be varied or extended or have parts discharged as the protective need for which they were made changes. For example, an order that bans foreign travel may be varied for a family holiday that appears to pose no threat to the girl in question. We deliberately aimed to provide that, in such cases, the change would be made through the civil courts, even if the order was granted by a criminal court. That was done not only to avoid, as far as possible, the criminalisation of the process, but because a sheriff or summary sheriff will be far more accessible than the High Court, which is the court that is most likely to deal with FGM offences.

However, transferring all aspects to the civil court would mean that, if the convicted person was to appeal against the making of the order, that would also be treated as a matter for the civil courts. That could result in both an appeal against the order in the civil court and a separate appeal against the criminal conviction or sentence in the criminal court. Such twin appeals would, as an unintended result, bring to the system the potential for confusion and increased costs and the possibility of conflict between competing court judgments.

We lodged amendments 5 to 7 to ensure that orders for an FGM conviction that are granted by a criminal court under proposed new section 5G of the 2005 act may, for the purpose of appeal by the convicted person or the Crown, go through the criminal court system along with the rest of the sentence. Such appeals will involve neither the protected person nor their family members. For the reasons that I set out to do with accessibility and the need to avoid criminalising the process, there will be no change to the treatment of applications for variation, discharge or extension of such an order, which will remain within the civil system. I hope that that remedies an issue that we all thought about at stage 1.

I move amendment 5.

The Convener: As no member wishes to speak, I ask the minister to wind up.

Christina McKelvie: Again, the amendments speak for themselves.

10:45

Amendment 5 agreed to.

Amendments 6 and 7 moved—[Christina McKelvie]—and agreed to.

The Convener: Amendment 8, in the name of the minister, is grouped with amendments 9 to 11.

Christina McKelvie: Amendments 8 to 11 are also technical in nature. They clarify the bill's

provisions in respect of two situations: first, when the period of effect of an FGM protection order has been varied, and, secondly, when an order did not originally specify a period of effect but is subsequently varied to do so.

Amendments 8 to 10 will put beyond doubt that, where an order has only one time period that relates to a condition, together with another condition that is not subject to a time period, the order remains in effect until it is discharged. Amendment 11 clarifies the way in which the provisions in the bill that relate to the duration of an order interact with the order when it is varied, extended or discharged.

I move amendment 8.

Amendment 8 agreed to.

Amendments 9 to 11 moved—[Christina McKelvie]—and agreed to.

The Convener: Amendment 12, in the name of the minister, is grouped with amendments 13 to 15.

Christina McKelvie: Amendments 12 to 15 are, again, technical in nature.

Proposed new subsections 5A(4) and (5) require the court, in making an FGM protection order, to take into account the views of the person whom the order would protect. Proposed new section 5L makes clear that the court must also go through that process in considering whether to vary, extend or discharge an order and in considering whether to vary or extend an interim order.

Amendments 12, 13 and 15 tweak the language of the bill to ensure that, when the court is considering the variation, extension or discharge of an FGM protection order, any reference to a person who would be protected is read as including a person who is already protected. Amendment 14 does the same in relation to the court's consideration of whether to vary or extend an interim order.

I move amendment 12.

Amendment 12 agreed to.

Amendments 13 to 18 moved—[Christina McKelvie]—and agreed to.

Section 1, as amended, agreed to.

Sections 2 to 7 agreed to.

Section 8—Amendment of the Children's Hearings (Scotland) Act 2011

The Convener: Amendment 19, in the name of the minister, is grouped with amendments 20 and 21.

Christina McKelvie: The bill, at section 8, already amends the Children's Hearings (Scotland) Act 2011 to enable the court to refer a matter to the principal reporter if it thinks that a ground for referral has arisen during consideration of an FGM protection order.

Amendments 19 to 21 extend that power to include cases in which the order is varied, discharged or extended by the court of its own volition, bringing it into line with the court's powers in cases where a variation, extension or discharge has occurred by way of an application.

The amendments put it beyond doubt that the courts can, if they think that a ground for referral has arisen, refer the matter to the principal reporter whenever the circumstances of an order have changed, and they also address an issue that was raised at stage 1.

I move amendment 19.

Amendment 19 agreed to.

Amendments 20 and 21 moved—[Christina McKelvie]—and agreed to.

Section 8, as amended, agreed to.

After section 8

The Convener: Amendment 22, in the name of the minister, is in a group on its own.

Christina McKelvie: Amendment 22 adds FGM protection orders and interim orders to the list of civil proceedings, as set out in the Courts Reform (Scotland) Act 2014, for which the summary sheriff has competence. Summary sheriffs were introduced by the 2014 act as part of the wide-ranging reforms to the courts that were recommended by the former Lord President, Lord Gill. One of the key aims of the reform of the court system was to bring justice as close to the public as possible with the introduction of a third tier of the judiciary.

Empowering summary sheriffs in that way does not remove the powers of the sheriff in such cases. It simply means that the sheriff principal for a sheriffdom will be able to move quickly and flexibly in deploying the full range of judiciary to deal with matters relating to an FGM protection order or interim order.

The amendment brings the treatment of FGM protection orders into line with the civil courts' treatment of forced marriage protection orders and proceedings relating to domestic abuse, adoption, children's hearings and family law, all of which can be dealt with by a summary sheriff, and opens up another avenue of justice for the public.

I move amendment 22.

Amendment 22 agreed to.

Sections 9 to 11 agreed to.

Long title agreed to.

The Convener: That ends stage 2 consideration of the bill, which will be reprinted as amended at stage 2 and published at 8.30 am tomorrow. Stage 3 amendments can then be lodged with the clerks in the legislation team at any time. The Parliament has not yet determined when stage 3 will be. When that is confirmed, members will be advised of the deadline for lodging stage 3 amendments.

I thank the minister and her officials for their attendance. The committee will next meet on Thursday 6 February, when it will consider its approach to the race equality, employment and skills inquiry.

Meeting closed at 10:53.

This is the final edition of the *Official Report* of this meeting. It is part of the Scottish Parliament *Official Report* archive and has been sent for legal deposit.

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

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