OFFICIAL REPORT
AITHISG OIFIGEIL

Justice Committee

Tuesday 28 January 2020

Session 5

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JUSTICE COMMITTEE
4th Meeting 2020, Session 5

CONVENER

*Margaret Mitchell (Central Scotland) (Con)

DEPUTY CONVENER

*Rona Mackay (Strathkelvin and Bearsden) (SNP)

COMMITTEE MEMBERS

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

*attended

THE FOLLOWING ALSO PARTICIPATED:

Janet Cormack (Clan Childlaw)
Susan Edington (Edingtons WS)
Jennifer Gallagher (Family Law Association)
Ruth Innes QC (Faculty of Advocates)
Nadine Martin (Harper Macleod LLP)

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Justice Committee

Tuesday 28 January 2020

[The Convener opened the meeting at 10:00]

Decision on Taking Business in Private

The Convener (Margaret Mitchell): Good morning and welcome to the Justice Committee's fourth meeting in 2020. We have apologies from Shona Robison.

Agenda item 1 is a decision on whether to take in private agenda item 4, which is on our work programme. Do members agree to take that item in private?

Members *indicated agreement.*

Children (Scotland) Bill: Stage 1

10:00

The Convener: Agenda item 2 is consideration of the Children (Scotland) Bill at stage 1. I refer members to paper 1, which is a note by the clerk, and papers 2 and 4, which are private papers.

We have one evidence session this morning. I welcome the witnesses: Janet Cormack, legal policy manager, Clan Childlaw; Susan Edington, Edingtons WS; Ruth Innes QC, Faculty of Advocates; Jennifer Gallagher, chair, Family Law Association; and Nadine Martin, Harper Macleod LLP. I thank the witnesses for their written submissions. Such submissions are tremendously helpful to the committee before it takes formal evidence.

We have a large panel of witnesses, so I would be grateful if members could keep their questions as short as possible. The witnesses should keep their answers as succinct as possible, and they should not feel that they have to answer the question if it does not relate to their area of expertise.

We will move straight to questions.

Will you describe the characteristics of families who settle their parenting disputes by negotiation and alternative dispute resolution techniques? We know that research from 2007 found that domestic abuse was alleged in 47 per cent of all court actions over contact raised by a parent. However, a lot of cases are settled outwith court. It would be good to have your views on the characteristics of those families.

Will you also give a general view on what changes to current law and practice would most help families who resolve, or have the potential to resolve, their cases out of court?

Who would like to start? I know that Susan Edington has a view on the issue.

Susan Edington (Edingtons WS): We need much more holistic triaging at the very beginning. People who are entering a separation situation require a myriad of departments to help at that stage.

I do a lot of collaborative law, for which we can bring in experts in various areas. We have never had to use experts in children's involvement. Perhaps that would be quite a good area to consider for resilience purposes, to ensure that children do not suffer from their involvement in decision making. We need to give them that opportunity; we need a more family-centred focus in relation to separation; and perhaps we need to

provide family centres in which advice can be given and a more holistic view can be taken.

The Convener: Are there barriers to using alternative dispute resolution techniques?

Susan Edington: There are. No legal aid is available, so people on lower incomes cannot afford alternative dispute resolution. There is also a lack of qualified people for the work and a lack of training of people to do that work in our legal profession. Although alternative dispute resolution is available, it has to be paid for, and it is not looked at in degree courses as a separate area yet—it would be very helpful if that occurred. I feel that having a few bolt-ons is not going to help; we need to look at the matter in a completely different way.

The Convener: In your view, does the bill adequately deal with what needs to be done?

Susan Edington: I am afraid that it does not adequately deal with what we require in law to allow ADR to happen.

Jennifer Gallagher (Family Law Association): A number of the Family Law Association's members are collaboratively trained and they are also trained as mediators. In my personal practice, when I initially see clients, my aim is to keep them out of court if possible. If you are collaboratively trained, you have access to other professionals who can help, such as family counsellors. As Susan Edington says, at the moment, the clients who can access that service are privately funding it. There is no available funding for people on low incomes, who cannot afford to pay privately for legal services to access mediation services.

With regard to the welfare of children and dealing with cases in a way that possibly prevents them from ending up in court, I agree with Susan Edington that early intervention for those families is essential. Once families are in court, people are very entrenched in the positions that they have adopted because of the nature of the court process. Although referrals to mediation can still be helpful in some cases that are litigated, the prospect of success might be lower because of the nature of the process. If intervention for such families could happen at a much earlier stage, we might find that the outcomes are better because the cases never get to court.

Most specialist family lawyers do not consider court as the first option for their clients. Court is one of a number of dispute resolution options and one that we would generally go to last, rather than that being our first port of call.

The Convener: Would spending on such an approach really be preventative spend? There is a better outcome and an earlier resolution that everyone is satisfied with, and views have not become entrenched.

Jennifer Gallagher: Yes, that is my view—it would be helpful. For instance, mediation is a really good option for families, but we are reliant on voluntary organisations, such as Relationships Scotland, to provide mediation services. The funding for those organisations is under threat and legal aid funding for mediation is very limited. A lot of accredited solicitor mediators will undertake legal aid cases, but the rate of remuneration is very poor. There is not necessarily an incentive to offer the services if they are not adequately funded.

The Convener: Should the bill address that?

Jennifer Gallagher: I think so. If you are looking to make provision for children in the process and considering the welfare of the child, it is very important that you look at those issues.

Nadine Martin (Harper Macleod LLP): I concur with Susan Edington and Jennifer Gallagher. I am aware that there is a separate proposal for a bill on mediation, but I had hoped to see more emphasis in the Children (Scotland) Bill on encouraging the parties to consider speaking with a mediator at an early stage in the process. In my view, signposting people does not particularly lead to more uptake.

I mediate often, and I mediate at legal aid rates for cases in which one party is not legally aided but the other party is, because I feel quite strongly that mediation helps to prevent the trauma that a litigated court process about children can bring. I think that the provision to simply signpost people to services will not lead to a real uptake in people engaging with ADR as a way to resolve issues.

The Convener: So there needs to be a court mediator to speak to at the time. Is there a patchwork of provision throughout Scotland, such that provision can vary quite a lot?

Nadine Martin: Yes, provision varies. There have been discussions in CALM Scotland, which is the lawyer mediators group, about starting a pilot duty mediator scheme. However, the scheme would very much depend on the views of sheriffs in each jurisdiction and how useful they think that mediation is. The hope is that sheriffs could be shown that, even for standalone issues, mediation can help. That applies even in the middle of litigation, but it is always better if mediation can happen at the start of the process.

Janet Cormack (Clan Childlaw): From the child's perspective, adequate resourcing of mediation would ensure effectiveness and that children would be valued as parties to it.

Liam McArthur (Orkney Islands) (LD): Nadine Martin talked about signposting mediation. The

committee carried out an inquiry into ADR earlier in this parliamentary session, which included discussion about whether there should be a presumption of mediation before people were able to go to court. On balance, there were stronger and more compelling arguments against going down that route. I would be interested to know whether you believe that that is the direction in which we should be going.

The inquiry also heard from the Scottish Legal Aid Board that further discussions were to be had on the extension of legal aid to other forms of ADR. That was two or three years ago, and clearly a resolution has not been reached. Have those talks been stymied? Should we go back to the Scottish Legal Aid Board to ask about the issue?

The Convener: Should mediation be court initiated, or should there be an automatic presumption of mediation without the court suggesting it?

Nadine Martin: There is an issue with such a presumption. Mediation has to be a voluntary process: people cannot be forced to mediate. However, allowing the parties to have a separate discussion with a mediator to allow them to understand how the process works and how it might benefit them would, I think, divert some cases from expensive and lengthy litigation that has both a financial and an emotional cost to the families and children who go through it. The courts try to keep the process as short as possible, but it is acrimonious and adversarial. The purpose of mediation and collaborative law is to try to steer away from that and to allow the family to come to a solution together as a family—albeit a separated family.

Liam McArthur: You said that mediation is voluntary, which everyone accepts as fundamental to the process, but we have also heard concerns that mediation is never, or rarely, an option in cases of domestic abuse, for example. What is your view?

Nadine Martin: Domestic abuse is a compelling factor. Each individual mediator would make a decision, having spoken to both parties. Initially, a mediator would meet with the parties separately. If a person comes to a mediation session and says, "I have concerns about domestic abuse. Here is my experience," many mediators—and I, in my role as a mediator—might say that such a case is not appropriate for mediation. As with all presumptions, it would be rebuttable: if factors make a case unsuitable for mediation, it might not even be approached.

Liam McArthur: Are you aware of on-going discussions about SLAB and funding?

Nadine Martin: I have seen no increase in the mediation fees from the Legal Aid Board. There are many mediators, but, certainly in relation to collaborative law, I have never heard of anyone practise it with legal aid funding. Many solicitors are unable to do as much mediation as they would like to do, because the funding is simply not there.

Jennifer Gallagher: There is a general issue with the Legal Aid Board and funding for family cases, and particularly financial provision cases, in that the level of funding is such that, economically, most solicitors' firms cannot undertake the work. There is an access to justice issue for a lot of families, on the basis that they cannot access legal aid solicitors to do that type of work.

Liam Kerr (North East Scotland) (Con): I have a supplementary question on that exact point. We have had representations to the committee about legal aid rates, the attractiveness of the work and people entering the profession.

My question is for Nadine Martin. You talked about offering legal aid rates to what one might call private clients—I do not know if you would use that term. To allow the committee to fully understand the matter, roughly what do you charge as your normal standard rate, in comparison with the legal aid rate? If I were instructing you privately, what would be your costs estimate to me?

10:15

Nadine Martin: My point relates purely to mediation cases.

If someone is legally aided, the Legal Aid Board will pay £84 per hour for mediation. In effect, that is split between the parties: if each party is legally aided, they will pay approximately £42 per hour through legal aid.

Rates vary among solicitors, but most private firms charge somewhere between £150 and £250 per hour for private work, depending on the experience level of the solicitor and the type of work involved.

As a mediator, I feel that it is unfair to penalise a party by charging them an excessive rate, if the other person is being funded through the Legal Aid Board. I simply say that my hourly rate for mediation in which one party is legally aided is the same rate—£84—so that each party feels parity.

Mediation is not profitable for solicitors when we factor in the time that is taken away from fee-earning work, which would be done at a higher rate.

Liam Kerr: If you were not charging the legal aid rate but were charging the private rate of £150 to £250 per hour, and I came to you as a client and said that I wanted to go through the process,

what would be your rough cost estimate to me? How much would I need to budget for?

Nadine Martin: That is genuinely a difficult question, because mediation can run for any number of sessions; it depends on how many issues are to be resolved and how much work needs to be done. Certainly, a privately paying person who engages in mediation that involves, say, childcare and financial issues should budget at least a few thousand pounds. However, the cost is far less than the cost of litigating those issues, and agreement is usually reached more quickly, provided that the parties are able to participate meaningfully in the process.

Liam Kerr: Thank you.

The Convener: Are you happy, Mr Kerr?

Liam Kerr: Very.

John Finnie (Highlands and Islands) (Green): Good morning.

I will ask about children's participation in decisions that affect them. Do you support removal of the presumption that only children aged 12-plus can be asked for their views? If so, what should it be replaced by? Do you support the view of the Children and Young People's Commissioner Scotland that there should be a new presumption that all children have capacity to form a view?

Ruth Innes QC (Faculty of Advocates): The faculty has addressed that in our written submission: we support removal and think that there should be a presumption-free approach. Even though the presumption is in legislation at the moment, in practice sheriffs and judges take views from much younger children. The court rules have recently been changed and now refer to the age of five as being an age at which the relevant form could be sent to children.

We support removal of the presumption, so we are concerned that it remains in the section that relates to legal representation. It should be removed from there, as well, for consistency.

We are also concerned about use of the word "capable", because its use indicates that there needs to be assessment of the capacity of the child to express a view, which is different in meaning from the current provision, in which the test is simply one of practicability. That allows the court to take a clear view on taking the views of the children in pretty much every case in which the child is there and can be found. The provision should be removed from the bill and there should be a return to the practicability test that is in the current legislation.

John Finnie: Would any other panel member like to comment?

Janet Cormack: Clan Childlaw supports removal of the presumption, because it can cause an unintended barrier. We agree with the children's commissioner: we would support a presumption that all children can participate and that it is a matter of supporting them to give their views.

John Finnie: I was going to come on to that. We have heard about different versions of how that might be achieved. As practitioners, how comfortable are you about establishing the views of very young children?

Janet Cormack: The youngest children whom our solicitors normally work with are about 10 years old, because a child's capacity to instruct a solicitor has to be tested in the context of the presumption. Clan Childlaw does not have experience of much younger children.

The Convener: Can anyone comment on younger children?

Ruth Innes: I work as a child welfare reporter, which relates to another issue in the bill. I see children from the age of five: in my experience, I have had no difficulty in obtaining from very young children views that I hope have been useful to the court. There is an issue about how younger non-verbal children express views. In our submission, we acknowledge the need for training of child welfare reporters, particularly in relation to how views can be obtained. However, it is certainly possible to obtain views.

Jennifer Gallagher: I do child welfare reports. I speak with school-age children, and I agree with Ruth Innes.

John Finnie: Have very young children been involved in any of Harper Macleod's mediation cases?

Nadine Martin: In my experience, not many, if any, mediators would involve a child in a mediation. However, there are moves towards more specialised training, with a view to allowing children some involvement in mediation in particular circumstances—if both parents want it to happen and the child is comfortable with that. That requires specialist training, and such involvement would not be appropriate in every case. That would be a decision primarily for the mediator, in conjunction with the parents. There is scope for mediations to involve children, which I think happens in other jurisdictions.

An issue that shoots off from that is the need to think about how and when it is appropriate for a mediator to obtain the views of a child. That is separate from the question about a child's involvement in the process. Some parents just cannot agree on what the child's view is about a situation, so it is difficult for them to come up with

solutions and options that must then be imposed on the children. That is a live issue in mediation, and how it will be resolved is not yet clear.

John Finnie: Ms Edington, do you have experience of the issue?

Susan Edington: Yes—I have seen children as young as five. Our faculty took the view that children can be separately advised, if that is what they want. We have done that on a pro bono basis, I have to say: we did not charge a fee. It is really about trying to give the child options. Some children have taken great pleasure in being involved—so much so that they have become quite demanding.

I finally got to the bottom of a problem about a child seeing his father with that child, who was five. I had thought that he was being influenced by his mother, but it was clear from the outcome that that was not the case. The problem was purely that the father had blamed the child for wetting the bed when he had been sleeping top-to-tail with another child; it had not been him, and he felt that his father had failed him. Once we were over that hurdle, he went on happily to have contact with his father.

However, I felt a little uncomfortable about getting that child's views, because I felt that unqualified. I did it not by asking questions of him but by playing with him and trying to get to the bottom of what was wrong through chatting, rather than anything else. The child thoroughly enjoyed it, however, and when I finally asked him whether there was anything else that I could do for him, he said that he would not mind a choc ice, so I do not think that he was traumatised by what he went through.

However, I can envisage such experiences being traumatic for younger children, which is why I suggest that triage at the beginning could involve the whole family and provide help and support for each area. We now have specialists in that area, which is wonderful. I was speaking about a time about 20 years ago, when as a faculty we took to providing that service. We have since stopped providing it, because our sheriff does not support such work.

Janet Cormack: I refer to the work that has been done on the F9 form and on how we change the culture for younger children, which has been mentioned. The F9 form was revised with a view to improving other additional methods, and a lot of that work is interesting to look at. Younger children should be offered a range of options. As Clan Childlaw says in our written submission, we very much support the role of child support workers. They are available in some places: we would like them to be more widely available.

Liam McArthur: The Government consulted on whether the bill should include provisions on confidential children's information being provided subject to the views of the child having been considered and to that having been deemed to be in the child's best interests. Children 1st is particularly keen for there to be provisions on confidentiality. If the information that a child shares with a welfare worker or whoever subsequently finds its way into court proceedings, that can be traumatic for the child.

We have also heard the view that the rights of adults under the European convention on human rights need to be respected in the process. Children 1st's view is that, at the very least, proportionality in relation to whatever information is shared needs to be better reflected in the bill. Do panel members have views on that?

Ruth Innes: That relates to ECHR article 6 rights. If a court is going to make a decision based on views that have been taken from a child, and if the court cannot tell the parents what those views are, that decision is based on information that is secret and outwith the knowledge of the parties. The parents do not have the opportunity to provide submissions and do not know the reasons for the decision, so there are serious issues with taking the views of children.

Concerns about that have been raised in cases such as the one that we mention in our written submission, in which the judge took the views of the child. The question is how those views are communicated to the parents. As a child welfare reporter, I make it very clear when I speak to children what use will be made of their views. If they have any concerns about confidentiality, they have to highlight them to me, and I have to tell the court.

Liam McArthur: That is helpful. Children 1st was trying to reflect the distinction between interviews with children in the context of court proceedings and, I suspect, mediation and—as often happens—children's engagement with services at a much earlier stage in the process. Files of information are built up over many months, if not years; Children 1st is concerned about such information being used in court proceedings. It is not only the information that is relevant to the case that the court is hearing that is used; a volume of information is handed over as a case file. In such cases, the discussions with a child are very sensitive, and the child is not made aware at the time that what they say might be used in court and played out in front of either parent or both parents.

Could the bill safeguard against that by ensuring that appropriate information is shared with the adults, for the reasons that you have suggested, and there is not wholesale transfer of case files to the court?

10:30

Ruth Innes: That is a difficult issue to cover. That would arise primarily in cases involving permanence and adoption, for which there is a social work file. Janet Cormack perhaps has a view on that, from the perspective of Clan Childlaw's work.

I reiterate that all the information that has been built up is relevant to the court's consideration of what is in the best interests of the child. It is therefore likely that the court will base its decision on that information, so there is, again, a potential clash between the parents' rights under article 6 of the ECHR and the right of the child to confidentiality.

Janet Cormack: I do not have anything to add. I agree that there has to be a balancing of rights.

Ruth Innes: It is difficult to see how that could be formulated.

Liam McArthur: Is there no way of framing the bill to ensure that what we might call a proportionality test would be applied? I recall that when we were considering the named person scheme, one of the issues was transfer or sharing of information not being blocked. The idea was to ensure that that was done proportionately in all cases, so that information would be shared only with people who had a legitimate interest in it.

That might be an ill-starred example, but it suggests that the law can at least attempt to ensure that information is shared proportionately, rather than there being a wholesale release of information that might have no bearing on the case in hand, and which might also be highly sensitive.

Jennifer Gallagher: As I was listening to that exchange, it occurred to me that, rather than their being dealt with in primary legislation or court rules, such issues might be addressed through the procedures for recovery of evidence. The sheriff having to consider such issues, balance them and make decisions case by case might be a more appropriate way to deal with such issues. That suggestion is off the top of my head—I have not thought it through. It occurred to me that it might be an option as I was listening. As other witnesses have said, it is a very difficult matter to cover in legislation.

Liam McArthur: That is helpful. Thank you.

James Kelly (Glasgow) (Lab): I want to touch on the role of child welfare reporters. Some witnesses have suggested that solicitors do not necessarily have the best skill set to carry out that role and that social workers or psychologists might be better placed to be child welfare reporters. What do panel members think of that view?

Susan Edington: As I have said, although solicitors require training in such areas, they are also best placed to understand where such information will be used and what will happen to it. If it is going to a court setting, they understand—in a way that is perhaps unique to a solicitor—what the court will require. However, perhaps we could have a much more holistic approach at the initial stage; we could have a form of triage in which we could see whether social work involvement is required, such as in domestic violence cases.

James Kelly: So there should be better training for solicitors but also better involvement of appropriate social workers and psychologists.

Susan Edington: Yes.

James Kelly: Does anyone else on the panel have a view on that?

Jennifer Gallagher: The FLA's view is that training is essential for people who undertake such work. It is also important to bear in mind what the role of the child welfare reporter is. In some situations they might be asked simply to take the views of a child, which is work that need not be undertaken by a solicitor. However, a number of other issues in a case can be addressed by a child welfare reporter. Solicitors are exceptionally good at receiving information, working out what is relevant and presenting it in a manner that is helpful to the court. They have a good understanding of the legal framework and how to apply that to particular facts and circumstances. Consequently, solicitors bring a lot of experience and many good reports are produced for courts across the country.

The introduction of form F44 has addressed a number of the concerns about reports not being properly focused, because a sheriff now has to consider what he or she wants a report to address and give the reporter a proper remit to do the work. That addresses quite a number of the concerns that had been expressed previously about child welfare reports.

Ruth Innes: I agree. You will have seen from our written submission that we also agree that there should be training. Indeed, we at the Advocates Family Law Association are looking at training for advocates who also work as child welfare reporters.

We think that the provision in the bill might be disproportionate to the problem. The problem is mainly to do with training and the need to have a proper register and proper regulation of child welfare reporters. That can be managed through the current court system rather than being managed through a new administrative process.

Child welfare reporters are skilled in this area—they have a lot of experience, as Jennifer

Gallagher said. The issue is about using and building on that experience and giving them appropriate training.

Janet Cormack: Our view is that child welfare reporters can have a variety of professional qualifications and backgrounds. Obviously, it is important to have an understanding of court procedures and legal tests, but equally important is having an understanding of child development and how to communicate with them. Regulation would bring consistency in standards and training, which would address that aspect, but it really does not matter what the professional background of a child welfare reporter is.

James Kelly: That is helpful in offering a practical way forward.

Is account taken of a child's relationship with their wider family in examining the detail when reporting?

Ruth Innes: It depends on the remit that the court has provided. As Jennifer Gallagher mentioned, a form specifies what the child welfare reporter should do. A views-only report is simply related to the views of the child. If the remit is wider, the court might specify who the child welfare reporter should see, which might include the views of their wider relatives.

If the child welfare reporter has been asked to provide recommendations in relation to contact and residence, they will take into account wider relationships such as those with siblings, grandparents and wider family members. My practice as a child welfare reporter is to ask children about their wider family, so that I have a holistic picture.

James Kelly: That makes sense.

The policy memorandum sets out a number of options on fee rates for child welfare reporters. Those include hourly rates and a rate per page, which might encourage people to write longer reports. What is the best way to manage the rates?

Ruth Innes: An hourly rate would make more sense than a rate per page.

James Kelly: Yes.

Ruth Innes: There are a number of issues to do with paying a rate per page. Someone might write a long report unnecessarily, which might not necessarily help the court. Just because a report is short does not mean that a person has not spent a number of hours preparing it.

James Kelly: It is the old adage about quality, not quantity.

Ruth Innes: Yes.

Jennifer Gallagher: There are cases where a lot of work is involved in investigating the circumstances but the substance of the report does not need to go to many pages. An hourly rate would reflect the work that has been done.

James Kelly: That makes sense.

The Convener: Should the regulation of child welfare reporters and curators be managed nationally or locally? We have heard varying opinions on that.

Ruth Innes: As I alluded to, our view is that it should be managed at local level—in other words, within sheriffdoms. There is already an administration there, which can be developed. I would have thought that giving the power to have the lists to the Lord President, who would then delegate it to the sheriffs principal, would be the most sensible way of dealing with the matter.

The Convener: Although having a local element is a good thing, a lack of consistency could be a problem. A balance needs to be struck. How would you deal with that?

Ruth Innes: We recognise that there is a need for regulation and registration, so if there are standards that child welfare reporters have to meet, the issue can be addressed in that way.

The Convener: So certain things should be standardised, but there should be an ability to take account of local circumstances.

Ruth Innes: Yes.

The Convener: Is that everyone's view? Does anyone else want to comment?

Nadine Martin: I am not a child welfare reporter, but I work across various jurisdictions. At the moment, the process for the sourcing, appointment and continuation of child welfare reporters varies widely from jurisdiction to jurisdiction. I agree with Ruth Innes: if there is still regulation at local level but there are set standards and rules that everyone must adhere to, that will give everyone some certainty about what is required for the role. At the moment, policies vary widely between jurisdictions.

The Convener: You are saying that there need to be suitable appointment rules and clear guidelines on what is required. That is helpful.

Susan, did you want to comment on that?

Susan Edington: No. I absolutely agree that the matter should be dealt with in the way that Ruth Innes has suggested.

Jenny Gilruth (Mid Fife and Glenrothes) (SNP): Good morning. As members of the panel will be aware, section 15 creates a new duty to explain court decisions to children. I note that

Jennifer Gallagher's and Janet Cormack's organisations support that, but the Sheriffs Association has said that the requirement is unworkable because of the burden that it will place on the judiciary and, in its submission, the Faculty of Advocates states:

"it is not appropriate to make the explanation of decisions to children mandatory."

Is section 15 workable? Do you have a view on who should be responsible for explaining decisions to children? Should it be the sheriff, a child welfare reporter or somebody else?

Janet Cormack: As you will have seen, we are supportive of the court explaining the decision to the child. One of the issues is that we have an adult court system that we fit children into. If we looked at the issue from a child's perspective and took into account the principles of the United Nations Convention on the Rights of the Child, we would have a different arrangement.

It is important that decisions are explained to the child, but we expressed concerns about the child welfare reporter doing that, because there is not a child welfare reporter in every case and they are not in court when the case is heard or the decision is made.

We are supportive of the court explaining the decision to the child. If that were to be introduced, it would be appropriate for a child support worker to perform that role. As an independent party with training in communicating with children, they would be able to do that effectively.

Jennifer Gallagher: Our membership's view was that the principle of such decisions being explained to children is a good one. We have anecdotal evidence from our members that, a lot of the time, although court reporters come out to see children and ask them to give their views on what is happening, they never find out why the decision has been made. Often, the child might have expressed views to a reporter but, for various other reasons, the outcome of the case is quite different.

A lot of information has been gathered about the effect that that has on children. The principle of children finding out about significant decisions that affect them is important, but the practicalities of how that is done should be left to the individual decision maker. I know that a sheriff in Glasgow has written to children on that, but there are mixed views in the profession about the appropriateness of that. How these things are managed in practice must be thought about carefully. I note the comments from the Sheriffs Association about the logistics of the issue. The Scottish Courts and Tribunals Service would also probably have issues with the logistics, the funding and the availability of resources to do that properly.

10:45

Ruth Innes: We have said that explaining decisions to children should be discretionary rather than mandatory. I agree with Jennifer Gallagher that, in principle, it is a good thing to explain decisions to children, but there is a question as to whether, practically, it can be done in every case. Obviously, the duty will include interim orders, so a number of hearings might be involved. Sheriffs will have a number of child welfare hearings in one day, so there is a question as to how, practically, they will explain the decision to the child quickly enough before the change in the arrangement takes place, which might happen the next day or the next weekend.

Do the judiciary have appropriate training to explain the decisions to children and do they feel comfortable doing it? Should it be done in writing or face to face? We are also concerned about the fact that the bill provides that the only person who can give the explanation is the sheriff or a child welfare reporter, who, as we have said, may not be present at the hearing and so would not know what the reasons are. Therefore, we think that there should be greater discretion and flexibility in relation to explaining decisions to children.

Jenny Gilruth: Would leaving the bill as it is leave a loophole, because it does not spell out who should explain the decision but leaves that open to interpretation? If we allowed greater discretion under the bill, a sheriff could in future just ignore it, which is not what we want to happen; we want children to have an understanding of the decisions. Therefore, should the bill be more prescriptive?

Ruth Innes: I do not think so. The problem is that the bill says that

"The court must ensure that the decision is explained",

and then specifies the two ways in which that could be done. That should be opened up to give the sheriff the discretion to allow the decision to be explained by somebody else and in a way other than through those two routes.

As I said, the explanation should be discretionary rather than mandatory in every case. Potentially, there will be arguments in every case about whether and how the decision should be explained.

The Convener: Section 12 is on the statutory factors that the court should take into account when making a decision about a child in an individual case. In the current legislation, there are two factors, which are the prospect of parental co-operation and the need to protect the child from abuse or the risk of abuse. Section 12 goes a little further, and says that the court must also take into account the effect of a court order on

"the involvement of the child's parents in bringing the child up"

and

"the child's important relationships with other people."

What is your view on a statutory list of factors and, if there should be such a thing, does the bill have it right? Ruth?

Ruth Innes: I hesitate to start again—sorry.

Our view is that, obviously, the welfare test is paramount and that a checklist can be unhelpful, because it lists only certain things and there are other factors that will impact on an individual child, such as mental health, physical health and addiction issues. We could end up listing a whole number of issues in a checklist. The difficulty with that is that it potentially asks the court to focus on those issues and there is a danger that other issues are excluded. Our general view is that the welfare test itself allows the court to take into account all those kinds of factors. Obviously, the factors that are listed in relation to risk of abuse, co-operation and relationships with other family members such as siblings are all important, but they are not the whole picture. That is our concern about checklists.

The Convener: Is it helpful to have that as a starting point, and to emphasise that that is what it is, or are you concerned that, in individual cases, courts might not get any further and might just say, "Well, that is what we have to look at"?

Ruth Innes: Yes, that is our concern. It suggests that those are the factors that are to be looked at, so other factors that are very important in the life of an individual child could be ignored or passed over.

Susan Edington: The word "individual" is very important in what you have just said. Every child and every case is different, and they should be looked at in that manner. The checklist suggests prescription rather than anything else.

Jennifer Gallagher: The benefit of the welfare test is that it orders the court to look at all the relevant factors in a case, so it means that the court can deal with the child on an individual basis.

Susan Edington: Exactly.

Janet Cormack: We also pointed out the risk of missing something. The bill specifies the paramountcy of the child's welfare, and we have welcomed the reference to maintaining the relationships that are important to the child. As you will be aware, we do a lot of work to try to ensure that siblings are not separated or that they remain in contact when they are separated. We hope that that provision will have the effect of getting the courts to think about those relationships.

The Convener: We are at the stage of writing our stage 1 report. We have scrutinised the bill and we are looking for ways in which it can be improved at stage 2. Is there anything that you would suggest to add to section 12 that would cover the points that you have raised? Is there any way that it could be improved?

Ruth Innes: I suppose that you could list other factors that I have mentioned, but I am still not sure that it would be an exhaustive list. Our view is that all of it is superfluous. All of it could be deleted and the welfare test could simply remain as the paramount consideration. The court would know that it would have to take all those issues into account, because they are all relevant to an individual child.

The Convener: As a result of a policy decision, there is currently a requirement in law for courts to look at the prospect of parental co-operation and the risk of abuse. Is there an inherent danger that if we miss those out completely, let alone add anything new, aspects that we would want to be covered will be missed?

Ruth Innes: I do not think so. Courts are well aware that observation of abuse and the risk of abuse are important issues that impinge on the welfare of the child and on the orders that courts should make.

The Convener: Are you saying that removing it would almost force questions to be asked of the individual child's circumstances?

Ruth Innes: Yes.

The Convener: Does anyone disagree with that?

Janet Cormack: No.

Susan Edington: No.

Jennifer Gallagher: No.

Nadine Martin: No.

The Convener: That is very interesting.

We have heard from various witnesses that there should be a presumption of shared parenting, and that the child should have the right to have the involvement of grandparents. Will you comment on that?

Does nobody want to start? It is your area, Ruth, and we said that we would talk to the person who is best able to speak about it.

Ruth Innes: We do not think—this is consistent with what I have already said—that there should be any presumptions in relation to the welfare tests. Courts have the ability to make an order that provides for shared parenting, if they consider that that is in the best interests of the individual child.

We do not think that there should be a presumption about what the court should do.

With regard to whether there should be a right to have the involvement of grandparents, our view is that, under the legislation as currently framed, any person with an interest who wishes to obtain a court order in relation to a child can make an application to do so. We do not think that there should be a specific right, or that parental rights and responsibilities should be imposed on such persons, but people are able to make such an application at present.

We welcome the removal of the issue that has arisen around siblings in private law cases being able to apply for contact orders; previously, there was an issue with regard to children under 16 being able to do so. Janet Cormack would be able to comment more on the difference in approach in public law.

The Convener: The question was specifically about shared parenting and grandparents. When I probed a little further, the witnesses were quite happy with the presumption about shared parenting and thought that the balance was right. After a little further delving, the representative from Grandparents Apart UK said that children should have the right. They said that a welfare report presented in court might include something adverse that may go against grandparents having contact, but grandparents have no opportunity to challenge something that is untrue or is not based on evidential fact. That is why they have gone for there being a right. Should there be an opportunity for grandparents to challenge anything that they think is factually inaccurate or has not been evidenced?

Ruth Innes: The child welfare report is not the court. It is for the court to make findings in fact. The child welfare reporter simply has to narrate what the various people have said; the reporter does not, and should not, make a decision about what is true or false—that decision is for the court.

The Convener: I think that the witness felt that, once the court has been presented with the evidence, grandparents do not have an opportunity to say that something is not true or has not been evidenced properly. Has that been your experience?

Ruth Innes: Grandparents quite often give evidence if the case goes to a contested hearing, because they are the closest family members to the child and are often brought along by one parent or the other and asked about such issues. However, I have not seen the issue arising in practice.

The Convener: Is anyone else able to shed any light on this issue?

Nadine Martin: I have been instructed by grandparents separately in actions in which the parents have been unable to reach agreement and allegations have been made about grandparents. We produced sworn affidavits, which were given to the sheriff, saying, “Here is my evidence about those points.” There are already routes in the procedure by which grandparents give evidence, instruct their own representation or seek their own orders about contact. All of those can be expensive and difficult, but there are routes in the process for grandparents or anyone else who has a point to make to take legal advice.

I was involved in a case in which I produced very detailed sworn affidavits that said, “Here is our position about everything that has been said about our conduct. This is the equivalent of us giving you our evidence on that point.” I was not involved in the dispute between the parents; I represented and gave advice to the grandparents only. In that situation, they felt very much that things had been said about them and they had not been given the opportunity to answer them. At the moment, there are ways by which such a situation can be addressed.

The Convener: Would legal aid be available in that situation?

Nadine Martin: In that case, the grandparents were not legal aided. I am not certain whether the Legal Aid Board would consider that. It might say that giving affidavits is not necessary. Seeking legal aid to raise proceedings in one’s own right as a grandparent would be different, but I am not certain that the board would fund someone’s right to comment and make a point.

The Convener: Is it true to say that there could be a cost barrier to grandparents being able to present another view?

11:00

Nadine Martin: Yes. If a grandparent could not access legal aid, they would have to weigh up whether it was worth their paying money simply to put their position to a court—which may or may not influence the decision and would not allow that person to participate in the proceedings actively. In the case that I have referred to, the grandparents felt so strongly that they were being misrepresented that they were willing to meet the cost.

Jennifer Gallagher: That brings us back to the welfare of the child. There will be cases where the grandparents have a locus to seek an order in relation to the child because they have a relationship with the child and it is of benefit to the child for that relationship to continue. As Nadine Martin said, there are options available for grandparents under the existing legislation.

Essentially, the law should relate to the welfare of the child, and it would not be appropriate in every single case for the grandparents to have some sort of automatic right, particularly if they do not have any on-going relationship with the child and have not been particularly involved in the child's life.

The Convener: Grandparents Apart was careful to say that it was about the right of the child to have grandparents in attendance. I suppose that that applies to situations where children have had contact with grandparents. However, it can sometimes suddenly look like that contact is going to disappear because of something that is said. Given the important role that grandparents generally play, that is perhaps something that we need to consider with a view to making sure that there is not an issue with access to justice there.

Fulton MacGregor (Coatbridge and Chryston) (SNP): I agree with what the panel is saying on this matter. We cannot be too prescriptive to the court, as that would take away from the individual, unique situation of every child. Most witnesses who have come before us have said that.

On the matter of grandparents and other significant relationships, the point that we explored during previous evidence sessions and which has been referred to by everyone on today's panel is that the relationships with the child are the important thing to consider, whether they are positive relationships or not—hopefully they mainly are. Those relationships can often be a casualty of the process.

Nadine Martin spoke about a specific example. My feeling from constituency casework is that people might not know how to deal with significant relationships other than those of grandparents. Have you experienced that issue in your day-to-day work? If so, how can we seek to address it, so that we are always making decisions that are in the best interests of the child, as Jennifer Gallagher has said?

Jennifer Gallagher: In my experience and in my practice, I have advised grandparents who are interested in pursuing contact orders in relation to grandchildren. The advice that is given depends on the particular circumstances. If there is an on-going relationship, if it is possible for someone to demonstrate an interest in the child and if the situation can be considered from the point of view of the child's welfare, the matter can be pursued—if that would be of benefit to the child. The availability of legal aid can sometimes be an issue in relation to the criteria that the Scottish Legal Aid Board generally applies in making legal aid available for child-related cases.

There is not a barrier to grandparents seeking advice. In practice, the parent of the child will often obtain contact and will then use their time with the child to get their own family involved with the child.

Fulton MacGregor: That is the crux of my point. If a child is involved in the children's hearings system—we have used this example before—there would be a full assessment of their situation. If, in the context of the children's hearings system, a young person says that they do not want to see their dad, for instance—perhaps because of things that have happened—but they do want to see other members of their paternal family, that will get captured by social workers on the children's panel, and things can be put in place. I am sure that that can also be captured through the child welfare reporter, although it might not always be.

If there is a parental dispute, and if—to use the same example—the child says, "No, I don't want to see dad," there is an argument, as expressed by Grandparents Apart and others, that the relationships of grandparents are a casualty of the process when cases are dealt with solely in the court system. I know that grandparents can instruct representation, but it sounds like grandparents would have to seek that out, and some of them might not do that.

Nadine Martin: The adversarial nature of a dispute between parents that is litigated makes the situation difficult, because people take certain positions. Sometimes, if the position is taken that the child will not see their dad, that can mean that they do not see their dad's family. That can have long-lasting consequences for the child, particularly if they had positive relationships with those family members. I do not think that there is any easy fix for that, although I often see better resolutions in an alternative dispute resolution process, in which the situation can be explored in a respectful way, with people saying that, although the relationship is not working and cannot be made better at the moment, they can accept that gran and grandpa still have a good role to play. However, it is quite difficult to explore that approach in a situation in which parents are taking positions.

There is no easy answer. Sometimes, there are positive and beneficial relationships with other family members even in situations in which the parents cannot get along or the child has a reason not to want to spend time with a particular parent, and those relationships can be lost.

It is quite hard to say what a fix for that would be. Certainly, I see these issues being handled better in processes in which there are explorations of alternative ways of resolving the dispute.

Jennifer Gallagher: I agree. I find that I can come up with much more bespoke solutions in situations in which there is the scope for doing so in the context of mediation. Services such as Relationships Scotland offer family therapy-type approaches, which can be helpful for some families and are probably a lot better than what can be done in court.

Fulton MacGregor: I do not think that there is an easy fix. Thank you very much for your frank responses.

The Convener: I suppose that what you are saying is that, by teasing out these issues, you can get people to focus on the child as opposed to their differences and their desire to score points.

Rona Mackay (Strathkelvin and Bearsden) (SNP): I would like to ask about sibling contact and relationships. Last week, the committee heard powerful evidence from Oisín King. His personal experience went to the heart of what we should be talking about with regard to sibling contact. I know that Clan Childlaw and CELCIS have strong views on that issue. What is your reaction to the evidence that Oisín King gave us last week?

Janet Cormack: We are immensely grateful to Oisín King for giving his testimony and sharing his story. As he said, many people are affected by this issue, and we are pleased that the committee heard that evidence. In general, there is an increased awareness of the issue of siblings being separated when they enter care and of the fact that many of them do not see each other, as Oisín King so accurately described.

You will be aware that Clan Childlaw works with partners in the Stand Up For Siblings coalition, including Who Cares? Scotland, and we have submitted joint evidence to you. That evidence is worth looking at closely to see what the problems are and what the research base is in relation to the need to deal with the issue through legislation. Our submission also contains some case studies that demonstrate the problems that are faced and what the current practice is, as well as what lessons we can learn.

Rona Mackay: Should the bill include siblings' rights, such as the right to be notified of or appear at children's hearings, the right to make representations, a right to appeal or ask for review, and so on?

Janet Cormack: We believe so, yes. Obviously, there are various aspects of the bill that deal with siblings, and you will not be surprised to learn that we support all of them.

On participation rights, as Alistair Hogg described last week, we are awaiting the judgment in a Supreme Court case that concerns participation rights in children's hearings. Clan Childlaw absolutely believes that siblings should have participation rights, and the six aspects of those rights that we see as inherent to article 8 rights were listed last week. We think that they are interconnected and proportionate, so we absolutely favour siblings having participation rights in the way that has been described.

Ruth Innes: We agree with that. We are aware of the case that is currently being decided by the Supreme Court. However, legislative change in relation to the provisions in the Children's Hearings (Scotland) Act 2011 that concern the definition of "relevant person" and to section 126 of that act, which sets out the way in which a sibling can participate in a hearing and seek contact, ought to be dealt with in this bill.

Rona Mackay: You will be aware that the Scottish Children's Reporter Administration thinks that the approach needs to be proportionate. Do you think that changes could be made in a proportionate way to focus on the child who is the subject of the hearing?

Ruth Innes: Yes, there is a way of doing that, although it is not in the bill at the moment.

Liam McArthur: I think that no one could help but have been deeply moved by Oisín King's testimony last week. The case that he set out was compelling.

On the issue of the rights of grandparents and shared parenting rights, there is a slight concern that, in what would probably be a small number of cases, the relationship between siblings might not be positive—at least, not positive in both directions. That means that applying the right of a sibling to be heard in a hearing or whatever might not necessarily uphold the welfare interests of the child who is the focus of the hearing. If we were to institute a right of all siblings to be heard, if they so chose, how would that be balanced with those concerns?

Ruth Innes: The issue of the right of the child who is the subject of the proceedings to object to a sibling becoming involved, attending a hearing and getting information that is relevant to them is part of one of the cases that is before the Supreme Court at the moment. However, the question is about proportionality and the need to balance the competing rights. That can be done if the legislation is appropriately framed.

Liam McArthur: I know that I am burrowing down into what is probably a minute number of cases, but one can imagine a situation in which the relationship between siblings is not necessarily a positive one for the child who is the subject of a hearing but the other child is not aware of that and has an attachment to the child, therefore the child might be unlikely to object to their sibling being heard in the hearing, even though it might not be

in their interests, perhaps because of the unhealthy relationship that might have developed. Is there an expectation that experts who are involved in that process would pick up on that and would be able to enter an objection or advise the hearing appropriately?

Ruth Innes: I think that the hearing would have to have regard to any issues that were raised in relation to the nature of the relationship between the siblings, whether that came to light through an expert, a parent, a carer or whoever. The situation can be managed. Obviously, the hearing has to have regard to the child's welfare as the paramount consideration.

Janet Cormack: I agree that that would be dealt with through consideration of the welfare of the child being paramount. As you said, only in a minority of cases would that be inappropriate or unsafe. The situation can be dealt with. We need to change the system for the majority of the siblings involved.

The Convener: It may well bring in the issue of confidentiality, with the child who was the subject of the hearing saying that they felt that they were torn in two ways but that they felt that something was not right. It is an interesting point.

James Kelly: On the issue of delays in court cases, section 21 of the bill asks the court to have regard to the adverse impact that delays might have on children. Does asking the court to consider those matters go far enough, or should there be something specific that the court should be empowered to do when there is a delay in a case?

11:15

Ruth Innes: The court has control of its own process, and the courts have been very clearly directed by the Supreme Court, in a number of cases, that delay is inimical to the interests of children and that they must appropriately case manage any actions in relation to children in order to avoid delay. Therefore, there are case management rules that relate to that.

The way in which the current provision—the amendment in proposed section 11ZA of the Children (Scotland) Act 1995—is framed seems to conflate the issue of making a decision and the proceedings themselves. The bill says:

"When considering a child's welfare, the court is to have regard to any risk of ... delay".

The words

"When considering a child's welfare"

mean that the court is at the stage of making a decision about the child's welfare, but it is more to do with case management. It is the process itself that the court should be trying to avoid delay in, and the court has substantial case management powers through which to do that. In the court structure, from the Supreme Court to the inner house, sheriffs certainly know that delay is to be avoided.

James Kelly: You are saying that there are currently adequate powers and that the provision in the bill is perhaps not worded appropriately and needs to be re-examined.

Ruth Innes: Yes.

Jennifer Gallagher: Effective case management is the way to avoid delays in court processes, and there are certainly significant case management rules in the sheriff courts for child-related cases.

Nadine Martin: Although the Scottish Legal Aid Board says that it will make legal aid available fairly quickly in those cases, I have experience from past cases of lengthy application procedures and of being asked for information that was not really relevant to the determination of whether the person should obtain legal aid. Sometimes, that approach still contributes to quite lengthy delays in our being able to effectively represent someone.

Emergency cover to attend a hearing, for example, is helpful, but there is much work to be done in disputes that involve children's residence, or if there has not been contact for a long time. Through experience from not too far in the past, I know that there are still delays in obtaining full decisions from the Scottish Legal Aid Board, particularly when the applicant may not qualify for full legal aid and may have a contribution. Sometimes, the assessments of those financial determinations can take a significant period of time, and it is then difficult for applicants to make a decision, because they will not be certain whether they will have a legal aid certificate. In my view, that still contributes to delays.

Janet Cormack: We think that that should be in the bill. It is of sufficient importance to be put into primary legislation, and it is a way of securing procedural rights under article 8 of the European convention on human rights.

The Convener: Do you think that there are variations between how cases are treated in the criminal courts and how they are treated in the civil courts? We have heard that there are sometimes better, less-adversarial practices in the criminal courts, because that issue has been looked at more in them and there have been more rules and more discussion about case management delays, which have not necessarily been transferred to children's involvement in civil cases.

Ruth Innes: I am not sure that that is the case. Obviously, there are case management rules in

criminal cases, through the preliminary hearing system, but the same applies in child cases. I suppose that the question is whether the rules have been properly implemented.

The Convener: The same legal aid delays would be found in criminal court hearings or in criminal cases.

Ruth Innes: I think that it is much easier to get legal aid and to have matters dealt with quickly in criminal cases. In civil cases, it takes longer to apply the considerations that the Scottish Legal Aid Board has to apply in relation to financial issues and merits. That probably causes part of the delay.

The Convener: When we talk about significant delay, how long are we talking about? Can you give best and worst-case scenarios?

Nadine Martin: I have had cases in which it has taken months to get a full determination on legal aid. A party would be asked to provide a huge amount of financial information, all of which would be provided and processed, but then there would be more questions. The process can feel interminable for people. Clients have said, "This is so difficult for me that I feel like giving up. I feel that I won't ever get legal aid, so what is the point in dragging everyone through this process?" People lose hope.

At the same time, the agent is under pressure to prepare a case and be ready to go to court. We do not want to put a child in a situation in which there is delay after delay. It is a real difficulty.

Ruth Innes is right to say that there are different rules in criminal legal aid that sometimes mean that it is awarded automatically or more quickly. In civil cases, delays are a real concern.

Fulton MacGregor: I want to ask the panel about vulnerable witnesses in the courtroom. Do you support the scope of the concept of "deemed vulnerable witnesses" as provided for in the bill?

Ruth Innes: I think that we support the scope. We certainly agree that there should be provisions prohibiting cross-examination by parties in cases that the vulnerable witnesses legislation covers.

By way of background, we raised a couple of issues. Proposed new section 22B(4) of the Vulnerable Witnesses (Scotland) Act 2004 provides that the prohibition

"does not prevent a party to whom it applies from conducting the party's own case in person until"

the evidential hearing begins. Our concern about that provision is that a section 11 order might be sought in a divorce case in which financial provision is being sought and there are complex issues, and if a party is not going to represent themselves in a case, that needs to be known about as soon as possible and the person who acts for them needs to be involved prior to the evidential hearing, as early as possible, when it becomes apparent that an issue has arisen and the measure should be imposed.

Jennifer Gallagher: The FLA's view is that there are practical implications of the provision. The principle is fine, but its operation might prove difficult in practice, particularly in civil cases, when the pleadings and so on have to be put in order before we get to the stage of an evidential hearing. If a solicitor has to be parachuted in at a very late stage to deal with a case in which a person has been acting for themselves, significant amendment of the pleadings might be required.

The FLA raised another, practical issue about the proposed register of solicitors, given the types of case to which solicitors might have to be appointed. That will generally happen in difficult cases, and sufficiently qualified solicitors might not want to put themselves forward for inclusion on the register if posts are not adequately funded. In particular, if the posts are funded at something like legal aid rates, I imagine that many experienced court practitioners will say, "This is not for us." There could be a practical difficulty in that the service might not be available.

Fulton MacGregor: I was going to ask you about the register in a follow-up question. I know that the Family Law Association comments on that in its submission. Does anyone else have a view? Do other witnesses agree with Jennifer Gallagher?

Nadine Martin: I agree with Jennifer Gallagher. We would be asking solicitors who went on the register to take on potentially very difficult cases at a late stage in proceedings, when they had not had the opportunity to provide advice about potential outcomes. A solicitor would be taking on a lot of risk of being blamed by the litigant, if the outcome of the litigation was not what they wanted. Such risks are inherent in solicitors' practice, but I do not think that it will be attractive for solicitors to come into cases at a very late stage.

Remuneration is an issue, but so is the professional risk that we take on, as solicitors, in conducting a proof and dealing with the determination from that. We also have to consider appeals. Appeal points could arise, perhaps because the solicitor was not fully prepared or the client did not agree with their argument on X, Y or Z.

There are lots of practical issues that need to be fleshed out before solicitors would feel comfortable about being included on such a register. If you want the right solicitors to deal with such cases, that will need to happen. The risk is that less-

qualified people would take the positions and would not provide the fullest benefit.

Fulton MacGregor: Is that the consensus view of the panel?

Ruth Innes: We would need to ensure that the register had geographic coverage and that the remuneration was sufficient to ensure that solicitors would go on the register. Some professional practice issues would also have to be addressed. In principle, we agree that the register would be a good thing, but we point out that there are practical issues.

Fulton MacGregor: I want to go back to the scope of who are "vulnerable witnesses". Scottish Women's Aid raised a concern about the scope and said that the description should apply in all cases in which there are allegations of abuse in a section 11 case, regardless of whether there are other relevant civil or criminal proceedings. Has the panel read the *Official Report* of that evidence session? What are your views on that point?

Ruth Innes: The court still has the discretion to deploy a special measure if that is raised by the party seeking "vulnerable witness" status. As long as the court has discretion to use such measures, even in a case where there has been no conviction, the issue can be dealt with.

Rona Mackay: What do you think of child contact centres in general, and is regulation required? As a matter of principle, should such centres be used in situations where safety concerns suggest that supervision is needed?

Jennifer Gallagher: Contact centres are a very valuable resource and are often used to facilitate contact in difficult cases. In principle, we do not see any difficulty in regulation. However, regulation should be balanced to recognise that such services are offered by charities—for example, Relationships Scotland's funding is under threat, so heavy regulation could prevent such providers from offering the service. There are difficulties regarding geographic availability of contact centres, which will have to be borne in mind in making any regulations.

Rona Mackay: Funding aside, do you think that contact centres should be regulated?

Jennifer Gallagher: Yes—there should be standards.

Janet Cormack: We suggested that there could be different tiers of centres—from those that facilitate simple handovers to those that provide guidance and assessment. That aspect should be taken into account.

Susan Edington: I feel that having centres for specific tasks would cause stigma. The profession does not send people to contact centres in the same way as the courts do. I am a chamber practitioner; it would be very rare for one of us to send people to a contact centre.

Another small point is that "contact" is the wrong word for such centres. If we called them child centres, family centres or something of that nature, people would be less likely to shy away from them. My clients would be happier to go if they did not think that they were places where only bad people go. The feeling is currently that they are places where parent couples who cannot parent are sent.

11:30

Rona Mackay: For clarification, if you do not use contact centres, what do you use?

Susan Edington: We are negotiators: we negotiate with other members of the family to provide that service. We do not very often have domestic violence cases, but when we do, we look to other members of the families to provide that service, and we make sure of the safety of the children in that manner. I use collaborative law and other forms of dispute resolution, so we are perhaps able to explore those areas in a much wider way than the courts.

Liam Kerr: Section 16 concerns enforcement of court orders. It will impose a new duty on the court to investigate why there has been a failure to comply when a person fails to follow a court order. A number of stakeholders are supportive of that provision: the children's commissioner and Children 1st in particular say that such investigations do not typically happen, in practice. That view contrasts with that of the Faculty of Advocates, which said that the power already exists and the courts normally investigate the circumstances anyway. The committee has also heard from the Sheriffs Association, which suggests that the new duty would prevent a robust approach to enforcement. The senators of the College of Justice say that it could encourage people to disobey a court order.

I am interested in the panel's views on the matter, starting with Ruth Innes of the Faculty of Advocates.

Ruth Innes: Our understanding is that, if a court is going to find somebody in contempt of court, it will have had to investigate the reasons for that, because they are relevant to whether the person can be found to be in contempt. The reasons must be considered for an order to be varied or discharged under section 11 of the Children (Scotland) Act 1995. Our understanding is, therefore, that sheriffs and judges already carry out such investigations; they can appoint a child welfare reporter to investigate why something has not been obtempered. I have come across that

and have reported to the court on such issues. We do not see how the provision would add to what courts currently do.

Liam Kerr: Just to be clear, would you say that the children's commissioner and Children 1st have perhaps misunderstood the position and that, in your experience, investigations are already happening, therefore we do not need section 16?

Ruth Innes: Correct.

Liam Kerr: Thank you. Does anyone else want to comment?

Janet Cormack: You will not be surprised to hear that Clan Childlaw supports inclusion of the provision. We made the point about adding to the provision the need to have regard to the child's views when investigations are taking place, so that that is on the face of the bill.

Liam Kerr: I understand that. Why should the committee prefer your view that there is a lacuna that we need to fill by imposing a positive duty, as opposed to the view of the Faculty of Advocates, which says that, in its experience, the provision is not necessary because such investigations already happen.

Janet Cormack: I am afraid that I cannot give any more detail on that right now. I would be happy to get back to the committee after consulting colleagues.

Liam Kerr: Thank you.

Jennifer Gallagher: It is important to note that when a court has made an order after hearing evidence, the process of dealing with contempt of court should not involve rehashing over and over again matters on which the court has already made findings in fact. One of the risks is that a party who is unhappy with the order that a court has made after hearing evidence, and who has set their face against abiding by the court order, could use the investigation element of the process as an opportunity to go back over ground that has already been determined by the court. Therefore, it has to be made clear that the investigation could not relate to those matters.

As Ruth Innes said, the existing contempt of court procedure involving the minute, answers and investigation would allow for such matters to be dealt with. Those cases will always be difficult.

That brings us back to what we talked about earlier, when we discussed early intervention with families before they get to court. When it gets to that point, and someone has set their face against abiding by a court order, there is, in practice, very little that the court can do to deal with that. Perhaps looking at the case in more detail before things get to that stage would be helpful, but that would not work in every case.

Liam Kerr: I will stick with section 16. Other evidence that the committee heard said that there could have been more problem-solving approaches or further sanctions in section 16 to deal with such situations. What other problem-solving measures should be in the bill and should they be in section 16?

Ruth Innes: Problem-solving measures are about saying, "The order isn't working, for good reason, but the court has already determined that it is in the best interests of the child to have contact with a parent, so what can we do to resolve the issue?" Then, if the order is varied or discharged, the welfare of the child has to be looked at again, under section 11(7) of the 1995 act. We always come back to the welfare principle; the court already has the ability to solve problems using that section and by going back to the general provisions that it can make.

Liam Kerr: If we were to amend the bill to add in specific problem-solving approaches, you would argue that that would impose a restriction that is not there at the moment.

Ruth Innes: Exactly. The welfare of the child is the paramount consideration of the court. The views of the child have to be taken into account. The court has to have flexibility to deal with the case of the individual child, as has been suggested.

Liam Kerr: I understand.

Nadine Martin: In practice, many of my clients who have been on the other end of a recalcitrant parent's failure to fulfil the obligations under an order feel as though there is nothing that can be done. There is a perception that it is difficult to resolve a situation in which one parent says, "I just won't make this child available to you." It is one of those situations in which there is no easy fix. There is a perception that, in some cases, the court will not do very much about it. We have proofs where the sheriff establishes that there is no reasonable excuse why contact is not taking place, but by that time contact has not taken place for a long time and you have a child who is saying, "I don't want to go any more. It's been a long time and I'm nervous about it." That is a reflection on practice and what the people who come to me say—they say that they worry.

The question in the consultation paper that asked whether the court should be able to apply sanctions garnered a lot of response. Ruth Innes is correct in that the best interests of the child always have to be paramount, but sometimes imposing a sanction on the parent with whom the child lives does not benefit the child. I have many clients who have said to me that they do not feel as though they got a resolution at the end of the process—it is difficult.

Liam Kerr: Do you propose a solution to that?

Nadine Martin: That is the problem. As Ruth Innes just said, the minute you start to put in sanctions and problem-solving measures, the bigger question that arises is whether that is in the best interests of the child. Does it help the child to penalise the parent with whom the child lives? It is a difficult question, but I saw that it garnered a lot of attention in the answers to the consultation paper. Practitioners would like there to be an answer, but I am not quite sure what it is, other than reflecting on the child's best interests.

Jennifer Gallagher: You could look at trying to address the underlying problems through avenues such as family therapy, but the problem with that is that it is not available throughout the country and it is not adequately funded. You would need a whole infrastructure of facilities if you were really serious about problem solving and trying to deal with underlying issues.

Susan Edington: I come back to the idea of a cohesive set-up, so that we can bring in all those things at a much earlier stage. The bill involves bolting things on to a system that needs a complete overhaul.

Fulton MacGregor: I have a question about the new duty at section 16. It is interesting that the majority of the panellists today—although not all of them—are giving a different view from the one that the committee has previously heard. The vast majority of the evidence, as Liam Kerr has said, has been to the opposite effect. I want to tease that out because, as a committee, we need to see where that is coming from.

Is it fair to say that not every case in which an order has not been complied with—for whatever reason—leads to proceedings for contempt of court?

Nadine Martin: That is correct. Someone has to initiate it and bring it to the court's attention.

When a court order does not operate, the person who is supposed to get contact might say, "I cannot fund this," or, "I do not want to go back to court—it's not working; it's too difficult." Sometimes, people say, "My child is so upset when they are brought for contact that I'm not going to force the issue." Unless the failure to obey is brought to the court's attention, it will not independently check up and ask what is happening.

Fulton MacGregor: I understand that, if contempt of court proceedings are initiated, there will be an investigation, as Ruth Innes described. However, is it possible then that the new duty will be implemented in cases where proceedings for contempt of court have not been brought? I do not know whether you would call it a lower threshold, or whether it is just that proceedings have not been initiated, but is it possible that the court will use the new duty at an earlier stage?

Nadine Martin: Generally, in procedural terms, if a court makes an order—usually, a final order, or something approaching a final order, for example about the times when contact should take place—it may fix another hearing for everyone to come back and see how the order is working. However, if it is a final order, the case is finished unless someone comes back to the court and says that there are problems with it, that they would like changes, or that it is not happening. I am not sure how a court could, in practical terms, independently initiate an investigation into how well an order is working.

Jennifer Gallagher: I agree. My experience of dealing with such cases is that interim orders can be made at a reasonably early stage and that, where they are not complied with, that will generally be dealt with by a child welfare hearing at which the issues will be aired and the sheriff will look at what is happening and potentially make changes to what was ordered. Contempt proceedings would not necessarily be initiated at that point. As Nadine Martin says, that would be more likely for a final order that is not complied with. In such cases, when the client seeks advice, we might try to negotiate a resolution with the solicitor for the other party, but we will probably initiate a minute for failure to obtemper the court's order, and then the whole process flows from there.

Fulton MacGregor: The majority of panel members do not see when section 16 would be used. Should the committee get more clarity on that?

Ruth Innes: As I have said, our impression is that the court is addressing the reasons for failure in those contexts. When it arises on an interim basis and a case comes before the court again because an order has not worked, the court addresses the reasons for that and considers varying the order or making a different order. When there are contempt proceedings, the court also looks at it at that stage.

As I have already said, section 16 does not add anything to what the court is already doing and has to do.

11:45

Liam Kerr: I want to be absolutely clear about what happens in the process. Section 16 is about the court understanding why there has not been compliance. As part of that consideration, I presume that the court will hear representations from the people who are involved or their representatives. One party will say, "I didn't

comply, and my representative is going to put forward this case," and the person on the other side will say, "You should have complied, because of X, Y and Z." Will that not be the investigation into what has happened?

Ruth Innes: Yes—that is the process that we are talking about. On an interim basis, the person might come back to court and say that the court order is not working. For example, the individual who is acting for the person who has not been getting the contact will put a motion before the court, so the other side will have to come along and explain the failure to adhere to the order, and the court will then look at varying or discharging that order.

In relation to contempt proceedings, the person who says that there has been contempt will say that they have not got the contact that they asked for. The response to that will be the explanation as to why that has not happened, and the court will then investigate.

Liam McArthur: Earlier, I said that the Scottish Government has consulted on issues relating to confidentiality but that it chose not to include such provisions in the bill. Another issue that falls into that category relates to the rights of unmarried fathers. A consultation touched on the possibility of introducing the compulsory joint registration of births or of automatic parental rights and responsibilities being attached to unmarried fathers. Variants of those models are used in other parts of the world.

At the outset, Dr Barnes Macfarlane provided research to the committee, and she suggested that work should be done on the current law on unmarried fathers, because it is increasingly out of step in human rights terms. Does anyone on the panel take a view on the rights of unmarried fathers? Should something be done? I recognise that the number of such cases is just over 2,000—about 4 per cent—so we are not talking about vast numbers, but the issue is clearly of significance to those who fall into that category.

Ruth Innes: The issue ought to be looked at again, but the question is how that should be done. From my practice, and from looking at the rights of fathers in other jurisdictions, I am aware that such rights are narrower here than they are in other jurisdictions. The question is how we regulate that. If a father is not named on a birth certificate and then has to go to court to get parental rights and responsibilities, that seems disproportionate.

Liam McArthur: One of the previous witnesses characterised the situation by referring to the right of the child to know who their father is—in a sense, that is part of knowing who they are. However, you are right that we do not yet have a clear understanding of a route that might allow us to make some headway, and I recognise that introducing automatic joint registration or automatic PRRs might tip the balance too far.

I see that no other witnesses have a view on that issue, so we will wrestle with it on our own.

The Convener: That concludes our questioning. I thank the panel for attending. It has been a worthwhile session that has certainly given the committee an insight into the practical implications of some of the very complex issues that the bill seeks to address.

That concludes the public part of today's meeting. Our next meeting will be on Tuesday 4 February, when we will continue our evidence taking on the Children (Scotland) Bill.

11:49

Meeting continued in private until 12:25.

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