JUSTICE 1 COMMITTEE

Wednesday 16 March 2005

Session 2

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JUSTICE 1 COMMITTEE
8th Meeting 2005, Session 2

CONVENER

*Pauline McNeill (Glasgow Kelvin) (Lab)

DEPUTY CONVENER

Stewart Stevenson (Banff and Buchan) (SNP)

COMMITTEE MEMBERS

Marlyn Glen (North East Scotland) (Lab)
*Mr Bruce McFee (West of Scotland) (SNP)
*Margaret Mitchell (Central Scotland) (Con)
*Mrs Mary Mulligan (Linlithgow) (Lab)
*Mr Jamie Stone (Caithness, Sutherland and Easter Ross) (LD)

COMMITTEE SUBSTITUTES

Brian Adam (Aberdeen North) (SNP)
Helen Eadie (Dunfermline East) (Lab)
Miss Annabel Goldie (West of Scotland) (Con)
Mike Pringle (Edinburgh South) (LD)

*attended

THE FOLLOWING GAVE EVIDENCE:

Carol Duncan (Scottish Executive Justice Department)
Kirsty Finlay (Scottish Executive Legal and Parliamentary Services)
Moira Wilson (Scottish Executive Justice Department)

CLERK TO THE COMMITTEE

Callum Thomson

SENIOR ASSISTANT CLERK

Douglas Wands

ASSISTANT CLERK

Lewis McNaughton

LOCATION

Committee Room 6

Scottish Parliament

Justice 1 Committee

Wednesday 16 March 2005

[THE CONVENER *opened the meeting at 10:13*]

Item in Private

The Convener (Pauline McNeill): Good morning and welcome to the eighth meeting in 2005 of the Justice 1 Committee. It would be helpful if members switched off their mobile phones, as they normally do.

The deputy convener of the committee, Stewart Stevenson, will join us at some point. I have received no other apologies.

Under agenda item 1, the committee will consider whether to take agenda item 4—rather than agenda item 3 as the previous version of the agenda stated—in private. Under item 4, the committee will consider its approach to stage 1 of the Family Law (Scotland) Bill. Do members agree to take item 4 in private?

Members *indicated agreement*.

Family Law (Scotland) Bill: Stage 1

10:15

The Convener: Agenda item 2 is the Family Law (Scotland) Bill. I welcome our witnesses and thank them for coming to the meeting. Carol Duncan, Moira Wilson, Alex Mowat and Kirsty Finlay are all in the bill team.

I invite Carol Duncan to speak to the bill team's paper, after which we will proceed straight to questions.

Carol Duncan (Scottish Executive Justice Department): I have a deeply irritable cough and a cold and forewarn members about my spluttering—I am sorry about that. I have my handy Strepsils with me, so we will see how things go.

A short overview of the bill's main contents might assist the committee. Of course, the papers that are already available to the committee contain detailed descriptions of the bill's provisions, supporting data and research evidence.

The bill deals with topical, problematic, thought-provoking and challenging issues. Family law impacts on everybody, and everybody has a view on it. Ministers seek to promote stable and supportive adult relationships above all, as children thrive when there are such relationships. However, ministers also believe that the law must recognise social change and changes in family types in particular. In the bill, ministers offer realistic and considered measures that acknowledge current trends and provide safeguards and protection for those who are vulnerable. Ministers are particularly concerned about ensuring that children's needs are met when adult relationships are under stress or have broken down. Children should not be disadvantaged as a result of the decisions or choices that the adults in their lives have made.

The Executive does not seek to intrude unnecessarily on family life, but to provide a sensible framework for resolving disputes and safeguarding interests when relationships are not working. Ministers respect individual freedoms and do not seek to impose mutual obligations where adults have not chosen them. However, a safety net is needed for those who may suffer disadvantage as a consequence of their legal status. Striking the right balance is hard, and reasonable people may differ as to where the balance lies.

Legislation in isolation can be a blunt tool. That is why, when the bill was introduced, ministers announced several positive non-legislative

measures that will support and complement the legislative provisions in a meaningful and effective way.

It is important to see the bill in context. Much of Scotland's family law is of fairly recent vintage and works well—it does not need a radical overhaul. However, certain areas need to be updated so that provisions that are now regarded as unfair or unduly harsh are removed, and progressive provisions that reflect the way in which many families live are introduced. Ministers are keen to provide a fair and durable framework for family relationships in early 21st century Scotland.

Furthering and protecting the interests of children is a central goal of the bill. As a result, it upholds and seeks to extend the ground-breaking principles of part 1 of the Children (Scotland) Act 1995.

The Executive has consulted widely on its proposals. Wrestling with the range of stakeholders' views—which are sometimes diametrically opposed—has not been an easy task. Family law is, by its very nature, an emotive subject. It is clear that some people who responded to the consultation feel aggrieved and excluded as a consequence of their personal experience. The Executive has listened hard throughout the consultation process and has tried to steer a careful course.

In reaching judgments, ministers have considered evidence, statistical data, social and legal studies and comparative research. As members know, the Executive recently published a research paper entitled "Cross-jurisdictional Comparison of Legal Provisions for Unmarried Cohabiting Couples", which addresses the emerging approaches that other countries are adopting.

The Scottish Law Commission has made an invaluable contribution to the bill. As an independent consultant on the development of family law, the commission has offered an impartial evaluation of existing law and the steps that can be taken to address its outdatedness.

I turn to the main reforms that the bill proposes. The goal of the divorce reforms, which will reduce the periods of separation that constitute grounds for divorce, is to lessen acrimony in divorce proceedings and to enable family re-formation. Adult conflict has a detrimental effect on children, and steps to alleviate such conflict are to be preferred. The reforms will not increase the rate of divorce in Scotland. The rate of failed marriages is more closely linked to the preparation for marriage and to the attitude that adults take with them into relationships than it is to the length of waiting time before breakdown is acknowledged in law.

Divorce is often a painful and distressing event in family life, but it is part of a wider process of transition, and the law, ministers believe, should enable adults and children to come to terms with it and then move on. The proposed reforms will simply mean an early recognition of the fact that certain relationships have ceased to function. They will not detract from the special status of marriage in our society or make divorce easy; they are about ensuring that the processes for ending a marriage avoid bitter and protracted disputes, which benefit no one, least of all children.

Cohabiting couples are no longer a minority family type and cohabitation is now prevalent in Scottish society. Forty per cent of children in Scotland are born to unmarried parents nowadays. The reforms in the bill will neither undermine marriage nor the freedom of those who have deliberately opted out of marriage. The bill seeks to provide safeguards to address the current vulnerability of long-standing partners and their children when relationships break down and when one party dies without a will. The bill gives a clear steer that the policy focus is on interdependent relationships, in which the parties have created a joint life. It is to those cohabiting relationships that the safeguards will apply, not those that are merely transient and without any sign of commitment.

Ministers propose to give parental responsibilities and rights—PRRs—to unmarried fathers who jointly register the birth of a child with the child's mother. There is a common misconception that being named as the father on the birth certificate confers parental responsibilities and rights; currently it does not. Rights are given in order to allow a person to fulfil his or her parental responsibilities. Having parental responsibilities and rights entitles a parent to take major decisions relating to the child, such as on schooling, on where they live and on medical treatment.

Joint registration takes place in cases where both the mother and the person acknowledging themselves to be the father have attended the registry office and signed the register together; where the mother produces a statutory declaration by the person acknowledging themselves to be the father and declares, in the prescribed form, that he is the father; or where the father produces a statutory declaration by the mother that he is the father and acknowledges himself to be the father in the prescribed form. At present, the law in Scotland gives no automatic recognition to unmarried fathers, apart from their child support obligations. That does not reflect the reality of many families in Scotland today.

Ministers concluded that the proposed reforms in this area should not be retrospective, because to apply the changes retrospectively might cause difficulties for mothers who have chosen not to

marry the father. They would be faced with a change in the legal situation, and they would be obliged to take legal recourse simply to restore the status quo. Many of them would be particularly vulnerable and would not be in a position to take such action. However, there is nothing to prevent the mother and father of the child reregistering the birth. It may have been that, when the child's birth was first registered, only the mother's name was put on the birth certificate. The adults could subsequently decide that they wished the child to be jointly registered and they could carry out the registration accordingly. In such cases, the father would obtain automatic parental responsibilities and rights.

Ministers have taken into consideration the need to ensure that that and other reforms do not expose mothers and children to domestic violence. The provisions on matrimonial interdicts strengthen the protection afforded to victims of abuse.

Some families in transition work everything out for themselves, but others need encouragement to resolve their differences in a conciliatory manner. The Executive actively and financially supports family relationship support bodies, which can offer advice at the onset of difficulties and, through early intervention, can help couples who want to make a go of their joint life to do so. Where break-up is inevitable, out-of-court resolution is preferred. The expertise of mediation services is extremely valuable.

Ministers believe that the bill offers a comprehensive and sensible response to the issues that emerged from the consultation exercise and stakeholders' contributions.

I will now address the matters that ministers consider are not best served by legislation. The Executive has listened carefully to the views of grandparents and step-parents on the issues that concern them. Grandparents seek an automatic right of contact with their grandchildren. Step-parents seek a facility to acquire parental responsibilities and rights by entering into a written agreement without recourse to court.

Ministers fully appreciate the significant role that grandparents and step-parents play in the lives of children. It can hardly be overstated. They can enhance children's development and help them to grow up in a stable and positive environment.

However, the question is whether legislation is the most efficacious and appropriate medium to facilitate grandparent and step-parent involvement in children's lives. Ministers believe that it would be more appropriate to address such issues by pursuing a non-legislative route that would meet the real concerns of grandparents and step-parents and achieve meaningful results.

Ministers have asked officials to prepare for consultation a draft grandparents charter with proposals for giving wider recognition to the role played by grandparents. The charter might also suggest other non-legislative ways in which the standing and locus of grandparents could be clarified and strengthened. In addition, it will also consider how grandparents might have better access to family mediation and relationship support.

Furthermore, Alan Finlayson OBE, former reporter to the children's panel and honorary sheriff, has been appointed by the Executive to help to prepare what has been called a parenting agreement. In that task he will be supported by a reference group of key stakeholders who will also assist with the grandparents charter. The parenting agreement will contain information, advice and guidance for separating parents on the practical issues that they should consider in relation to their children, such as arrangements for contact, after-school care and holidays. It will assist families who are in transition to identify the issues that require to be addressed with a view to reducing conflict and protecting children.

In addition, and as previously announced by ministers, the Executive will launch an information and communication campaign to tell people about the changes to family law, the non-legislative measures and sources of additional help and advice. It emerged from the consultation exercise that there is widespread ignorance of the existing law, such as the myth of common-law marriage. That requires to be addressed.

The consultation also revealed that there is some dissatisfaction with court processes associated with family cases. Family law is only one of the areas that is dealt with routinely by the Scottish civil courts. Civil justice is a public service that has a vital role to play in supporting family relationships and helping to resolve conflict. The Executive is clear that all public services should be firmly focused on the needs of those who use them and it is keen to hear ideas about how matters can be improved.

The Executive is supporting the Scottish Consumer Council's series of civil justice seminars, chaired by Lord Coulsfield and involving stakeholders from all parts of the civil justice system. The seminars are examining civil justice critically and aiming to identify proposals for change and development. A report of the seminar series will appear in the autumn. Ministers will carefully consider the emerging issues and any proposals for change that come from the seminar series as well as from the consultation and debate around the bill and elsewhere, and they will assess the best way ahead. Family law court processes will naturally feature in any detailed review of court procedures and practices.

As I said earlier, family law does not exist in a vacuum, so the Justice Department has taken steps to ensure a joined-up approach through consultation with colleagues in the Education and Development Departments for their respective interests in family policy and inclusion. Their input has helped us to identify the cross-cutting implications of legislation in a multi-stranded area of law.

Executive amendments have already been considered. Ministers will introduce amendments on private international law and its impact on the civil partnerships amendment to section 7 of the Family Law (Scotland) Act 1985, and it will make provision to take account of the Pensions Act 2004. The Executive will also propose some amendments to provisions in the bill.

Ministers believe that the bill strikes a reasonable balance between state involvement in the lives of families and the protection of those most vulnerable to less favourable outcomes. The package of legislative and non-legislative measures acknowledges and addresses the development of family law in Scotland. In conclusion, ministers look forward to a serious, well-tempered and open debate on and scrutiny of the bill during its progress through Parliament.

10:30

The Convener: Thank you. Your voice held out remarkably well.

Carol Duncan: It is early days.

The Convener: I know. There is still a way to go.

I would like to clarify what you said about Executive amendments. Do you already know that you intend to amend the bill?

Carol Duncan: Yes. However, there will be no sea change in policy: the amendments will be about technical matters that have arisen. We have spent a considerable time speaking to key stakeholders, in particular family law practitioners. They have pointed out that they think that certain sections are not quite right and do not address the legal problems that are out there, so that is why we are speaking to them.

The Convener: Given the widespread consultation and the delay in publishing the bill, should that sort of thing not have been caught before the bill was published?

Carol Duncan: With the best will in the world, one would have hoped that that would have been the case

The Convener: Did you run out of time?

Carol Duncan: The matters will be addressed. The bill was presented to the Parliament in good shape. As we know, the drafting of bills is an art rather than a science, but we are optimistic that an exceedingly good product will emerge at the end of the day.

The Convener: I am sure that you can bear it in mind that the committee is concerned that, before we have even started to consider the bill, you have advised us that there are omissions that need to be rectified.

Carol Duncan: As I said, the amendments will be technical. They do not represent a change in policy: the underpinning policies remain the same.

The Convener: Can you indicate what the amendments are about? For example, you mentioned civil partnerships: is that one of the matters on which you will introduce amendments?

Carol Duncan: I will pass that question to Kirsty Finlay, from the office of the solicitor to the Scottish Executive.

Kirsty Finlay (Scottish Executive Legal and Parliamentary Services): When we drafted the bill we did not know when the Civil Partnership Act 2004 would be commenced. Therefore, any references to civil partners in the Family Law (Scotland) Bill would have hung in the air until the commencement of the 2004 act. To the best of my knowledge at that point in time, it could have been well into 2006 before the 2004 act was fully commenced. Therefore, we had to draft the bill to make the minimum number of references to civil partners. That was not ideal, but it was felt to be the best approach, given the anomaly in timing that we expected there to be between the commencement of our legislation and that of the Civil Partnership Act 2004.

The position now is that the Civil Partnership Act 2004 will be fully commenced by 5 December 2005, so we want to amend our legislation to take account of the fact that that act will come into force earlier than we had anticipated. We hope to have a more cohesive piece of legislation that ties in more neatly with the Civil Partnership Act 2004 than would previously have been possible.

The Convener: Thank you very much.

Margaret Mitchell (Central Scotland) (Con): Good morning. I will explore the issues around the provisions that relate to divorce. Some countries have a no-fault approach to divorce but Scotland has traditionally had a joint approach, which is fault and no-fault based. What is the thinking behind maintaining that approach, especially in the light of your comments that very strongly recommended trying, wherever possible, to have a non-adversarial approach to divorce?

Carol Duncan: We wanted to strike a balance on divorce and we were guided by the recommendations made by the Scottish Law

Commission. As Margaret Mitchell is probably aware, the Scottish Parliament information centre has prepared briefing papers on divorce, which include a comprehensive analysis of different divorce law systems in different countries. You are right to say that some countries have clearly gone for the no-fault system. From the research that my colleagues and I are aware of, the mixed system seems to be the internationally prevalent divorce regime—if I can call it that. The reason why ministers opted to retain the mixed system is because they wanted to take a pragmatic approach to present trends in society. Plainly, ministers want to reduce the amount of acrimony and recrimination that often ensues when a marriage breaks down.

If I may, I will refer to some statistics on the subject. The SPICe paper bears out the fact that 82 per cent of divorces in Scotland are based on the no-fault ground. With consent, no-fault divorce can be obtained after a two-year separation or, without consent, after a five-year separation. The other 18 per cent of divorces are based on what we call the fault grounds, which are adultery, unreasonable behaviour and desertion.

The Executive must steer a difficult course. It has weighed up the arguments on either side and has decided that no-fault divorce is to be preferred. That said, I am sure that we can all envisage a situation in which a marriage has broken down because of intolerable behaviour. The question is whether the victim in that relationship should be forced to remain married to an abusive partner. Obviously, the Executive has taken on board the submissions that were made by religious bodies. I believe that adultery is a major factor for those bodies.

We have compared the different regimes that are out there and we have looked at the needs of Scottish society. On balance, we believe that the mixed system is the correct way to proceed. I appreciate that the proposal is not radical; however, we think that it is sensible and pragmatic.

Margaret Mitchell: It is helpful to tease out the issues and see the thinking behind the bill. I can see the logic in what you say.

I will move on to cases where there is a consent-based divorce. Under the provisions of the bill, it is still necessary for one party to sue the other. Was consideration given to provision for a joint petition?

Carol Duncan: It is difficult to know whether that would manifestly change the end product that would be achieved, which is the divorce. If no children are involved, the pro-forma form that is presently used for two-year and five-year divorces would be used. Notwithstanding the nomenclature of pursuer and defender, all that we are talking about is a legal document that the parties sign in front of a solicitor and present to the court. In cases that do not involve children, the situation that you are positing would not make an awful lot of difference. I hope that that answers the question.

Margaret Mitchell: It answers it, but I do not necessarily agree with what you said. A joint petition would be an eminently sensible way forward, whether or not children were involved. The process does not have to be unduly technical and it could be simplified and made less adversarial by a joint petition. The parties have consented to the divorce; why do anything that has the potential to cause problems?

Under the new provisions it will be possible to get a divorce within a year. How practical is that, given court waiting lists?

Carol Duncan: The Scottish Court Service has been consulted throughout the process. It is well aware of the provisions and of the tie-in with the financial memorandum—the member will doubtless have read it—which sets out how the changes in divorce law will impact on the courts. The financial memorandum sets out that the Scottish court service will make provision for the changes in the legislation.

Margaret Mitchell: Are you confident that divorce within a year is achievable?

Carol Duncan: I do not think that I am in a position to answer that. The issue is very much one for the Scottish Court Service; all I can say is that it is alive to the changes and will have to make the appropriate recruitment of extra staff, or whatever.

Margaret Mitchell: I thought that it would be useful to get on record the thinking behind section 14, particularly in relation to using the date of separation or that of decree for the valuation of matrimonial property.

Carol Duncan: Without being overly technical, I should say that section 14 addresses the decision in the case of Wallis v Wallis. The current legal position is that the crucial date for triggering the valuation of matrimonial property is the relevant date, which in most circumstances is the date of separation.

Family law practitioners do not completely agree on this matter. Although some solicitors believe that this is not a problem that requires to be addressed, others believe that it is. The point is that, when parties separate one person moves out of the matrimonial home—for example, the husband moves out while the wife remains there. Part of the divorce settlement involves transferring the value of the matrimonial home, and taking that value as at the date of separation does not allow

for any increase in the property's value over the intervening period. That applies not only to matrimonial heritage but to pensions, especially in cases that involve husbands or wives who are police officers or are in the army. Their pensions can fluctuate from one day to the next, depending on whether they are coming up to their 30 years' service. I use that as an example.

In section 14, we seek to give the sheriff or the Court of Session—it will tend to be the sheriff in this matter—the discretion to consider any increase in value of the matrimonial property in the ensuing period and to decide what is fair and reasonable. Nevertheless, we are preserving the relevant date. We are not 100 per cent sure that we have got the matter right and a working group that will include family law practitioners, solicitors, the Scottish Law Commission and officials will be set up to tease out these issues.

Margaret Mitchell: That is helpful. It is clear that there is an issue to address but, as you have said, there is a lot behind it.

Carol Duncan: It is an exceedingly complex matter.

Margaret Mitchell: Absolutely. I am pleased that you are addressing it and even more pleased that you are setting up this working group to consider it in more detail.

Mr Bruce McFee (West of Scotland) (SNP): Section 17 of the bill deals with parental responsibilities and rights of unmarried—

Carol Duncan: My colleague Moira Wilson will answer those questions.

Mr McFee: That is okay—you should save your voice.

The bill's pretty broad definition of joint registration includes potential joint registration of a birth or amendment to the registration of, for example, a child who is born before the legislation is enacted and whose father is not declared on the birth certificate. The father will be able to register his name on the certificate thereafter. Are you happy that, after the legislation comes into force, amending the registration will confer new parental responsibilities and rights on someone who, for whatever reason, did not wish to be registered—indeed, perhaps the mother did not want him to be registered—but an unmarried person who is registered as the father of the child at the time of birth before the legislation comes into force will not have the same responsibilities and rights?

Moira Wilson (Scottish Executive Justice Department): You have pointed out a potential anomaly. However, the number of re-registrations in such circumstances is likely to be small. The remedy is for the father who is named on the birth certificate to sign a parental responsibilities and rights agreement form with the mother, if she so agrees, and to register it in the books of council and session. One would assume that the mother would agree if she were willing to re-register the birth.

Mr McFee: Yes, but that option is already available. For fathers who are in that position, there is no change. Those fathers will not automatically have parental responsibilities and rights conferred on them, unlike individuals who were not registered initially, but who subsequently become registered. There is inequity there.

Carol Duncan said that there was nothing to prevent re-registration of a birth. I presume that she was talking about cases in which the father was not registered in the first instance.

Moira Wilson: Correct.

10:45

Mr McFee: The possibility of re-registration does not also apply to fathers who were registered in the first instance.

Moira Wilson: No. I agree that, in that regard, there is a slight anomaly. It is a fact that parents can choose to re-register a birth, but that re-registration can be done only with the mother's full consent.

Mr McFee: Yes, but a birth cannot be re-registered, even with the full consent of the mother, if the father is already registered.

Moira Wilson: No, but in those circumstances the mother and father could sign an agreement form that would have the same effect.

Mr McFee: That is the present situation.

Moira Wilson: That is right.

Mr McFee: That is one side of the issue. There is an argument that section 17 is not retrospective. Are you happy that your proposals will conform to the United Nations Convention on the Rights of the Child and the European convention on human rights, given that—in effect—they discriminate against certain fathers?

Moira Wilson: We have received assurances on the balancing act that we have tried to perform in relation to the rights of the father and the rights of the mother. The judgment that was made was that it would be inequitable to go back and change the legal relationship when a birth had been registered in a particular way with a particular legal consequence, because to do so would leave a mother in a situation in which she would have to go to the courts to reinstate the status quo. Given that the father will not find himself in different circumstances, in that remedies will continue to be open to him—in the form of parental agreements

or recourse to the courts—the advice that we have received is that section 17 is fine.

Mr McFee: The provisions are not retrospective; they will give different rights to different fathers at different times. Are you happy that, in that regard, they are ECHR compliant? You have explained why the provisions are not retrospective and I understand your reasoning, but are you happy that they meet ECHR requirements not only in so far as they apply to fathers who were not registered at the time of the birth and who subsequently registered, but in so far as they apply to fathers who might have been registered for 10 years?

Moira Wilson: We are happy in that there are remedies that will remain available to such fathers. It is a question of balancing the rights of the parties concerned. The judgment that was made was that retrospection would not be appropriate.

Mr McFee: I want to probe the Executive's thinking behind why the bill will limit conferral of responsibilities and rights to fathers who register. In other words, even after the bill comes into force, if the father is not registered, he will not have responsibilities and rights. Why was that decision taken? Under current legislation, if a father can establish by another means that he is the parent, he would be entitled to the responsibilities as opposed to the rights. Why was it decided not to extend responsibilities and rights to fathers in such situations? I can see immediately that one would not want to do that in a case that had involved rape. Was there anything else behind it?

Moira Wilson: The thinking behind it was that it would be inappropriate to confer parental responsibilities and rights on all fathers in situations in which it was clear that the mother had not agreed to that. You cite the example of a case involving rape; the same argument would apply to a very casual relationship. The balancing factor was that ministers were looking for a sign of the father's commitment to the relationship, which would be provided by joint registration of the birth.

Mr McFee: Would that situation differ clearly from the situation within marriage?

Moira Wilson: Yes.

The Convener: Currently, can an unmarried father put his name on the birth certificate without the mother's consent?

Moira Wilson: No. There must be joint consent. Two declarations are required, depending on whether the mother or the father registers the birth, but there must be a statutory statement by both parents before both names can be included on the birth certificate.

The Convener: The law as it stands requires consent.

Moira Wilson: Yes.

The Convener: My question is similar to the one that Bruce McFee asked, but I will put it another way. Currently, if a mother and father both agree that the man is the father and decide to register a birth jointly, do parental responsibilities and rights for the father flow from that?

Moira Wilson: No—not under the existing law.

The Convener: I have difficulty understanding the logic of that, given that the mother would have consented to the father's being named on the birth certificate. That means in effect that a mother could deny parental responsibilities and rights to a man whom the law recognises as being the father.

Moira Wilson: That is the current situation, which is as decided by the Children (Scotland) Act 1995. That decision is now being reviewed and if the bill is enacted the position will be reversed.

The Convener: I thought that you said that the provision would not apply retrospectively.

Moira Wilson: Sorry—I meant that the position would be reversed for future circumstances.

The Convener: I am having difficulty understanding the logic behind not allowing the provision to apply retrospectively. If a mother and father are not in dispute about who is the father, how can the law deny a father the rights that flow from recognition that he is the father?

Moira Wilson: A mother would have made the decision to put both names on the birth certificate in the knowledge of the legal consequences. It would be wrong to change that consequence retrospectively.

The Convener: Are you suggesting that if the mother had known that the consequence would be different—

Moira Wilson: She might have made a different decision.

The Convener: Right. However, the bill would allow a mother to deny a father the rights that he wants by refusing to consent and by forcing the father to go to court, with all the costs that that would entail. I am not arguing in favour of a position, but I am trying to understand what the bill would do.

Moira Wilson: The bill would retain the status quo in that the legal effects of the decision that parents made at the time of the birth will remain. If the parents together wanted to change the legal effects of their decision, they would have recourse to a parental responsibilities and rights agreement.

The Convener: Is there unfairness in that even when there was no dispute about a man's being the father, he would not have the same rights as a married father or, indeed, the mother?

Moira Wilson: There might be no dispute that the man was the father and had registered the birth jointly with the mother. However the mother would have made the decision to register the birth jointly in the knowledge of the legal consequences. It is considered wrong to change legal consequences retrospectively.

The Convener: Would the bill therefore—rightly or wrongly—recognise a mother's right to deny a father parental rights?

Moira Wilson: It is unusual for legislation to apply retrospectively. Kirsty Finlay will probably talk generally about that.

Mr McFee: Before she does so, I suggest that the bill's provisions on the division of matrimonial assets would do exactly that and that they will apply retrospectively. People who entered marriage contracts that had certain legal consequences would face different circumstances after separation or divorce. I am having difficulty with the logic of your argument. You say that we cannot suddenly change the legal consequences of a father's decision to register a birth if he was signing up to one set of legal consequences when he did so. However, the bill will change the legal consequences of divorce. The logic seems to have been selectively applied.

Kirsty Finlay: As a general rule, Scottish ministers do not favour retrospection. The law should be clear, precise and predictable. We are talking about situations in which parents have registered the birth of their child in the full knowledge that registering the birth and naming the father on the birth certificate do not confer responsibilities and rights. At that time, parents are advised that in order to have responsibilities and rights, an agreement must be entered into.

Mr McFee: If I am being asked to accept that argument, why should we prevent unmarried mothers and fathers of children who were born before the bill was passed from simply re-registering—although the father is already registered—which would confer the rights on the father without his having to go through all the problems of establishing rights by other means?

Kirsty Finlay: The option of re-registering is not open to parents, because the facts and circumstances of the birth are the same. That would involve changing a legal document and that is not what we are doing.

Mr McFee: I say with respect that it would not involve changing a legal document: the document would say the same thing. To register a father who had not registered in the first place would change the document. What I suggest is to record exactly the same thing—it is the other way round. However, my suggestion would confer responsibilities and rights on the father, if that were possible.

Kirsty Finlay: The matter has been given much consideration. The decision was taken not to make retrospective the conferral of parental responsibilities and rights as a result of registering both parents.

Mr McFee: Will you repeat that?

Kirsty Finlay: The decision has been taken that if a mother and father are already registered, the situation will remain as it is. The decision was taken not to make the change in the legislation retrospective.

Mr McFee: I understand that the decision was taken before the bill was written. I am trying to establish why it was taken. For re-registration of any description to take place, the mother and the father must both consent.

Kirsty Finlay: We are not talking about a re-registration; we are saying that if a man has not already registered as a child's father, he can—as he can now—register as the child's father with the mother's consent. That will continue to be the case. If the bill is passed and the change to legislation is accepted, the consequence of a man's registering as a child's father, with the mother's consent, will be that he has parental responsibilities and rights in respect of that child.

Mr McFee: I understand the proposal; I am trying to understand the rationale behind it. I am concerned that a father who has registered and who very likely wanted parental rights that he does not have and will not have if the bill is passed—he will have the responsibilities, but not the rights—will, in effect, be penalised by wishing or looking as if he wishes to take on the responsibility early. It might be argued that somebody who did not want, or whom the mother did not want, to take on that responsibility could assume it simply by registering.

The Convener: It is fair to say that Kirsty Finlay has given us an answer about the rationale. We understand that the Scottish ministers do not like retrospection and that there will be consequences for a mother who signs up to something if we make that retrospective change. Whether there are loopholes in that is mainly what Mr McFee wants to pursue.

Mr McFee: Absolutely. That brings me round to the question of why a simplified provision could not be made that would confer parental responsibilities and rights on fathers when unmarried parents had previously declared the father as being the father.

Moira Wilson: The simplified procedure in those circumstances already exists in that the parents can sign an agreement between them—they both have to sign it. The re-registration that Mr McFee suggests would require the consent of both

parents. There is already a simplified procedure for parents who agree that both parents should have parental responsibilities and rights—regardless of whether the father is already named on the birth certificate—which is to sign and lodge a parental responsibilities and rights agreement. That simple administrative procedure exists and will continue to exist. Scottish ministers have signalled that they want to promote the use of such agreements for families who find themselves in the circumstances that we have outlined, because promoting the involvement of fathers in their children's lives is a key plank of the bill.

11:00

Mr McFee: We might want to consider just how simple that procedure is.

I turn to a slightly different subject. I am not advocating either side of the argument on this, but what was the rationale behind the Executive's resisting the pressure to give grandparents statutory rights? Perhaps you could explain the purpose of the grandparents charter and answer the question that I am sure we will all be asked: is that not just a sop to a lobby group?

Carol Duncan: As you will probably appreciate, we have divvied up our portfolio so it might be my lucky day.

Moira Wilson: On the first point, ministers signalled at the outset that they did not consider that to grant grandparents a legal right of contact would be an appropriate legislative measure. The most important principle of the Children (Scotland) Act 1995 is that the welfare of the child is paramount. To give adults automatic rights of contact would not be appropriate. That said, ministers have been sympathetic and have been working with the Grandparents Apart self-help group. Non-legislative measures need to be taken to address the real issues that affect grandparents and grandchildren, of which the grandparents charter is part. To complement that, we have to consider parenting agreements—there is crossover between the two pieces of work.

This is all about what is in the best interests of children, the people who are important to the children and how to ensure that those people continue to have appropriate roles in children's lives. A steering group is supporting both of those developing pieces of work, which includes representatives of Grandparents Apart and other interested stakeholders. It is early days. We see the grandparents charter as exploring a range of issues to do with times when families are in contact with professionals and with one another. The charter will cover the roles and responsibilities of grandparents and the professional reaction to the grandparents' role—for example at a children's welfare hearing or when a social worker is involved. Across the whole professional arena the charter will consider the relationship between the wider family and the professionals and how to improve matters.

Mr McFee: Is that modelled partly on the Australian system?

Moira Wilson: It is too early to say precisely what it is modelled on. The work has started and the desired outcome is clear; it is to make life better. It is too early to say precisely what journey the group will go on to get there and precisely what the charter will look like, but it will cover all aspects of a family's interrelationships with professional bodies. It will also cover access to mediation for grandparents and grandchildren and the fairly wide spectrum of contact that families have.

Mr McFee: How would any agreements–I will not say "orders"—be enforced, if indeed they could be enforced and if that is the intention?

Moira Wilson: There will be no legal connection with the grandparents charter, so there will be no legal sanction through that. There will be no legal enforcement. The approach is about encouraging and supporting families to recognise what is important to children, and to ensure that they address the issues.

The Convener: I will ask a couple of questions on the controversial issue of granting access rights to grandparents. My initial feeling is that the Executive has got its approach right and that it has handled the matter sensitively. However, I am concerned about decisions of the courts. If the guiding principle is the welfare of the child and we always go back to that, why would decisions be made that could exclude grandparents? Is the problem the courts or access to the courts because the costs of pursuing such matters are exorbitant?

Moira Wilson: Access to the courts is possibly a problem, because it is costly. However, the basic problem is in supporting family relationships that have broken down. Recourse to the courts is not necessarily the best route for solving such problems. We have only anecdotal evidence from grandparents, but they tell us that when they go to the courts, they have difficulties in having their role recognised. That is one of the matters that the steering group will have to consider and on which it will have to do more work.

The Convener: If, even before we come to talk about a steering group, you have decided that grandparents will not be given rights, you must have based that decision on research. Does that research show that, if relationships are difficult, the courts are likely to exclude grandparents? Why do they not grant access rights under the principle of the welfare of the child?

Moira Wilson: That would be an individual decision for an individual case. There will be some situations in which that will be an appropriate decision to make.

The Convener: What do the trends show? Do the courts generally grant access to grandparents?

Moira Wilson: Court statistics do not allow us to examine that level of detail.

The Convener: I would have thought that it would be important to have that information so that we know whether we have done the right thing. My concern is that the welfare of the child—which is the right principle—is perhaps not being applied in the first place. If it was, the courts would overlook the fact that the relationship between the adults had broken down and would grant access by grandparents, unless there was a problem in respect of the grandparents that meant that such access would not be in the child's best interests. Will we not know what the statistics show until the working group reports?

Moira Wilson: At present, the court statistics would not allow us to get that level of detail.

The Convener: Do you have an instinct about what the courts are doing? Do you have any idea? Do the courts tend not to grant access if there is a breakdown in the relationship?

Moira Wilson: I do not have a detailed answer to that question, I am afraid. The courts also work on the principle that no order will be made unless it is in the child's best interests. We have to accept that there are circumstances in which no order is made at all.

The Convener: Perhaps we should ask what the welfare of the child means and challenge the system to think more about what that means. I appreciate that it is probably more appropriate for the minister to respond to that.

Moira Wilson: I think that you are right that Mr Henry would prefer to respond to that.

The Convener: I gave you a get-out clause.

Mrs Mary Mulligan (Linlithgow) (Lab): You said that the courts might not be the best way to resolve breakdowns in family relationships, partly because of people's ability to access them. Is there a role for family mediation services? Does that happen at the moment and might that be addressed through the steering group?

Moira Wilson: Yes.

Mrs Mulligan: Yes, it happens at the moment or yes, it will happen?

Moira Wilson: Yes, it happens at the moment but perhaps not as much as it should. The family mediation service is already opening the door wider to grandparents in response to some of the stories that it is hearing. A clear part of the steering group's remit will be to consider the role of mediation in supporting families in those circumstances.

The Convener: When is the group likely to report?

Moira Wilson: Its timetable is not fixed exactly. Its work will go alongside consideration of the bill, but it will work reasonably openly and publicly and will consult along the way, so interim reports or documents will be issued over the next few months. We hope that the work will be completed by the early part of next year.

The Convener: We will not necessarily see the outcome of the report before the passage of the bill.

Moira Wilson: By "the outcome of the report", do you mean the final grandparents charter as it will emerge at the other end?

The Convener: I think you said that Alan Finlayson was considering a range of issues, including the grandparents charter and the parenting agreement.

Moira Wilson: Alan Finlayson is the author of the parenting agreement. The Executive is doing the grandparents charter in house, but both are being done with the support of the steering group.

The Convener: The steering group is not likely to report before the end of the passage of the bill.

Moira Wilson: The group is likely to bring out a draft version of the charter quite early for consultation, but final consideration is likely to take a bit longer. However, documents will emerge over the next few months.

The Convener: The committee will need to press for an answer on that timetable. It would be impossible for us to take a view on the provisions in question until we have seen how the working group's reports are shaping up.

Moira Wilson: We can get back to you on a timetable.

Mr Jamie Stone (Caithness, Sutherland and Easter Ross) (LD): Good morning. As a former member of the Holyrood progress group I apologise for the noises off stage. Doubtless we shall know more after tomorrow's documentary.

I turn to the definition of cohabitant in section 18. I am sure that all of us support what the section is trying to achieve. We have all heard tragic stories in which cohabitants have lost out. Why is there a requirement for same-sex cohabitants to live together

"as if they were husband and wife",

rather than as if they were civil partners?

Kirsty Finlay: When we were drafting the bill, we were unaware of when the Civil Partnership Act 2004 would come into force. We did not want to be in a position whereby any reference in the bill to civil partners—for example, a reference to a same-sex couple living together as if they were civil partners—would be unable to come into force until the provisions in the Civil Partnership Act 2004, creating civil partnerships, had come into force. At that point, we thought that that could have been as much as a year after the provisions of the Family Law (Scotland) Bill had come into force. Therefore, to avoid same-sex cohabiting couples being unfairly disadvantaged, we felt it appropriate to refer to them in the manner that you mentioned. Now that we are aware that the Civil Partnership Act 2004 will come into force considerably earlier than we had anticipated, we would consider making some technical amendments at stage 2 to tie in the definitions so that there is a more uniform approach to same-sex couples between the Family Law (Scotland) Bill and the Civil Partnership Act 2004.

Mr Stone: So you might well revisit the definition at stage 2.

Kirsty Finlay: Yes.

Mr Stone: As far as I am concerned, the language may carry a rather unfortunate weighting. I take it that you, as civil servants, appreciate that.

Kirsty Finlay: Yes.

Mr Stone: The list of relevant factors in the definition of cohabitant is exhaustive, whereas in Australia it is inclusive. Why is that? What are the merits of doing it that way round?

11:15

Moira Wilson: The definitions are those that the court should take into account when defining whether a couple are or were part of a legally relevant cohabitation. The policy intention is that the provision should be for couples who are in an intimate, long-lasting and committed relationship. The combination of the definition of what a couple is and the other factors will ensure that the legally relevant cohabitations will be recognised. The effect will be that the provision will not be appropriate for short-term, temporary relationships.

Mr Stone: The proposal is not to lay down definite rules on which cohabitants will qualify under the new scheme. Could not the trouble and expense of the court process and action on each occasion effectively put off cohabitants who wish to claim? Might the rather daunting prospect put them off completely? I accept that that is not the intention, but do you accept that impediments could be created?

Moira Wilson: Impediments to what? I am sorry, but I am not quite clear what you are saying.

Mr Stone: Impediments to a cohabitant who wishes to claim.

Moira Wilson: We hope that, over time, case law will develop that makes it clear what kind of cohabitation comes into the ambit of the provision and what kind of judgments are being made. We hope that, in time, cohabitants will be able to make agreements between them based on that without having recourse to court. Also, cohabitants should in time be able to see quite clearly what kind of cohabitation meets the definition.

Mr Stone: The trouble is that it will take some time for case law to be compiled or put together in a dossier.

Moira Wilson: Yes, but the early message from the definition is that short-term, uncommitted and more casual cohabitation is excluded from the definition and that longer-term, more committed relationships are included. That is clear from the outset.

Mr Stone: Do you think that the approach that you suggest will mean that the people who claim early—before the case law is established—will be disadvantaged because they will probably have to go to court and pay for solicitors?

Kirsty Finlay: Part of the difficulty is that it is virtually impossible to outline a hard-and-fast set of rules on people's relationships and what will constitute a cohabiting couple and what will not. We have tried to create a set of facts and circumstances that can be taken into account when, at the end of a relationship, a couple want to go to court to apply for the rights.

As my colleague said, we know that it will take some time for the case law to develop. However, we are not of the view that anyone would be seriously disadvantaged by that. We have tried to make the law as clear as possible in relation to the sort of things that would be considered.

Mrs Mulligan: Sections 19 to 22 deal with new rights in relation to cohabiting. Is there any way in which a cohabiting couple could deliberately choose to avoid court interference in the division of assets, as I am led to believe is the case in Australia?

Moira Wilson: As far as the division of assets is concerned, the presumptions are rebuttable. Proof of ownership would be sufficient and the provisions would come into play only in a case in which there was a dispute about ownership.

Mrs Mulligan: In answer to Jamie Stone's question, you said that the bill aims to reflect the different circumstances that can arise in different cases. If people make a positive choice to cohabit

rather than to go down the marriage route, should they not have some way of being able to avoid being in the circumstance in which their assets are divided?

Moira Wilson: There are two things. If a couple want to maintain separate absolute ownership of their properties, there would be no question of their property being divided up because proof of ownership would be sufficient to establish ownership of the property. It would be perfectly feasible for cohabitants to make contracts with each other about what should happen to their properties.

Given that the court would have the discretion to intervene only if no will was left, the cohabitants could make a will and decide for themselves how they wanted their property to be divided. The only circumstance in which that would not apply would be where the vulnerable party needed to be protected from economic disadvantage. That is only right and proper.

Mrs Mulligan: I appreciate that the provision is about protecting the vulnerable. Indeed, I would have some concerns if an opt-out were available that would leave people vulnerable, but that is an issue that needs to be explored.

I have a specific question about section 21. If an individual is married but separated and living with someone else, whose financial claim would take precedence?

Moira Wilson: In what circumstances?

Mrs Mulligan: If an individual was in circumstances in which they were married but separated and, in being separated, were living with someone else, who would have first claim?

Kirsty Finlay: I do not know that we can simplify matters like that. It would depend entirely on the facts and circumstances of the case. I apologise for giving such a terrible lawyer's answer—

Mr McFee: It is a typical lawyer's answer.

Kirsty Finlay: Yes, but that is the situation. It would depend on how long the parties had been involved with each other. If, after being married for six weeks, one of the couple had gone off and lived with someone else for 14 years, obviously the financial interdependence of that 14-year relationship would be much stronger than that of the marriage. As I said, the court would have to take into account the facts and circumstances of the case in coming to any decision.

Mrs Mulligan: That was not quite a lawyer's answer, because you gave some helpful information about what the circumstances might be.

Why has the Executive chosen to go down the route of discretionary financial provision for cohabitants who separate rather than the rules-based approach that is used in the divorce of married couples?

Moira Wilson: The decision was connected with the need to balance the protection of the vulnerable with the protection of people's rights to live outwith such legal constraints if they so desire. That was the judgment call that had to be made. To protect the vulnerable, we considered situations in which somebody who was economically disadvantaged as a result of the relationship should be entitled to some recompense, as it were, rather than to an absolute claim for aliment or for any on-going responsibility resulting from the relationship.

Mrs Mulligan: Finally—if you give me a lawyer's answer to this question, I am in real trouble—how well does the discretionary financial provision on intesty—

Mr McFee: Intestacy is the word.

Mrs Mulligan: Yes, that is the word.

How well does the discretionary financial provision on intestacy sit alongside the absolute rules of Scottish intestate succession?

Kirsty Finlay: We are satisfied that we have considered the current law. The bill is drafted to sit alongside the provisions of the Succession (Scotland) Act 1964.

Mrs Mulligan: So you are happy with the way in which the bill is drafted.

Kirsty Finlay: Yes, although minor technical amendments may be required at a later stage. We have done our best to ensure that the bill sits alongside the existing law on succession in Scotland.

Moira Wilson: We have done what needs to be done at this stage to address the harshest outcomes, in the knowledge that the Scottish Law Commission is embarking on a complete review of succession. We have not tried to address all the succession issues that relate to cohabitation—we have gone for the existing measures that have the harshest outcomes and parked the rest, which will be considered in the wider review of succession law.

Mrs Mulligan: That is interesting. Is there a timescale for the Scottish Law Commission's review?

Moira Wilson: The review was announced recently as part of the commission's current programme. As far as I am aware, it is one of the commission's medium-term projects, which I think means that it will take two or three years. I do not know the exact answer, but I could find out.

Mr Stone: I have a supplementary question. As I am new to the committee, I am allowed a daft-

laddie question—only the one, though. Given what you said about case law and not taking a rules-based approach to cohabitants' rights, have you chosen that approach because, in essence, we are in new territory with cohabitants and cohabitants' rights? Is that why you are taking an open, suck-it-and-see approach?

Moira Wilson: We are certainly in new territory. With the definitions and the details in the bill, we have attempted to give a clear description of the intention. It is difficult to see how much more can be done at this stage.

Mr Stone: Might the bill have to be revisited at a future date if we find that we have to tighten it up?

Moira Wilson: In what regard?

Mr Stone: The bill uses fairly loose definitions. I understand the reason for that—we are in uncharted territory. The intention is described in the bill, but if the substance of the bill is not as finely tuned as you would like it to be, might we have to revisit it in the future to amend it, which might be unfortunate?

Kirsty Finlay: It is impossible to say at this stage whether we would need to revisit something in the future.

Carol Duncan: We have tried to make the bill as permissive as possible. If we tried to set out every single factor, there would inevitably be a lacuna and people would fall through. The bill tells the courts what factors they may take into consideration, but they are not persuasive or restrictive and it is up to the courts to decide, based on the facts and circumstances, what is just and equitable if there is to be a division of property.

Mr McFee: I want to return to the scenario that Mary Mulligan posed in which two married people are separated but not yet divorced, so a contract is still there. One individual—let us make the villain the man—is with another individual in an adulterous situation in what was previously the marital home. The chap then dies. I heard your non-lawyer's lawyer's answer, which was that the matter would be for the court, but, of course, all the issues that we are considering are a matter for the court. I want to change tack and turn the question round. Is there anything in the bill that would undermine the position of the surviving spouse or the children from the marriage?

Carol Duncan: We have been aware of such situations and have taken every possible step to ensure that a surviving cohabitant cannot be better placed than a surviving spouse. Does that answer your question?

11:30

Mr McFee: On the face of it, that answers my question. I can understand that the surviving cohabitant should not come out better off than the surviving spouse, but I am asking whether anything undermines the position of the surviving spouse as it is now. In other words, are new rights given to the cohabiting partner that are to the detriment of the spouse?

Carol Duncan: No, because there is already a succession framework whereby a surviving spouse has legal rights—prior rights. I will not bore you with the details of that framework, but there is a clear succession regime. We should bear in mind that section 22 refers to the net intestate estate: the Government has been paid its tax money, any legal and prior rights have been satisfied and this is the net amount. That indicates clearly that the surviving spouse cannot be prejudiced.

Mr McFee: Okay. Is that the situation in other sections of the bill?

Carol Duncan: Kirsty Finlay will keep me right. Section 22 is the only one that deals with succession matters on death: the rest are all living provisions.

Mr McFee: If a cohabitation breaks up, does anything affect the rights? For example, a chap may have left his wife: they are not divorced, but they are separated. He lives with somebody else and then separates from them. Does anything in that situation affect the existing rights of the spouse?

Moira Wilson: No. Section 19 is about the goods that have been acquired during the cohabitation; it is about the goods that could be in dispute between the couple who have been living together, not goods that were part of the marriage.

Mr McFee: What if both cohabitants were paying the mortgage that exists on the house, to which the spouse would presumably have a claim?

Moira Wilson: The—I was going to say the matrimonial home, but it would not be a matrimonial home.

Mr McFee: It was.

Moira Wilson: The property that the cohabitants live in is excluded from the provisions. The provisions in section 19 would not impact on a home, because the section relates to household goods. Property law would take care of any claim that was to be made on a home, if there was such a thing.

Mr McFee: The committee might want to revisit that matter to ensure that it is satisfied that that is the situation.

Margaret Mitchell: It would be helpful, to flesh out the issue around intestacy and cohabitation, if you could provide an example of how the discretionary financial provision on intestacy might work in one situation and how it could equally be interpreted under the absolute rules of Scottish intestate succession: in other words, if there is a sibling, mother or father. That would enable us to examine the prior rights vis-à-vis the position of the cohabitant. I presume that the cohabitant falls under the discretionary rules.

Moira Wilson: Absolutely.

Margaret Mitchell: Could you give us an example to aid our understanding of the issues with which you are grappling?

Kirsty Finlay: I wonder whether it might be better if we write to the committee about the matter, rather than give a convoluted example.

Carol Duncan: It is difficult to give an example off the top of our heads, but I am sure that we can come up with something meaningful.

Kirsty Finlay: Can I clarify that you want to know how the bill would work in practice when there are siblings?

Carol Duncan: Would you like a worked example?

Margaret Mitchell: Yes.

The Convener: We have the probably unenviable task of considering the bill and trying to incorporate it with existing provisions, whether that is under the law of succession, gender recognition or civil partnerships.

Carol Duncan: There is a huge read-across with the bill, as it impacts on many different areas.

The Convener: One of the examples that you have given is what happens when everyone has got their bit from the estate and there is a bit left. In such a situation, the cohabitant might get their discretionary portion. There could be quite a lot left in an estate. The principle is that a surviving cohabitant should not be in a better position than a surviving spouse.

Carol Duncan: My understanding is that legal and prior rights take up a fair amount—a third or a half—of the estate, so it may well be that there is not a great deal left in the fund.

The Convener: Usually, if there are children, a third will be left to them. Eventually, that will be distributed again and the spouse will get some of it, but that would not necessarily happen if there was a cohabitant. However, the principle in the bill is that the cohabitant should not be better off than the spouse.

Carol Duncan: Without a shadow of a doubt, that is the policy intention.

The Convener: That does not mean to say that the spouse is not affected. If there is no cohabitant, what was left would be divided again between the same parties, but if there is a cohabitant that will not happen.

Carol Duncan: Yes. That is a matter for judicial discretion. The Court of Session judge or the sheriff would look at the facts and circumstances. If there is a surviving spouse and surviving children, the judge might decide that it is not fair and equitable to give as much to the cohabitant as he or she would have given them if there was no surviving spouse or children. A lot of flexibility is built into the provisions.

The Convener: Is the policy intention of the bill to be a safety net for some of the big cases that have arisen in which there is no marriage but there are disputes about property and children? Is the bill an attempt to deal with such cases?

Carol Duncan: There is empirical evidence that there are often older couples who have lived together for years but have not got around—for want of a better expression—to getting married. An example would be a traditional, old-fashioned relationship in which the woman packed in her job, children were born, she was the primary carer for the children, the children went away, her partner was still working and then he suddenly died. If there was no will, the woman would not get a penny, even though she had been financially dependent all her life. There will obviously be relevant cases of relationships involving younger people as well, but the bill will certainly be effective in cases such as the one that I described.

The Convener: At the same time, you do not want to allow the state to regulate relationships. If that happened, people might make a deliberate decision not to marry.

Carol Duncan: Correct. We must respect the decision that many people make nowadays not to marry, but by the same token they do not inherit the status and the package that goes with marriage because they have decided not to opt in to that.

The Convener: Did you say earlier that it is possible for cohabitants to strike an agreement on property?

Carol Duncan: Yes. That can be done under the law of contract.

The Convener: Would the courts recognise that if the matter went to court?

Carol Duncan: Yes, although such agreements—as is currently the case for prenuptial contracts—would be just one of the factors that the court would take into consideration in deciding what the parties' true intent was when they entered into the relationship.

The Convener: So a party to the cohabitation who clearly did not want any obligations arising from the relationship could not opt out. Ultimately, the court could still decide, on the principle of intermittent long-lasting relationships, that they could not opt out.

Kirsty Finlay: Yes. As we said, the purpose of this part of the bill is to protect the most vulnerable people. It seems unfair that a cohabitant in a long-lasting relationship can opt out of any responsibilities that he or she has to their long-term partner. The bill aims to ensure that that does not happen; that is why it is flexible and gives the courts discretion to consider all the facts and circumstances of the case. As Carol Duncan said, a contract that was entered into some time before the end of the relationship will be just part of the package that the court will consider.

The Convener: Would you agree that the test is an exceptionally wide one for the courts to adopt in using their discretion? You have not specified any guidance as to what an intimate or long-lasting relationship is, so it is for the courts to develop the meaning behind that.

Kirsty Finlay: The discretion under the bill is wide. That is based on a decision not to be too prescriptive. People's relationships cannot be prescribed—it is not for the state to determine how people should live together.

The Convener: The courts are going to have to decide at some point what a long-lasting relationship or an intimate relationship is. They will have to decide whether that refers to people who live together or to people who live apart but who might still have an intimate relationship. The courts will have to make those determinations. I accept that we cannot prescribe people's relationships, but it must be acknowledged that the courts will have an exceptionally wide discretion.

Carol Duncan: The court may well be assisted by case law. There has been a lot of development in case law in the areas of housing and social security. We are dealing with the same sorts of issues, with questions such as, "Are you living together as husband and wife?" or "Are you civil partners?" Judges do not have to start with a clean sheet; background information and case law will assist them in reaching their decisions.

Mr Stone: You gave the perfect textbook example of the lady or the male who is left and finds that there is nothing for them—we all know the sort of situation that you are talking about. You said that such situations would arise when a will is not made. Do we need to tell people, "Thou shalt make a will," to get round that? There is no plainer expression of the deceased's wishes than a will. Do you see what I am getting at?

I am not trying to contradict you. The courts will have a big power here, and this is new territory. Was consideration given not to making wills compulsory but to persuading an awful lot more people to make wills? Having a will puts things in black and white. A woman making a will can declare that she was living with a man and, although they decided not to get married, it was her express wish for a certain part of her estate to go to him.

Moira Wilson: As part of the information campaign that will follow the act coming into force, there will be general encouragement for people to make wills and to ensure that their wishes are well known, with all the benefits of doing so being highlighted. That will apply generally and not just to cohabitants.

Mr Stone: As part of the bill and in parallel with it.

Moira Wilson: Yes.

Carol Duncan: The Law Society of Scotland has intermittent campaigns, including make a will week, when members of the society go about the country in caravans and so on. That is all very laudable, but the message is often not taken on board.

Mr Stone: It is a bit like undertakers' adverts: it is not a particularly welcome message to many people.

Carol Duncan: Quite.

The Convener: That is a good issue for us to pursue.

We have some final questions on what are possibly less controversial issues.

Mr Stone: As you will be aware, many of us have had letters from the Scottish Council of Jewish Communities. The council is saying that its concerns were covered in "Improving Scottish Family Law" in 1999 and in "Parents and Children" in 2000 but are not covered now. I refer to the issue of the civil divorce followed by the release of the Jewish person from the religious marriage. Why was that aspect not put into the bill? Might you revisit that? I am no expert on Jewish marriage law, but the council seems to have a—

Carol Duncan: I can answer that question in so far as I can tell you that officials are not in a position to answer it. It should be put to ministers when they give evidence to the committee.

Mr Stone: That was a cryptic answer.

Mr McFee: Intriguing.

The Convener: Watch this space.

We have a few other issues to cover, starting with domestic violence interdicts. The Scottish Law Commission made recommendations for the reform of matrimonial interdicts, which predated

the Protection from Abuse (Scotland) Act 2001. Have you given any thought to simplifying and consolidating the provisions in the 2001 act? It might appear that we no longer need the Matrimonial Homes (Family Protection) (Scotland) Act 1981, but you might have a different view.

Carol Duncan: We do need it. Concerns emanated from the Scottish Law Commission that the Matrimonial Homes (Family Protection) (Scotland) Act 1981 was too prescriptive and did not give a woman or a man sufficient protection from their partner. In section 8 we have spelled out that interdicts with powers of arrest do not attach exclusively to the matrimonial home, because that would restrict the movements of the woman or man who allegedly had the protection of the interdict. With section 8(2), we extend interdicts beyond the matrimonial home to

"any other residence occupied by the applicant spouse … any place of work of the applicant spouse"

and

"any school attended by a child in the permanent or temporary care of the applicant spouse."

11:45

As a result of the SLC's comments—and because we thought that it was an appropriate thing to do—section 9 deals with powers of arrest. Just now, the powers of arrest that attach to matrimonial interdict fall when the matrimony comes to an end, namely, when the parties are divorced. There is anecdotal evidence to suggest that quite often at the time of divorce, violence can flare up or there can be considerable acrimony or recrimination. The view was taken that, rather than the powers of arrest flying off at the stage of divorce, they should remain in place three years from the granting of the order. Whether we are talking about divorce after two years or one year, the protection of the powers of arrest will last for some time after the granting of the divorce. Those are sensible measures that afford people protection.

The Convener: On marriage by cohabitation with habit and repute—

Carol Duncan: We are retaining it.

The Convener: Yes, but why did the Scottish Law Commission suggest that you should abolish it?

Carol Duncan: The Scottish Law Commission was unequivocal and said that there was no requirement for it whatsoever. The commission is only one of the key stakeholders that we spoke to. We also spoke to a lot of family law practitioners, who conceded that, although it was rare, marriage by cohabitation with habit and repute was encountered now and again, and that it was a useful protection. I quote the same example of the older couple who have been together for years, who everybody genuinely believes are married, and where there have been all the vestiges of marriage, without a marriage certificate. We thought on balance that, rather than get rid of it once and for all, it would do no harm to keep it on the statute book at this time, because it would afford protection to a few vulnerable people.

Mrs Mulligan: My only concern is that you said earlier that people believe that there is such a thing as common-law marriage, and that the concepts are sometimes misunderstood. Leaving marriage by cohabitation with habit and repute in situ will allow misunderstandings to continue. I accept that the information exercise that will take place after the bill is passed will be useful, because people need to be given information, but by leaving marriage by cohabitation with habit and repute on the statute books, are we not compounding the misunderstandings that can arise?

Carol Duncan: I would have thought that not many people are aware of the concept of marriage by cohabitation with habit and repute. It has been a difficult balance to strike but, as I said, it does no harm. I do not think that it furthers the myth of common-law marriage. That would not be an adverse effect of keeping it on the statute book.

The Convener: Kirsty Finlay said earlier that some provisions on void marriages need to be updated in the light of civil partnerships. Can I presume that the concept of a civil partnership being void due to duress or error is one of the provisions that will be updated?

Kirsty Finlay: We are taking a general overview of the technical amendments that need to be made as a result of the commencement of the Civil Partnership Act 2004, so we will be considering a number of aspects of the bill.

The Convener: I have a couple of final points. We are still planning the witnesses whom we intend to call to give evidence. The bill has many different aspects. The committee has been exploring the enforcement of judgments in cases regarding access to children. Many groups represent fathers and we might hear from some of them about their experiences. Some of the groups are more controversial than others.

We may not have all the statistics on grandparents to hand, but is there scope to consider the concerns that many people have about the enforcement of judgments? Is that what the steering group is meant to do?

Carol Duncan: The steering group will flush out those issues as a matter of course. The main area of discontent among the different lobbying groups—groups such as Families Need Fathers

and Fathers 4 Justice—is that people are not getting to see their children when a contact order is in force. The Executive is actively looking into that.

Matters are made more difficult because we do not have clear and cogent statistical evidence on how big the problem is. As the committee probably knows, if a contact order is not obeyed by the person against whom it was made, the judge can impose certain sanctions. The person not obeying the order can be found in contempt of court and imprisoned or fined. In the support group in which lobbying groups for fathers are represented, we are considering ways of dealing with the non-enforcement of contact orders—ways other than the hard tool of the law, such as mediation or parenting agreements.

The Convener: You have hit the nail on the head, but I foresee a problem—with which other members can agree or disagree. I have seen many cases in which people's inability to enforce judgments—because of costs or problems getting into the court system quickly enough—has been the central question. Mary Mulligan and Margaret Mitchell spoke about that earlier. I am worried that we are not getting the information that we need.

We will tackle this issue as we work on the bill and I will certainly be asking witnesses questions on it. However, if we have no input to the steering group and do not know what it is doing, I can foresee difficulties.

I am not asking for an answer right now, but I am asking for that difficulty to be considered. I for one will pursue it vigorously and I do not think that I will be alone. It would be helpful if we could find a way of tapping into the work of the steering group, and vice versa.

Carol Duncan: We will get back to you on that.

The Convener: I wanted to lay that on quite thick because the issue is important for the committee.

Mr McFee: I agree—it would be very useful to get information back from the steering group. Although we would accept that the cost of going back to court to try to get a resolution is an issue, the disposals that are available to the court may be an even bigger issue. One could argue that the fining or imprisonment of the mother would be pretty detrimental to the child. There has to be another method of reaching a satisfactory solution for all.

Carol Duncan: Yes, indeed.

Mr McFee: Do we really want mothers to be fined or imprisoned? I think that most reasonable people would say no.

Carol Duncan: Everything must be set against what is in the best interest of the child. This is very much a live issue just now.

Moira Wilson: Another thing to bear in mind is that Scottish courts have the power to send families to mediation. That less harsh sanction is already available to the courts.

Mr Stone: This comment is more for my political colleagues than for the officials. I have felt a growing disquiet this morning that what we have been discussing is not exactly in keeping with the intention of the Scotland Act 1998 or of the Parliament, whereby Executive ministers introduce bills that committees test and probe, or, if necessary—thinking of groups such as Fathers 4 Justice—committees initiate bills at their own hand. That is a fairly clear structure, but when there is a working group beavering away in the background, that seems to be slightly outwith the intentions behind why we are here today. I put that idea down as a marker and the convener may shoot me down if I am wrong. However, you can see why I am uneasy. Is that what you are saying as well?

The Convener: I share your concern. We would not want the committee to be making stage 2 amendments on such issues when a working party has not finished its deliberations. That is, of course, if the committee formed that view. As you say, it might be too difficult to do that.

Mr Stone: But we are democratically elected—

The Convener: It would not help the work of the steering group if we amended the bill at stage 2 and then passed it while that work was on-going. However, the point has been made and I am sure that there will be an exchange of correspondence.

Moira Wilson: The only point that needs to be made in response to that is that the working group recognises that, no matter what the legislation says, it needs to be buttressed with non-legislative work on processes and activities and anything else that has to be done outwith the legislation to support families.

The Convener: I appreciate that point. We have run out of questions, believe it or not, and your voice is still working.

Carol Duncan: Yes.

The Convener: That is amazing. On behalf of the committee, I thank you sincerely for the time that you have spent with us this morning to help us to understand the big social issues that are contained in the bill. It cannot have been easy for you, but we are very grateful for the evidence that you have given.

There are issues about which we will correspond with you and I realise that some of those issues will also be for the minister, so we can sort that out in due course.

Carol Duncan: It has been a pleasure.

Petition

Miscarriages of Justice (Aftercare) (PE477)

11:57

The Convener: We move on to item 3. Members will note that the agenda for the meeting was revised because I thought that it was important to draw to members' attention the minister's announcement of funding for the Miscarriages of Justice Organisation (Scotland). I thought that this was a good-news story for us because we were pursuing the issue through the petition. Members may wish to comment

Members will see from the minister's letter that some substantial funding has been granted to MOJO for several years—not entirely because of the petition—so that it can set up an advice line to deal with some issues such as the psychological consequences for those who have suffered a miscarriage of justice. I thought that the committee would be pleased about that news. If members want to put something on the record, they can do so.

Mrs Mulligan: I welcome the Executive's announcement. It is a good response. I also welcome the fact that the letter from the Executive talked about the kind of services that might be available. Although I recognise that a residential facility might be a big issue for people in these circumstances, it is also right that the Executive is not thinking that it can just buy bricks and mortar and that will be the end of the problem, which goes much deeper than that.

Although I hope that the money will be adequate for lots of people in these circumstances, I am sure that the Executive will want to keep it under review in the future to see whether the resources that have been identified are adequate to deal with the problems that people experience. However, I hope that the numbers remain small.

Mr McFee: I am at a slight disadvantage because I have not seen the letter.

The Convener: It was a late paper.

Mr McFee: It is so late that I do not have it. That does not detract from the fact that I think that what the organisation does is extremely worth while. Convener, obviously you and Bill Butler have had an interest in the organisation. The funding is welcome. I suspect that those who have been involved with the organisation will think that the announcement is long overdue, but at last there has been some form of recognition.

I am not in a position to comment on whether the amount of money that we are talking about will be sufficient for the purpose, but it is the recognition that has been given to the organisation that is fundamentally important.

12:00

The Convener: I have spoken to the organisers of MOJO who tell me that, prior to the announcement, they were about to fold because of lack of financial sustainability. They are delighted with the news.

When we come to look at our forward work programme, we might find that we have some outstanding items in relation to the general issue of miscarriages of justice. One of the issues that I have been pursuing is the compensation scheme. There are some issues surrounding how it is applied, and one or two other issues that were raised by the petition. However, that is a matter for the committee to pick up at a later date.

Mr McFee: In the high-profile cases of people who were released from prison and had their names cleared after it was discovered that their convictions had been unfounded, it was striking that large amounts were deducted from their compensation payments to pay for their food and board in prison. That must come as a major slap in the face to anyone in that situation. I am not quite sure whether it is within our remit to consider that matter but it should be examined. If someone is awarded compensation for being in prison when they should not have been in prison, it is niggardly, to say the least, to make such deductions from their compensation payment. That is a dreadful way to treat someone in that situation.

Margaret Mitchell: Obviously the organisation is going to help the innocent victims of the judicial system and, as such, it is to be welcomed.

The Convener: Thank you for that.

We agreed to deal with item 4 in private.

12:03

Meeting continued in private until 13:09.

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