JUSTICE 1 COMMITTEE

Wednesday 11 May 2005

Session 2

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FAMILY LAW (SCOTLAND) BILL: STAGE 1.....1783

JUSTICE 1 COMMITTEE
14th 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 Barrett (Family Mediation Lothian)
Ephraim Borowski (Scottish Council of Jewish Communities)
John Deighan (Roman Catholic Church)
Major Alan Dixon (Salvation Army Scotland)
Dr Alison Elliot (Moderator of the General Assembly of the Church of Scotland)
Tim Hopkins (Equality Network)
Maureen Lynch (Family Mediation Scotland)
Dr Gordon Macdonald (CARE for Scotland)
The Rev Alan Paterson (United Reformed Church)
Vanessa Taylor (Scottish Inter-Faith Council)
Dianna Wolfson (Scottish Inter-Faith Council)

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 11 May 2005

[THE CONVENER *opened the meeting at 09:57*]

Family Law (Scotland) Bill: Stage 1

The Convener (Pauline McNeill): Good morning and welcome to the 14th meeting in 2005 of the Justice 1 Committee. We have full attendance. Agenda item 1 is the Family Law (Scotland) Bill. I welcome our first panel of witnesses. We have Dr Alison Elliot, who I am sure is known to members, as she is the moderator of the General Assembly of the Church of Scotland; John Deighan, a parliamentary officer of the Roman Catholic Church; Major Alan Dixon of the Salvation Army Scotland; and the Rev Alan Paterson of the United Reformed Church. I thank the witnesses for agreeing to give oral evidence and for their written evidence—it was helpful to receive it in advance of the meeting. We have approximately an hour to ask questions on your submissions.

Stewart Stevenson (Banff and Buchan) (SNP): I realise that there will be differences of view on a number of the issues that will be raised, but there should be an opportunity for each panel member to contribute. I come at the issue from the point of view of putting the child at the core of the family, because the child represents the continuation of society and of the family. It seems unlikely that the bill will be modified to undo some of the reform that has taken place over a number of years, particularly to divorce law. I take no view in saying that; I merely reflect the political reality.

My first question is a general sighting shot. Will the proposals strengthen or undermine family life in Scotland and, in particular, will they adversely or beneficially affect children? In the interests of equity, I will depart from the usual right to left order. I have no preference about who answers first—perhaps Major Dixon will start.

Major Alan Dixon (Salvation Army Scotland): Purely from the perspective of children, we go along with the Executive's proposals. We have issues about the reduction in the timescales for divorce, contested or otherwise, but, from the perspective of making life easier for children, we support the Executive's proposals.

10:00

Dr Alison Elliot (Moderator of the General Assembly of the Church of Scotland): The Church of Scotland welcomes the child-centred perspective. That represents a change in the perspective that churches have on family law. Fifty years ago, we would have been worried about the status between the adults and the children would have been thought of as appendages, whereas now it is entirely core to our thinking that we subscribe to the other principle, which is that we should look for the protection of the weakest in society. For that reason, we welcome the child-centred perspective.

We are pleased with the proposals. Obviously, the mechanism will be a lot better if it involves the principles of the children's hearings system. Exactly how children are involved in decisions is not for the legislation but for the rest of the system to operate. There is also the question of the extent to which mediation is encouraged and promoted. Seen in that way, rather than in a contested way, the principles and the provisions in the bill will be beneficial to families.

John Deighan (Roman Catholic Church): We, too, believe that the welfare and well-being of the children are critical. That is why we believe in promoting and nurturing marriage and ensuring that we do not undermine marriage or weaken the commitment of marriage.

The long-term effects on children of marital breakdown and family dissolution are enormous—the experience is not just a one-off, but something that can impact on them for the rest of their lives. We encourage the committee to consider how the bill can be used to keep families together, to encourage the specialness of marriage and to promote the status of marriage. Our concern is that the legislation may move to a position of saying that cohabitation is the equivalent of marriage, although people have not made the public assent that they are committing themselves to a long-term relationship for the sake of each other and of their children.

In looking at the relationship with children, we cannot discount the relationship between the adults, as the quality and the permanence of that relationship will impact on the children. We cannot just look at children in isolation or as appendages; they are part of a family unit. If we can keep that family unit together, the child will benefit in the long term.

We see that children do better in marriage—I am sure that the committee is convinced of that as well. They benefit in the whole gamut of areas, whether in health, education or prosperity. The issue is how we make family law that can keep marriage special in society. As we say in our

submission, we believe fundamentally that, if we enhance other relationships, such as cohabitation, or weaken the bond of marriage by making no-fault divorce easier, that will impact on the stability of marriage.

Stewart Stevenson: I will follow up on that, and other colleagues may develop questions, specifically on the subject of divorce. Over the piece, is it your view that the bill, as drafted, enhances or detracts from the outcomes for children in particular?

John Deighan: The bill highlights the fact that there may be a problem in society for people who need to manage or dispose of their property and finances. That problem is not unique to people who are cohabiting and we suggest that other means be found to ensure that people's individual rights and well-being are protected. That can be done. For example, people can be educated to leave a will so that difficulties do not arise when non-married couples split up. Also, many of the bill's proposals could be dealt with simply by encouraging people to make contracts. We believe that the proposals are unnecessary. It is not that we do not want to protect the rights of individuals who are cohabiting, but that we believe that those rights can be protected by other means without raising the status of cohabitation, which would be a threat to the institution of marriage.

Stewart Stevenson: I have a final wee point before I go to the Rev Alan Paterson. Given that, as I recall, fewer than 40 per cent of adults have a will, how could we in practical terms raise the figure to nearer the 100 per cent that you advocate, other than by laying down a law of succession? How would you achieve that figure?

John Deighan: Research from the Scottish Parliament information centre shows that changes in the law take a long time to impact on society. A lot of people still believe that there is common-law marriage, for example. Legislation will not change things overnight; education is needed, too. There are plenty of opportunities to educate people in schools, higher education, further education and citizens advice bureaux, or through television and the media. We can encourage people and show them the problems that they may encounter if they do not make a commitment. Our office gets calls from parents who split up and find that they do not have the rights that they believed they had in respect of visitation rights to their children and property rights. The issue is education, rather than the state filling a gap by recognising cohabitation.

The Rev Alan Paterson (United Reformed Church): We welcome the bill and its child-centred background. We go along with Dr Elliot on the notion that the church's attitude to marriage has moved over the past 50 years. Some of that movement has come about because, at a pastoral level, clergy and church communities have helped people whose marriages have broken down to work through that and to come to terms with it—we have supported people at painful times. Our church has come to realise that working with people changes our theological stance and, eventually, our approach to what we believe marriage is about. That view has evolved and we are happy with the notion that the most vulnerable people will get more protection under the bill than exists already.

Anecdotally, we picked up various examples, such as the couple in a contested divorce who were on their third sheriff and who, between them, had had 16 lawyers. In the meantime, the young children remembered nothing but conflict over the five years of their living memory. In a lot of ways, the pastoral aspect has helped to move the church's stance and its understanding, so we welcome the bill.

Stewart Stevenson: Are you saying that the generality of the bill reflects increasing secularisation and a diminution in the importance of marriage?

The Rev Alan Paterson: No, I do not think that that is the case. I suspect that 50 years ago marriage was—occasionally at least—entered into because society stigmatised other relationships. Parental and peer pressure put people into marriages that perhaps might not have been their first choice if there had been other options. Folk who are choosing to marry today are making more of a choice than those who chose to marry 50 years ago, because in many ways we have taken away the stigma from cohabitation, illegitimacy and so on. Society has moved on. Nowadays, folk who are marrying are making a positive choice.

The church has a high view of marriage: we see it as a choice for life. Marriage is about folk summoning together all the people who are important in their lives and those in the faith community that they are part of and inviting their support as they make a lifelong commitment to each other. As I said, the church has a high view of marriage. We suspect that the marriages that are entered into today may have a different quality from those in the past. Folk used to choose to get married perhaps for the reason that no other option was open to them.

Stewart Stevenson: If I may, convener, I would like to test my understanding of what the Rev Alan Paterson is saying. Do people who get married nowadays have a higher commitment to marriage than those who got married in the past? Is that evidenced in declining divorce rates, for example?

The Rev Alan Paterson: I am not saying that that is necessarily the case; I was suggesting that folk nowadays choose to get married out of a

wider range of choices. When I was a teenager, a lot of stigma was attached to people who lived together and even to divorcees; stigma was also attached to illegitimacy. None of that was healthy. It is not appropriate to make a value judgment on people who choose to live together; after all, it is their choice to do so. Time will tell whether their commitment is a greater or lesser one; only the people involved know what it is. In the past, the church tended almost to coerce people towards marriage. It should not do that and I am happy that it does not do so today.

Stewart Stevenson: If I may, convener, I will ask the other members of the panel to address the issue briefly. I know that colleagues are anxious to move on, but other panel members might like to comment on what the Rev Alan Paterson has said, as he gave us a slightly different view of the matter.

John Deighan: There are quite a few points that I could comment on—

Stewart Stevenson: Briefly, if you will.

John Deighan: Briefly, we have to encourage the things that work and that benefit children. As the research shows, cohabitation tends to last an average of two to three years. We can see that the commitment in cohabitation is not great and that that is not a good thing for children. It is sometimes argued that trial marriages lead to greater commitment in marriage, but the paradox is that there is a higher divorce rate, as has been pointed out.

Society has changed and a lot of that change has led to the fragmentation of family life. The church has to take steps to address that. There has been no consistent effort to say, "This is what's happening, but it is not a good thing." It is not a good thing for children to be split from their parents. We need to ask how we can try to ensure that children live with their parents and that parents live together. We need to ask what incentives can be given to those who get married and what disincentives can be made to prevent people from walking out on a marriage and on the commitment that they made to their family.

Dr Elliot: We all want to encourage marriage, by which I mean that people who are contemplating marriage should be supported so that they make the decision with integrity. I do not believe in incentives to encourage people to marry. The incentive route—the bribery route—is not the way in which to ensure healthy marriages.

I do not believe that marriage will be undermined by our giving greater recognition to people who choose not to marry. The Church of Scotland has always said that we would welcome an emphasis on preparation for marriage. That is what I mean when I talk about encouraging marriage. People need to know that, when they make the decision to get married, they will be supported in making that decision. People need to know what they are letting themselves in for.

The question of the fragmentation of the family is interesting, particularly when I look at what the Church of Scotland is doing to support families. Often, the church deals with families who are already opening up and splitting—because one person is in prison, for example. It tries to support families when fragmentation is happening. That is not a matter of saying that marriage is a little box that should not be looked at or of attempting to keep a marriage together for the sake of being together.

10:15

The Convener: The witnesses will be questioned on cohabitation and family support. If I understand Stewart Stevenson's line of questioning, he is homing in on an interesting point that the Rev Alan Paterson made, which is that, although the marriage rate is lower, people make more informed choices nowadays. I emphasise that before the final panel member replies.

Major Dixon: Alison Elliot expressed well the situation as we understand it. You were right, convener, to point out the other choices now. Do people enter into those choices with the desire to make a long-term commitment? Is that a loving commitment? If so, we support that. We want such people to make the additional commitment of making a public declaration through marriage, which is what happens in a marriage ceremony, whether it is civil or religious. From a religious perspective, the support that is given is along the line that we are gathered in the sight of God and a company of people, who are there to support and help. That is the major difference between marriage and cohabitation. In general, we welcome the commitment.

Margaret Mitchell (Central Scotland) (Con): Good morning. I will focus on the proposals in the bill for divorce and in particular those for the no-fault ground for divorce. What are your comments on the proposals to reduce the relevant separation periods and to abolish desertion as a ground for divorce?

The Rev Alan Paterson: By and large, we welcome the time changes, particularly to avoid dragging something on for a long time in young children's lives, as five years represent most of a nine-year-old's life and memory. To reduce the amount of conflict to which children are witness is important.

The other pastoral evidence that we have seen is from when children who are caught up in such a

situation almost cannot get on with growing up properly because they are caught in a time warp of confrontation. They may become manipulative, because that is the only weapon in their armoury, as they are vulnerable. For those pastoral reasons, we welcome the proposal.

Obviously, the issue is not simply about hitting the timescale and going for it. A divorce has implications for looking after bairns' future and other questions that tie in. Children perceive time differently. Relative to their whole lives, the time is a bigger chunk, so we welcome the proposal.

John Deighan: After divorce, conflict is not always resolved. A child can become the focus of conflict, especially in relation to visitation rights and so on. We have said that we are against divorce in principle. The proposal is to reduce the time limits for no-fault divorce—when people just decide that they have had enough. Divorce does not seem to provide happiness. Unhappiness is often at the root of choosing to divorce. The longer time periods show that the state recognises how much of a commitment marriage is—that it is supposed to be permanent and stable. The time period allows people to reflect. About 16 per cent of divorce proceedings are dropped each year. The longer the time period, the more chance there is of people being reconciled.

Dr Elliot: I do not think that time leads to reconciliation. The issue comes back to encouraging mediation and conciliation. The Church of Scotland is not against divorce in principle. We recognise that people enter into commitments that they are not able to sustain—there comes a point at which it is necessary, or at least preferable, to dissolve the marriage.

For the reasons that have been stated, we welcome a shorter time period for the divorce process. That is in the context of divorce being a complicated decision. The family should be supported as much as possible in making the decision. We also welcome the idea of a no-fault divorce process. We do not believe that it is helpful to be judgmental at that time in people's lives. We should instead move towards reconciling people who are in a desperately unhappy situation.

Major Dixon: In principle, we are not against the proposals for divorce and no-fault divorce. We look at the issue purely from a child's perspective. Not every divorce situation includes children. Some people have a relationship and decide to exclude an extension of their family. There are also situations, such as in my case, where the children have left home. The impact on children in that situation would be totally different from that in the scenario outlined by Alan Paterson in which a child is aged nine or 10. We must keep that in mind when we consider the time issue.

Margaret Mitchell: In Scots law, there must be a defender and a pursuer. Would it help if there was a joint agreement for a no-fault divorce rather than a situation in which it was almost as if one party was suing for divorce? Are you in favour of moving towards that no-fault approach where agreement can be reached?

The Rev Alan Paterson: If agreement can be reached, that approach is welcome. The problems occur when people cannot reach agreement. When people have decided that their marriage has no future and is dead, it is helpful if they can agree to as much as possible. If they cannot be reconciled to keeping the relationship together, it is an advantage if they can be reconciled to not continuing hostility. A move away from the fault notion is welcome.

Margaret Mitchell: If there is agreement, it is perhaps not helpful to have a pursuer and a defender. Should that be changed? If there is agreement, the fact that there must be a defender and a pursuer may increase the chance of acrimony. Do you agree that, where there are children, that approach could create problems unnecessarily?

John Deighan: We have no fixed position on that issue yet. Perhaps we could give the matter thought and feed back our views to the committee at some stage.

Anything that rushes divorce through could be problematic. We must remember that the main effect of divorce is that it allows people to remarry. Do we really want people who have just had one failed marriage to go straight into another one? Other provisions can be catered for in law, but divorce allows people to remarry, so trying to rush the process is a problem.

Margaret Mitchell: Is divorce always about allowing people to remarry?

John Deighan: Legally, that is the impediment that divorce removes. Financial provisions and provisions that relate to the children can all be sorted out by other means. Divorce dissolves the relationship in the eyes of the law and it frees the person—they cannot be freed to do other things—to marry again.

Dr Elliot: Margaret Mitchell's comments about whether there should be a defender and a pursuer sound persuasive, but I am not aware of our having considered the matter, so I had better not comment.

Major Dixon: We have not considered the matter either, so it would not be appropriate for me to comment.

Mrs Mary Mulligan (Linlithgow) (Lab): Given that there is probably a fairly arbitrary aspect to the setting of timescales for the period of

separation before a divorce is possible, we must try to balance the disruption to children in such circumstances against the opportunity for reconciliation. Do the witnesses think that reducing the timescales to two years or one year, as the Executive proposes, would mean that the periods of separation were too short, although in the current system they are too long, particularly when children are involved? Is there an alternative view?

In relation to Major Dixon's earlier comment, does he think that different periods of separation should be required, depending on whether couples have children at home or non-dependant children?

Major Dixon: My point was more to do with whether a divorce is contested. The decision to divorce is traumatic and sometimes can be forced on one of the partners. A divorce can be like a bereavement, which takes a long time to come to terms with. We cannot say that the bereavement process is completed after three years; for some people it goes on for five or more years.

It is difficult to set timescales—the process is arbitrary. We should consider how people can cope with making the traumatic decision to divorce and how they can allow that decision to work through their systems. If the divorce is contested, the decision is very traumatic; it can be less so if the divorce is not contested. We need to consider that when we decide whether the period of separation should be one year, two years or five years.

The Convener: My question is for John Deighan. I acknowledge the Roman Catholic Church's view on the matter and it would be ridiculous to try to argue the church out of it. However, most witnesses regard the five-year period of separation that is required in the current system as extraordinarily long. You said that getting a divorce is legally necessary if someone wants to remarry, but there is another aspect to the matter. As long as a couple are still married, the law of succession applies, so the husband or wife cannot disinherit their spouse during the five-year period, even if the relationship is long over and one party is in another relationship. That seems unfair.

John Deighan: Anyone who enters into an agreement must consider the consequences of doing so. If someone makes a commitment that is supposed to be permanent, I suggest that five years is brief in comparison with the permanent commitment that was intended. During that five-year period, one of the spouses might want to remain married, and it would be an injustice if, after entering into what they thought would be a permanent relationship, they discovered that their spouse could walk out of their lives and disinherit them after two years, as the bill proposes. Our concern is that the reduction of the period of separation would undermine the commitment that people make. People ask themselves, "What commitment am I making? I am entering into a permanent relationship that has certain consequences." If those consequences were changed, there would automatically be a psychological effect and people would think that they were making less of a commitment.

10:30

The Convener: By that logic, we would not have any period; we would simply say that, when people enter into a contract for marriage, it is meant to be long term, so they cannot get out of it. However, the bill tries to take a pragmatic approach.

John Deighan: The state's role is to promote what is good for society in general, and it is good for society if married people stay together. If people choose to cohabit or to leave a person to whom they have made a commitment, those decisions will not benefit the common good. Therefore, the state does not have to support or promote those choices.

The Convener: Obviously, not all cases are the same; there are a variety of circumstances, although we do not have time to go into them. However, if there is a breakdown of a relationship in which one party wishes to remain married and the other does not, does the church have no doubt that having a five-year period in which the relationship still exists does not impact on the children?

John Deighan: The teaching of the church is that we follow two paths—the path of truth and the path of charity. Obviously, at a pastoral level, we give support to families. In every parish, one finds a priest or someone who supports families that have broken down. However, as well as that, we must uphold the truth about marriage; society should recognise the social institution of marriage, because it benefits society in many ways that amount to more than the private decision of two individuals.

The Convener: I do not challenge that notion; I am comfortable with it generally, but I want to pin you down on the issue that interests me. Where there is agreement about a divorce, we can argue about whether the separation period should be one, two or three years, but it is the five-year period that interests me. You said that the church is concerned about the impact on children, which is the point that I have difficulty understanding, although I realise that your principal position is that there should be no divorce.

John Deighan: As I said, the evidence does not show that five years after a divorce—to choose an example time period—people are happier, nor

does it show that, after that time, the children have been removed from conflict. The children still have to deal with the fact that their parents are apart, which has an impact on them for the rest of their lives, not just for five years.

Dr Elliot: I find it difficult to understand the nature of the commitment that is being talked about. When people marry, they recognise that they are taking on a huge commitment that is probably outwith their capacity to sustain on their own. That is why a marriage service is done in the context of asking for God's blessing, as well as in the public context of asking for the support of one's close friends and family. Therefore, the commitment is not something that people enter into as individuals. People often assume when they make the commitment that their marriage will work automatically for the rest of their lives, but marriage is about realising that it will be extremely difficult to make it work. Marriage is not about waving a magic wand so that people are in a different state in which they are better able to be committed than they would be otherwise. That is the difficulty.

Mrs Mulligan: Do the witnesses agree with the Scottish Executive's proposal to grant parental rights and responsibilities to unmarried fathers who register the birth of their child jointly with the child's mother? I mention that specific situation, because I will come on to other ones. In its written evidence, the Salvation Army Scotland supported the measure, but I wonder what the other witnesses feel.

Dr Elliot: We support and welcome the proposal, because we reckon that both parents should take on rights and responsibilities.

John Deighan: In the light of natural law and the natural bonds that will exist, we have been in favour of giving recognition in such cases. We support encouraging relationships between children and their fathers.

The Rev Alan Paterson: We also welcome the proposal.

Mrs Mulligan: I want to take matters a step further. Should fathers who are unable to register the birth of the child with the mother at the time but who prove through other procedures that they are the child's father be given extended rights and responsibilities for that child? In particular, should they be given extended rights and responsibilities if doing so conflicts with the mother's wishes?

John Deighan: That is a difficult issue. The father of the child must be recognised as such, but a lack of initial commitment should certainly favour the parent who is the child's custodian. The church does not say that it is an expert on how to legislate to resolve such problems—I am afraid that members have the difficult part in that respect. There are two principles. It should be recognised that a child's parent has rights and that those rights should be encouraged, but they should not be encouraged to the detriment of the child. If a parent was not there when the child's birth was registered and, in the meantime, another family and marriage have started, there could be interference with that family. However, we cannot simply ignore the fact that a person is the father and access arrangements should be permitted.

Major Dixon: Legislation that is already in place deals with such issues and I would not want more legislation to be added to that. I would prefer people to make use of what is already available.

Mrs Mulligan: It is important to recognise that the issue is not only about rights—it is also about responsibilities. We should start with Stewart Stevenson's premise about supporting the child.

I would like to move on to step-parents. Do the witnesses agree with the Executive's decision not to allow step-parents to acquire parental rights and responsibilities through formal agreements with the resident parent? Will you say why you agree or disagree?

Dr Elliot: I understand that the logic behind the decision is that there are already mechanisms that allow step-parents to reach agreements through the courts that represent a greater commitment and emphasise the importance of the agreement. We understand and respect that logic. We must ensure that people are clear about the position and that there is plenty of information for them to realise what they are letting themselves in for and what the consequences will be. However, we understand the Executive's position and go along with it.

The Rev Alan Paterson: We agree with the Executive. A group of adults making decisions about a child is not necessarily the best way forward. Matters can become complicated if there are serial relationships. We back the Executive's judgment for such reasons.

John Deighan: Initially, in our response to the consultation, we gave qualified support to such rights for step-parents, but asked whether alternatives could be found and whether adoption could be encouraged as an alternative route.

Major Dixon: We support the Executive's position. As Alan Paterson mentioned, serial relationships are part and parcel of life nowadays and they can complicate matters. Children can end up with eight grandparents, and deciding on the time factor for children in such situations becomes extremely complicated—and that is an understatement. We support the proposals.

There is already provision in the Children (Scotland) Act 1995 for rights of access if a

dispute goes to court. Our issue is which court a case goes to. Will it be a family court or something else? The way in which the case is approached sometimes adds tensions. That can exacerbate the situation rather than help it.

Mrs Mulligan: Some of my colleagues might return to the issue of which courts are involved.

Mr Bruce McFee (West of Scotland) (SNP): Major Dixon has led me nicely on to the area on which I have some questions: that of grandparents and their rights, a subject that has hit the headlines on a number of occasions recently. Let me put my question in a straightforward way: do you believe that grandparents should have a right of contact with their grandchildren?

Major Dixon: Each component of the family relationship has something to offer. The more that can be offered, the better the relationship for the child. To make such a right of contact automatic is very difficult. If two folks are contesting their divorce, there will be a lot of tension. One set of grandparents might naturally take the point of view of their own child, which can then be used as a weapon against the other person. That is the context in which the difficulty often arises.

Dr Elliot: We accept that there should not be an automatic right on the part of grandparents. However, it should be exceptional for grandparents to be denied contact. How that can be legislated for, I do not know.

John Deighan: Our view is quite similar. The parents have the primary responsibility for the welfare of their child. They might decide that the grandparents should not have access. We have looked around the world, and it seems that legislators go one way or the other on the issue. Some grandparents will have been unjustly kept out of the lives of their grandchildren, especially when they have taken on the role of the parents, who might not have been capable of looking after the children. We were not able to come down firmly on the issue, particularly given the lack of firm proposals. We believe that it should normally be up to the parents to decide who their children see or who sees their children.

The Rev Alan Paterson: Our position is broadly similar. We hear stories from many grandparents who were the mainstay of their grandchildren's lives during a period of much trauma and who have done a lot to help to keep the children's heads together and to help them to cope. There are occasions when, because of a court decision, the grandparents are cut off from their grandchildren. More seriously, the children are cut off from the folk who have given them most support.

We do not believe that simply being a grandparent should automatically entitle someone to a right of access. We would like it to be possible for the children to have a say in their own cases. The arrangements should be child-centred, as other provisions are.

Mr McFee: There is a fair degree of unanimity that grandparents' rights should not be automatic. I will turn to provisions that could be put in place. As you might know, the Australian Government recently published a discussion paper entitled "A New Approach to the Family Law System". It proposes amending existing legislation

"to explicitly provide that time with grandparents be considered by the court when determining what is in the best interest of a child."

What is your view of such an approach? For example, would you advocate a system that is not determined in court but is more focused on mediation?

10:45

Major Dixon: We would want to ask the child what they felt about the situation. We want to get that balance. Children have their own relationship with their grandparents—or not, as the case may be. We would take an approach that brings into the scenario the ways in which the child would like the situation to progress.

Dr Elliot: The position that I reflect would welcome the mediation route as being preferable to going through the courts. However, as I am not a practitioner I do not know how that would operate.

John Deighan: We did not look at that question in great detail at this stage, but we stated in a previous submission to the Executive that, as the situation stands, grandparents can get parental rights and responsibilities through the courts. If that has been done, they should be allowed to exercise those rights and responsibilities. The reasons why they were awarded them in the first place will have been based on the family situation—I am thinking in particular of those cases in which the grandparents bring up the children.

The Rev Alan Paterson: Although I have not had time to consult my committee on the matter, perhaps grandparents should have the right to have access considered, rather than have the right to access. The ultimate decision must be in the best interests of the child.

Mr McFee: That is useful. One of the problems expressed by grandparents who have contacted us is that they have not been considered in the final decision. We are trying to tease out the best way forward and to find out whether a process of mediation should be followed or whether a right of access should be enforceable through the courts.

The Rev Alan Paterson: My answer was partly based on discussions within our denomination in which someone with long experience in children's hearings said that many grandparents who are unsung heroes and saints suddenly find themselves totally excluded, and the folk on the children's panels do not think that that is in the best interests of the kids. The right to access for grandparents should be considered but, at the end of the day, the best interests of the child should determine any decision.

The Convener: The witnesses will know that the Executive set up a working party to consider a grandparents charter in response to the issue that has been raised. Notwithstanding what has been said about the desires of the child, is it your general view that the role of the grandparent is important in family life? If you were to offer the Executive your input—in a few words—on the grandparents charter, what would you say?

John Deighan: The main point in our submission is that we support marriage and the bonds that marriage creates, especially those with close family such as grandparents. We see the problems that are created by the breakdown of the extended family in society today, so anything that can address that and encourage people to work together and involve their extended family in the lives of their children will be beneficial.

Marlyn Glen (North East Scotland) (Lab): I return to cohabitation and the new rights that are proposed in the bill. We touched on the importance of making a will earlier this morning and of encouraging and educating people about the importance of doing that. At the moment, however, less than a third of the adult population makes a will. Panel members agreed on the emphasis that should be placed on the importance of protecting vulnerable individuals. Do you agree with the Executive that the provisions in the bill relating to cohabitants are intended as legal safeguards to protect vulnerable individuals, including the children of cohabiting couples? What do you envisage will be the effect of those provisions?

Dr Elliot: We agree that the provisions will protect otherwise vulnerable people, but the matter is tied up with the definition of cohabitation. We would encourage the Executive to go further and tighten up the definition of cohabitation. Otherwise, the right will not be as secure as it ought to be.

Major Dixon: We broadly agree. We must remember that people who are cohabiting have decided not to go down the marriage route, which brings with it certain rights and responsibilities. That is a decision that they have made. The matter becomes difficult if we give cohabitees rights and responsibilities because the question then arises whether cohabitation is perceived to be another form of marriage.

John Deighan: I made the point earlier that we must, of course, protect vulnerable people. However, we believe that the proposals are unnecessary and that the aims can be achieved in other ways. If we promote the status of cohabitation—which, as the committee found, is a short-term thing that lasts for an average of two to three years, after which time people either go on to marry or the relationship breaks up—we could be sacrificing children and families and making more people vulnerable. That will happen if we undermine the status of the institution of marriage. We are against the proposals, which dilute the status of marriage in society.

It is not that we do not care about vulnerable people, but we believe that it is not only within cohabitation that people are vulnerable. Many people who live together are financially dependent on each other without regarding themselves as cohabitees. We need to consider how vulnerable people throughout society deal with their finances and property and how they dispose of them. As I said earlier, our way to address that is through education. We must take the opportunity to inform them how they can best protect themselves and manage their lives and finances.

The Rev Alan Paterson: We do not regard marriage as a package of privileges that have to be jealously guarded for those who have committed to it. We claim to have a higher view of marriage than that. Privileges that are granted to those who are married need not be kept from everyone else. We particularly welcome the bill's emphasis on the vulnerable and we support anything that protects them. I am all for education but it is a long-term process and a lot of people are in relationships now. Also, education is not a foolproof system. We need to help the vulnerable as much as we can and introduce safeguards. Marriage should stand on its merits rather than somehow being dependant on a package of privileges in the eyes of society.

Marlyn Glen: That is helpful. What are your views on the Executive's decision not to abolish the concept of marriage by cohabitation with habit and repute?

Dr Elliot: Pass.

John Deighan: Historically, there were reasons why such marriages were recognised. I take it that the Executive's assessment is that some people are still in them. We have not given the matter great consideration. I do not know whether there are surviving marriages by cohabitation with habit and repute from the time of the second world war. I believe that the initial reason for such marriages was a recognition that there were obstacles to

people marrying at that time. People lived together as if they were married but they did not get around to going through the process, and their children, their neighbours and the local shopkeepers all assumed that they were married. I do not have any evidence that such relationships still exist or need to exist.

The Rev Alan Paterson: We have no position on the matter.

Major Dixon: Nor do we.

The Convener: The provision relates to future marriages; it would not be applied retrospectively.

I return to cohabitation. John Deighan's concern is that his information suggests that the average length of a relationship in which a couple cohabit is about three years. However, some such relationships last much longer—say for 20 or 25 years. Both parties must agree to the commitment to enter into a marriage or a civil partnership, on which we now have law. One person might want to marry or enter into a civil partnership and the other might not, so the wiling party will suffer. Surely there should be safeguards, which is the principle behind the bill. The Executive's letter to the committee states:

"The Bill therefore provides a set of basic safeguards relating to the sharing of household goods, money and property … where economic disadvantage can be shown".

All the Executive is proposing is that there should be a safety net. My reading of the bill is not that the courts would grant the same rights as married couples to cohabitants who had been together for three years—although some people would argue that they should. However, where there is a proven case of similar commitment, the bill will ensure that there is a bottom line for the weaker party, who will suffer disadvantage. I would have thought that you would be concerned about those people.

John Deighan: Of course. It is not that we do not care about people; as I said, we believe that alternatives should be pursued to ensure that individual rights are protected. The actions of the state impact on people's psychology. If we say that people do not have to get married in order to get certain rights but need merely cohabit, we start to remove—

The Convener: I have to correct you. Cohabitants do not get the same rights.

John Deighan: They do not get the same extensive rights, but you must agree that the bill draws the rights of married couples and cohabitants closer together.

The Convener: We must emphasise that we are talking about a set of basic safeguards, although we as a committee are not clear what that means. I am sure that we will be told, as we always are, that it is a matter for the courts to decide, which is fair enough. The bill is broad, but it does not grant cohabitants the same rights as married couples.

John Deighan: It will draw cohabitation closer to marriage. Our worry is about the gradual dilution of marriage, so that it becomes socially irrelevant. If we move in the direction that is proposed, that is exactly what will happen.

Stewart Stevenson: This might raise your worry levels slightly. The bill defines a cohabitant as a person who

"is (or was) living with another person as if they were husband and wife."

It does not appear to require them to have ceased to be married. Therefore, it appears to create a polygamous or polyandrous set of responsibilities. Do you think that we should be passing into law something that provides that a series of relationships can exist simultaneously with legal rights to property and so on, or should we take a different approach?

John Deighan: You are illustrating one of the problems. As family life in society fragments and we start to try to patch it together, we come up against so many difficulties. What we have to do, given the educational role of the law, is promote a coherent vision of family life. We have to promote that which best serves society, couples and children. We believe firmly that that vision is marriage. We must recognise the burdens of marriage, which is why we give married couples privileges; we are not rewarding people for being married but are, rather, recognising the burdens of marriage and being open to having children in marriage. We support that because it is the coherent vision under which family life will flourish. However, as we start to change the law to reflect fragmentation, which is a bad thing, we will just see more fragmentation. We must take steps to try to stop fragmentation.

11:00

Dr Elliot: Family life flourishes where there is a stable loving and committed relationship between people. I have not been briefed on the consequences of the scenario that Stewart Stevenson described.

Stewart Stevenson: To be candid, I came up with it only when I thought more deeply about what has been said here, therefore I do not pretend to have considered the matter fully. Does anyone wish to comment? It appears to be clear that the bill will give property rights to two partners or a complex interrelationship of partners.

Dr Elliot: Does not that come up against the question that we raised earlier, about our possibly

having to define more narrowly or carefully what we mean by "cohabitees"?

The Convener: That is one of the complications with which we will have to wrestle.

Major Dixon: One would assume that the lawyers around this table would like that complication.

The Convener: No comment.

Finally, is there anything that has not been said about family support services? You may have picked up that we are trying to produce a new set of family laws. I do not want to suggest that it is a side issue, but modernising the legislation does provide the opportunity to examine services, which Stewart Stevenson touched on. Has the Executive given sufficient prominence to the proposals on family support services and mediation and will it provide sufficient resources? I know that you are all interested in that, whether with the aim of reconciliation or, where a relationship has ended, of mediating a successful conclusion for all parties.

Major Dixon: I am aware that the Executive supports four organisations that provide mediation and which assist families through difficulties, but the problem for me is that they are all secular and have no faith component to them. However, some people feel that it is important to have a faith perspective, on the basis that their issues and the way in which they have to deal with them will be better understood. I am pleased that the Executive supports the four organisations, but it needs to look to a wider constituency of groups that can provide support.

Dr Elliot: If you are offering extra resources, convener, I am sure that they will be welcome.

The Convener: That is not up to me.

Dr Elliot: Alan Dixon's point is a fair one. The churches have a variety of counselling and mediation services that are greatly involved in supporting families when things are difficult. There should be greater recognition of that and greater publicity for it, so that if people are interested in that route of gaining support they will be able to do so. We are committed to providing it anyway; the more that people know about it the better.

John Deighan: Through the work of Scottish Marriage Care, which grew out of the Catholic Marriage Advisory Service, we have noticed that the Executive's support is prominent, but we would have to ask the organisations whether it is enough. The cost of family breakdown is massive—it runs into billions of pounds—so spending money in the area is a good thing and we encourage the Executive to do it. However, we want emphasis on marriage preparation as well as on relationships breaking down or starting to break down.

The Rev Alan Paterson: The prevention of pain is the best end to start with. We in the churches who are still involved in solemnising, conducting or celebrating marriages perhaps need to take from discussions such as today's an awareness of the responsibility that rests with us when couples come and say that they want to get married. I suspect that the churches offer a broad variety of preparation opportunities, whereby they give folk a chance to talk through what they are signing up to. With civil marriages, I am not sure that there is any equivalent of the more old-fashioned process of sitting down and talking for a wee bit—or, indeed, for a long time—before the event.

If, after sessions with me before their wedding, three couples phone me up to say that they have decided to put off the wedding for a while, I am happy that I might have prevented three divorces. Perhaps there is a need for people to talk about the nature and shape of society and the wonderful role that the institution of marriage plays within it; I do not know whether mainstream education would be the place for that.

The Convener: That ends our questions. Thank you for a useful and lively session, during which we have discussed big issues. We have listened carefully to what you have said. Thank you for your written submissions and your oral evidence.

I welcome the members of our second panel to the Justice 1 Committee. Dr Gordon Macdonald is from CARE for Scotland and Vanessa Taylor and Dianna Wolfson are from the Scottish Inter-Faith Council; Vanessa Taylor is the organisation's policy and equalities officer. Ephraim Borowski is the director of the Scottish Council of Jewish Communities. At the beginning of the meeting, I should have introduced Professor Norrie, who will be our adviser on stage 1 of the Family Law (Scotland) Bill.

I think that some of the witnesses were in the public gallery during our questioning of the first panel. Our lines of questioning will be very similar.

Stewart Stevenson: Again, I start by asking for an overview. Do the members of the panel think that the proposals that are on the table will help children or hinder them? With the child at the centre of your responses, please say whether the bill will help or undermine children and family life. In order to be non-discriminatory, let us start with the witness on the right of the panel and then move across.

Dianna Wolfson (Scottish Inter-Faith Council): The overriding concern of the faith communities is that the sanctity of marriage be upheld. Looking at the different issues, I think that those communities would say that the child, being

the centre of a marriage and of the extended family, must also be at the centre of the whole process. However, they are very much aware of the reality of modern life in a secular society. Obviously, different faith groups hold different views, which can sometimes be difficult to grasp because of the concepts involved, but I think that there is broad acceptance of the proposals. Perhaps Vanessa Taylor will add to what I have said.

Stewart Stevenson: Before we move to the next witness, I want to press you on that. I acknowledge that you represent a wide range of faiths, but is there consensus among the people whom you represent that the interests of the child must be paramount when difficult choices have to be made between the interests of the parents and the interests of the child?

Dianna Wolfson: Yes—I think that that position came over in our consultations.

Vanessa Taylor (Scottish Inter-Faith Council): I think that we welcome the bill as an attempt to reconcile competing rights and responsibilities in protecting vulnerable people. As I am sure members will appreciate, the different faith communities have different views, so we need to recognise that each faith community deals with divorce differently. It is difficult to say that, overall, faith communities support the bill, but there is broad support for certain aspects of it. The faith communities certainly welcome the child-centred approach, which they see as being positive. However, there are concerns about certain aspects of the proposals.

Stewart Stevenson: I am sure that we will come to those.

Dr Gordon Macdonald (CARE for Scotland): In considering what is in the best interests of children, it seems to me that it is in the best interests of children to grow up in a family with their natural parents who are married. In that context, given that the bill will move society away from that, the proposals are probably overall unhelpful for children.

Stewart Stevenson: Colleagues will develop some of those issues in detail. However, do you think that the bill, in the broad sweep of its provisions, will be beneficial or harmful to children at the point where the breakdown of a relationship is generally agreed to have happened?

Dr Macdonald: That depends on what causes the most difficulty and harm to children. The premise on which the proposals in the bill are based is that acrimony in the breakdown of a marriage is what causes most harm to children, but it may well be that the breakdown itself is what causes harm to children. Therefore, that question needs to be addressed by the Executive, which it has not done so far. Certainly, evidence from the States suggests increasingly that the harm to children is caused by the breakdown itself rather than by the acrimony that accompanies it.

Stewart Stevenson: My colleagues will definitely pick up on that issue.

Ephraim Borowski (Scottish Council of Jewish Communities): I thank the committee for inviting us to give evidence today.

As members will know, the Jewish community's specific interest in the bill concerns not so much the provisions that it contains as those that it does not contain. Within the Jewish community, views on the general issues with which the bill deals are as mixed as they are in society in general. Members will also know that the Jewish religion as such is very strongly in favour of the family. However, unlike some faiths, it recognises that some marriages break down, and it looks to moving forward from that situation to the best advantage of all parties. In that context, we would like the issue that we have raised to be included. On Stewart Stevenson's specific question, I would like to pass if I may.

11:15

Stewart Stevenson: That is fine. We will come back to your specific concerns later. I surrender the baton to my colleagues.

The Convener: Dr Macdonald, you are saying that the problem might be that children are affected by the breakdown itself rather than by the acrimony. Will you expand on that?

Dr Macdonald: When I was growing up, I greatly appreciated the security that was provided by having both my mum and my dad there. The insecurity that is caused by the disruption—"Am I loved?"; "Is it my fault?"; "Why are daddy and mummy splitting up?"—is what causes emotional damage to a child. Nobody wants acrimony, but the Executive has put the cart before the horse with regard to the prime cause of emotional damage to children.

The Convener: If the Executive were to agree with you, what would you ask it to do to address that?

Dr Macdonald: The issue, which has already been covered by previous witnesses, is whether our emphasis should be on supporting marriage. No one is saying that all marriages work, but the Executive's priority for public policy should be to support marriage, to help people to make their marriages work and, where there are difficulties, to help people to reconcile those difficulties. Mediation and reduction of acrimony should come second to that, but that is not the case in the bill.

Mrs Mulligan: Are you concerned that the Executive seems to be placing the emphasis in the wrong place and that, rather than supporting marriage, it is considering ways of helping people out of marriage, if you like? Are there never situations in which a relationship has reached the stage at which, by staying together, the parents will cause more problems for the children? Children are perhaps more likely to be damaged when a relationship has collapsed to the extent that it makes the family environment a bad one for them to be in.

Dr Macdonald: The Executive's priority should be to support marriage as the most stable and best relationship within society—that is not the case in the bill. I understand what the Executive is trying to do and there are clearly situations—particularly in which there is violence—when it might be best for a woman to cease to be in that relationship. However, it is difficult to legislate for individual circumstances, which is essentially where the issue gets a bit murky. Each relationship is different and we can throw all sorts of factors in, such as drugs or violence. Nevertheless, the Executive should still consider what is best for society as a whole. Two thirds of marriages survive, and of the one third that do not survive, in most cases it is unlikely that there will be extremes of behaviour such that the situation would be seriously damaging to the other partner and to the children.

Mrs Mulligan: So—you think that the Executive should support marriage's advantages to society as a whole over support and protection for individual children within a family situation.

Dr Macdonald: The Executive needs to support what is best for children in society as a whole. That does not mean that the courts should not take into consideration what is best for individual children, but there is clearly disagreement—even among the witnesses who are before you today—about what is best for individual children. It is difficult for us to speculate on specific cases when we do not have any before us.

Mr McFee: I understand and support much of what you say about the need for emphasis on supporting marriage, but I want to nail one issue one way or t'other. Is it your contention that reduction of the limits for divorce, as the bill proposes, would increase the number of divorces because reconciliation would not be given a chance?

Dr Macdonald: It would certainly increase the number of divorces in the short term—I think that everybody acknowledges that—but I do not know whether it would increase them in the long term; we would have to wait and see. The change would make divorce easier to obtain and therefore could potentially increase divorces in the long term; it would be unlikely to reduce the number of divorces. Personally, I think that all of us, including the Executive, should have as our objective a reduction in the divorce rate, rather than an increase in it.

Mr McFee: I understand your comment that the change would increase the divorce rate in the short term, because those whose divorces are in the pipeline would take advantage of the reduction in timescales, but does your gut instinct tell you that the change would lead to a long-term increase in the divorce rate?

Dr Macdonald: My gut instinct is that, if something is easier to obtain, the likelihood is that it will increase. However, I have no evidence on that, so we will have to wait and see how it pans out.

Margaret Mitchell: The bill proposes a reduction in the time limits for no-fault divorces and will remove desertion as a ground for divorce. What are the witnesses' general views on the proposed new time periods and grounds for divorce? The parties in such cases will have reached an amicable agreement to divorce, but—to build on what Dr Macdonald said—should there be mediation even in such circumstances? I throw that into the equation. If the ultimate goal is to try to keep, where possible, a meaningful relationship for the benefit of the children—as it is for Dr Macdonald and many others—would the witnesses consider such a measure?

Ephraim Borowski: That measure might sound wonderful in principle but have no effect in practice. I am not speaking on behalf of the Jewish community when I say this, but it strikes me that to require mediation will simply result in a new cohort of professional mediators signing forms to say that mediation has been undertaken or, at least, attempted and that the requirement will have no practical effect because mediation might simply not have happened. One needs to be careful that one is not simply doing what appears to be the politically correct thing to no practical effect.

Dr Macdonald: There has been experience in England on requiring mediation. My personal view—I hope that it is CARE's view, although I have not discussed it with my colleagues—is that mediation would need to be voluntary rather than compulsory, but that does not mean that it should not be encouraged and that the Executive should not support it. My concern is that, although the Executive is currently putting a lot of resources into mediation—which is good; do not get me wrong on that—it is not putting many resources into any specific attempt to bring about reconciliation. In some cases, reconciliation will not be possible—we understand that—but it would be possible in others and it seems to be a shame that there is little or no support for it in cases in

which it would be possible. Obviously, many priests and ministers provide that sort of support every day to people who are having marriage difficulties, but public policy does not seem to offer any backing for that.

Vanessa Taylor: The faith communities regard marriage as being for life, but all the major faith communities accept or at least tolerate divorce, with the exception of the Roman Catholic community, from which you have already heard evidence. Divorce is increasingly accepted as a facet of modern life.

Different views are held on reducing the time period for non-fault divorce, but we have found strong support for mediation for couples with marriage difficulties. Alan Dixon of the Salvation Army has already touched on a concern that we mention in our written evidence. Although a lot of funding goes to mediation services, it is for secular services. Secular counselling may be helpful for some couples with a religious background, but it is not helpful for all. We would like funding to be available to faith-based organisations that offer mediation or would like to be able to offer mediation. We know of cases of faith-based organisations being turned down for such projects.

We support the idea of mediation, but we did not consult on whether it should be required, so I do not think that I can comment on behalf of the Scottish Inter-Faith Council. My personal view is that mediation should be encouraged but should probably be voluntary. I do not know how much good would result from requiring people to go through mediation; it might just exacerbate the acrimony.

Margaret Mitchell: Perhaps we should just require mediation to be considered.

Vanessa Taylor: We would certainly want more funding for mediation, but we would want that funding to be available to more than just the four services that have been identified.

Dianna Wolfson: I have nothing to add to that; I agree with what Vanessa has said about mediation.

Margaret Mitchell: You seem to be divided on whether mediation would be of any benefit to couples who are in agreement about divorcing. Is the one-year period for an uncontested divorce acceptable to you?

Also, should we be thinking in terms of pursuer and defender? To cut down on any acrimony, should we not be thinking about a joint petition to the court? If we have a pursuer and a defender, it is almost as if we automatically have a right and a wrong. Would having a joint petition be better for children's welfare? It would smooth the whole process.

Ephraim Borowski: In my experience, that is what happens in effect. One can meet one's ex round the table in a pub and pass the form backwards and forwards. If a divorce is uncontested, people do not have to go through lawyers. It may be appropriate to acknowledge that possibility and formalise it, thereby slimming down the process.

There is clearly a huge difference between contested and uncontested divorces, and between divorces in which property or custody issues have to be settled and divorces in which there is agreement. Where there is complete agreement, I suppose that there could be an extreme view that said, "Why not just let the divorce happen immediately?" However, no one is suggesting that. Even a waiting time that was reduced from two years to one year would still give people the opportunity to think about it, cool off and possibly get back together again.

Whatever we end up with will inevitably have a degree of compromise. You are right to be considering how to make the process the least acrimonious process possible, even if it is just for the two parties without any children involved. Paradoxically, doing that might result in a larger proportion of couples for whom there is agreement and no acrimony actually staying together.

11:30

Dr Macdonald: We disagree with the Executive's proposal to reduce the time limit. It came out in the earlier discussion that the Executive has picked out an arbitrary time limit. Ephraim Borowski has just made a perfectly rational argument; if you follow the Executive's logic, why wait a year if there is already agreement? The seriousness of the commitment within society is such that the law should recognise it and reducing the time period is unhelpful.

Margaret Mitchell: So what would you wish to be done in this extended period?

Dr Macdonald: In what sense?

Margaret Mitchell: What would you hope to gain if the time period was more than a year?

Dr Macdonald: A year seems to be a very short time, particularly if there are children involved. The commitment that is entered into in marriage, whether it is civil or religious, is a serious commitment for life. People should be aware of that when they enter into it. In a sense, we cannot hold everyone's hand all the time. We have to help people to be aware of the commitment into which they are entering. If they take out a mortgage, they should be aware of the fact that if they do not pay the mortgage, they will lose their house. To reduce

the time period to one year and say that people can get out of it very easily as long as they both agree undermines that commitment.

Margaret Mitchell: If nothing meaningful happens in a longer time period, will the situation change?

Dr Macdonald: The point is to provide opportunities for people to explore whether there is a possibility of maintaining the relationship.

Margaret Mitchell: How would you do that?

Dr Macdonald: Through funding mediation and reconciliation counselling.

Margaret Mitchell: Which is where we started.

The Convener: What evidence is there that reconciliation can change the course of a relationship breakdown?

Dr Macdonald: Reconciliation always changes a relationship. If there is some sort of disagreement, reconciliation will change it.

The Convener: Okay, let me rephrase that. What evidence is there that reconciliation services help people to reconcile in a relationship?

Dr Macdonald: The evidence is inevitably anecdotal. If you go and talk to ministers, you will find many who have come across people who have had relationship difficulties and who have worked with them pastorally to help them to resolve those difficulties.

We are all presented with a romantic idea of marriage by the media and people think that marriage is about a wedding service, but the wedding is only the start of a marriage. The marriage is what comes after. There is so much emphasis on the wedding service, but the marriage is about the relationship.

The Convener: I do not think that we can disagree with you, given that Bridget Jones is all over the press today as the perfect example.

On a more serious point, I do not think that we have had an answer to the line of questioning that Margaret Mitchell was trying to pursue. Whatever the grounds, and whatever you think about the law, we are not here to judge that; we are trying to sort out whether the Executive's proposals are workable and sensible. At the moment, one person has to sue the other even if there is no acrimony and there is total consent. One person has to sue the other in cases of adultery or unreasonable behaviour, for example. The current system almost forces people to write down a list of reasons why the other person is not a desirable partner in marriage. In a case of unreasonable behaviour, the person who is suing the other person is probably going to exaggerate how bad the marriage has been. The committee has to examine whether the system should remain as it is or move to using a joint petition.

Dr Macdonald: If there is a relationship breakdown, the likelihood is that there is fault on both sides. That is the likelihood in the vast majority of cases. None of us is perfect and, to a large degree, it comes down to selfishness on the part of the individuals concerned. The question is whether we, as a society, are to say that there is no fault. I understand the difficulty for courts in making a judgment about who is more to blame, but is society just to say that there is no fault? Is that not a denial of reality? The reality is that there is probably fault on both sides.

I have a lot of sympathy for judges and sheriffs who have to make those difficult decisions. Nevertheless, as a principle, society should say that fault does exist in a relationship breakdown. Where people are cohabiting, there is no legal commitment, so the courts do not need to get involved. However, where there is a legal contract, inevitably the courts will be involved.

Ephraim Borowski: Forgive my butting in on somebody else's argument, but the specific question was whether joint application would be preferable. It is clearly unrealistic to expect joint application in every case. Therefore, there will have to be something like the existing procedure. The question is then whether joint application would be an additional useful tool within the bill, rather than whether it would take over from the existing procedure. I would be surprised if anybody would disagree with the proposal, simply because it can happen—that is, the two people can toss a coin to decide which one is to be the applicant and which one is to be the respondent; one will sign page 1 and the other will sign page 2, and in effect that will be a joint application. In general, I am in favour of removing as much pretence from the law as possible. If an application really is a joint application, let it be clear that that is what it is. I would welcome that on the ground that, at the moment, people are forced to adopt a fake adversarial position.

Dr Macdonald: I have not considered this specific proposal, as I heard of it only today, but I can get back to the committee on it in writing. One specific concern that I have is that it is possible that some sort of pressure could be put on one party to sign a joint application although they were not content with it. That is a realistic scenario. However, I will get back to you with a written response on the proposal.

The Convener: If there are any issues that you have not covered in your written submission that you think it is important that we consider, we would be quite happy for you to write to us.

Vanessa Taylor: I will return to the initial question about reducing the time periods and will then address the proposal for the joint petition.

We found that people feel, broadly, that a five-year period is quite a long time and would cause a lot of acrimony, which would probably not be in the best interests of any children or of the parties concerned. There is fairly broad agreement on that. However, there is less agreement on the proposal to reduce the current two-year period to one year. There is a concern that reducing the time period would not give adequate time for a rethink or mediation and a possible reconciliation. Most weddings take more than a year to plan, and there is concern that it may be possible for people to get out of their marriage in less time than it took them to plan the wedding favours, the dress and everything else.

Some people have a strong feeling that the period should remain two years. Equally, the view has been expressed to us that if a marriage has broken down, it should not be prolonged unnecessarily, as ending it could give peace of mind to all concerned. I have to represent those two views that were put to us. There was broad agreement to the proposal to reduce the period from five years to two years but not to the other proposal.

We did not consult specifically on the proposal for a joint petition, but we consulted generally on the retention of fault causes and adultery. There was quite broad support for retaining those in law. The issue is less about vilification of one's former spouse than it is about the protection of what one might call the innocent party. If the innocent party has religious feeling, it protects them if they are able to say, "Yes, my marriage broke down, but it was not my fault." Speaking personally, if my husband went off with somebody else, I would want to say that it was that adultery that caused the marriage breakdown. That is quite an important thing for some people. It is not about vilification or apportioning blame; it is about the healing process.

Margaret Mitchell: Could it be both? Could a joint petition, where there is agreement that, despite the fact that the people involved have done their best, the marriage has not worked out and the people are worse together than they would be apart, be combined with the scenario that you suggest? That would mean that there would be a mixture of no-fault divorces and joint application, and having a pursuer in other circumstances.

Vanessa Taylor: Yes, speaking generally, I think that most people in the faith communities would support the mixed system because it allows the option of enabling the couple to come to some sort of agreement. However, it is important that the concept of fault is retained and that we do not move to a no-fault system altogether. Further, there is strong support for keeping adultery as a separate ground of fault.

Dianna Wolfson: I endorse what Vanessa Taylor says, but I would like to raise a point about the time limit. In our discussions, it was pointed out that the five-year time limit could be a problem for some people—particularly women, whose biological clocks are ticking away—with regard to having the opportunity to remarry and have children.

The other problem was that having such a long time limit means that there is more scope for people going into a situation of cohabitation, which some of the faith groups would view as being problematic. From that point of view, a reduction in the time limit would be helpful.

The Convener: After a brief question from Bruce McFee, we will have to leave this subject as we have other issues that we must address.

Mr McFee: There seems to be a general consensus that some form of mixed system, perhaps combining a no-fault joint petition and a retention of some part of the existing system, would be preferable.

Ephraim Borowski mentioned the issue of pretence in court, which we all know takes place. Would you support a provision in the law that said simply that there was a period after which people could apply for a divorce and that that period was the same in all instances? That would mean that people would not have to invent circumstances that would enable them to get to court more quickly.

Vanessa Taylor: We have not consulted on that so I am not quite sure what I can say about it. I think that, if the divorce is being sought on grounds of adultery or unreasonable behaviour, it might be better for the divorce to take place more quickly than it would if the divorce related to a breakdown of marriage and a period of non-cohabitation. I am not sure that a one-size-fits-all approach would be best.

Ephraim Borowski: As the question was directed at me, I ought to say something.

It is quite clear that one size does not fit all. In theory, if there is a fault, one would want to be able to dissolve a marriage virtually instantly. Equally, if there is agreement and no acrimony, one would want there to be a cooling-off period, which would allow the opportunity of reconciliation and so forth while ensuring that, once the parties have agreed that it is over, it is over. If the fundamental and underlying principle is the interests of the child or the potential child, perhaps

the appropriate time limit should be not one year, two years or five years but nine months.

11:45

Dr Macdonald: The concern about pretence in court is valid and applies not just to this area but to all aspects of court activity. The question that I would throw back at committee members—I realise that you might not want to pick it up immediately—is whether the adversarial system is the best one for our courts or whether it would be better to move towards a continental system in which an investigating magistrate looks for the truth. I hasten to add that that is not CARE for Scotland's position; I simply want to give another interesting perspective on the matter. My point is that our courts and our Parliaments are based on an adversarial system. Even the Scottish Parliament is based on such a system, even though we were supposed to move away from it. That inevitably means that people will take extreme positions, talk up their opponents' weaknesses and talk down their own weaknesses. I am not sure that such a system is the best one.

As far as timescales are concerned, some people, particularly those who have a strong Christian faith, have a conscientious objection to divorce. Indeed, I can think of a specific example of that. Reducing the waiting time for divorce from five years to two years would cause a significant problem for those individuals.

Mr McFee: That was what Margaret Mitchell was partly getting at in her question—and, luckily, we are asking the questions on this occasion. I certainly think that we should consider those comments.

The Convener: As usual, we are running out of time and have many more questions still to ask. I hope that members will not mind if I jump to a couple of issues that we really need to raise with the panel, the first of which is religious divorce.

Stewart Stevenson: I thank the witnesses for their submissions. I want to raise a brief technical point about agunah, which as described appears to apply only to women. Does it also apply to men?

Ephraim Borowski: Yes, in theory. However, it is less frequent, perhaps for largely sociological reasons.

Stewart Stevenson: But in Jewish law there is equality in that regard.

Ephraim Borowski: The underlying principle is that divorce, like marriage, is a contract that is entered into voluntarily. As a result, both parties must agree to it. By refusing to accept the divorce, either party can in theory prevent it from happening. It must be voluntarily granted and received, which is why our proposal does not empower the sheriff to instruct a religious divorce to be given and received.

Stewart Stevenson: So you are proposing that the sheriff should instruct that there be a period within which a get can be sought and that the civil process be delayed to create a gap for the religious process to be gone through. I imagine that that will also be the case in other faiths.

Ephraim Borowski: Yes. The fundamental principle of existing law, which there is clearly no proposal to change, is the clean break. However, that is frustrated by the current situation, because the original religious marriage ceremony creates two marriages, only one of which is dissolved by the civil process. As a result, there remains a tie that presumably matters more to one party than another; otherwise both parties would not be in the situation.

As you are aware, the current situation also gives rise to the possibility of blackmail. For example, the get could be thrown on to one side of the balance to be weighed against property, custody or access arguments. As you say, it is in order to allow the sheriff to say, "We are aware that there is this other problem in the background," just as there might be arguments about financial hardship, as opposed to a more general sense of hardship, which I would argue that this is. The sheriff can say, "Go away and try to resolve it. Come back to the subsequent hearing and report where you have got to." Our belief and our experience in England, New York and other jurisdictions where something like this has been done is that it significantly assists in resolving the problems before they happen.

Stewart Stevenson: I suggest an alternative approach, although I do not want to tread on the voluntary nature of an agreement made at marriage and an agreement at dissolution that is again voluntary, as that appears to be core to what you are trying to achieve. Would it be reasonable, in terms of your faith, for the legislation to place sanctions on those who sought to thwart the deliberations of the civil system post hoc? Would that be an additional or alternative approach, in particular when the cooling-off period may have failed and the civil proceedings have gone ahead?

Ephraim Borowski: There is a problem with the imposition of any kind of sanctions because, at least in theory, that could be represented as duress and that would, ipso facto, invalidate the get even if one were granted. Therefore, there is a difficulty with that approach, but I must admit that I had not thought about the imposition of sanctions for, as you put it, frustrating the civil process, rather than for not going through the religious process. That might change the balance as to whether it would count as duress in religious

terms. As I am not a rabbi, I cannot answer the question directly, but I can certainly go away and ask about it; it is an interesting question.

Stewart Stevenson: I will close the discussion off, because I am anxious that we get other issues in as well. I was thinking in particular about the distribution of assets rather than forcing the parties to accept a religious divorce, because that would be the line that you would not wish us as legislators to cross.

Ephraim Borowski: I have certainly taken the view in the past—and nobody has said outright that I was wrong—that it would be possible for a sheriff to say that one party is imposing a "hardship" on the other by refusing to make a clean break and to say that they will take that fact into account, among all the other elements on the table, in setting a level of alimony or apportioning property. My understanding is that that is all right so long as it is open to the recalcitrant party to change his or her mind and say that they are prepared to buy the deal, or that they would rather not and will therefore settle the matter. So long as it is open to them to go down either path, that cannot be represented as duress. Therefore, I would say that that approach is appealing, but that is not an authoritative view. I would have to consult on that and come back to you.

Stewart Stevenson: It would perhaps be useful for us to hear from you later to tie up those points.

The Convener: I agree. If we had more time, we would explore further what technicalities would be involved in putting provisions into the bill.

Stewart Stevenson: Sorry. I have one other point, if that is okay, convener.

In its remarks on Muslim couples, although I suspect that those remarks would apply to couples of other faiths too, the Scottish Inter-Faith Council says that it creates confusion for children of a marriage when the religious divorce happens first and the civil one happens later. Should we as legislators respond to that situation, or is it just a matter that we should note and of which we should be aware?

Vanessa Taylor: Like Judaism, Islam has religious divorce, but it is not exactly the same and the same circumstances do not necessarily apply. What is certainly different is that whereas in Judaism one party can stop the divorce indefinitely, that is not the case in Islam. For the husband, the divorce is simple in Islam. The wife can apply to a Sharia court and her case will be heard there. The position is different but, in both cases, the idea is that it would be beneficial for children if the religious and civil divorce happened at about the same time, because that would provide clarity for everybody concerned. In Canada, a system has been put in place in which a couple who have had a Muslim marriage can go to a recognised Sharia court for a divorce, which will then be recognised in civil law. That is another option for people, although it happens only in certain parts of Canada. I know that some Muslim lawyers are pressing for a similar system to be accepted under English civil law. The committee should be aware of that possibility.

Dr Macdonald: The principle should be that the state does not intervene in the internal affairs of religions. We support that principle and would be concerned if there were any departure from it. However, on the specific issue that Ephraim Borowski and his colleagues have raised, we do not have any specific opposition to the proposal of the Jewish community.

Mrs Mulligan: Given that Mr Borowski has agreed to respond in writing to Stewart Stevenson's points, I ask him also to respond to a question that I did not get to ask about the granting of parental rights and responsibilities to unmarried fathers. I did not see a view in Mr Borowski's paper on that issue, although there is a suggestion about the implications for children who are born of an adulterous relationship. It would be useful if he discussed that issue in his written reply.

Ephraim Borowski: I will make one brief comment. Until relatively recently, the advice from rabbinical courts in this country was that they would not consider a religious divorce for people who did not already have a civil one. Now, the advice is to get the religious divorce out of the way as soon as possible. That is largely a result of changes in society at large, such as an increase in cohabitation, that have led to the risk of more children being born, if not completely out of wedlock, at least, shall we say, to the wrong pair of parents, with all the attendant consequences that that has in the religion. That is the main reason why the matter is regarded as urgent and important. It is not really about sorting out divorces but about ensuring that children are not born into a situation from which, within the faith, there is no way out.

The Convener: I am sorry, but we must end the session there, although I am sure that we could go on all morning. We would like to consider further one or two issues that we did not get a chance to discuss on the record, one of which is cohabitation. However, if we need more information on those subjects, I am sure that you will not mind if we get back to you. I thank the witnesses for their excellent evidence, for which the committee is grateful.

We have another panel of witnesses to hear from, but this seems the right point to have a break for five minutes.

11:58

Meeting suspended.

12:11

On resuming—

The Convener: We move on to our third panel. I welcome Maureen Lynch from Family Mediation Scotland and Carol Barrett, who is the director of Family Mediation Lothian. We have a number of questions for you, the first of which will be asked by Stewart Stevenson.

Stewart Stevenson: Perhaps you could start by providing us with some basic information on the range of work that you undertake and the geographical coverage that you are able to achieve. I ask that in the context of the fact that it is fairly clear that in future there will be an increased demand for your services.

Maureen Lynch (Family Mediation Scotland): First, I thank the committee for the opportunity to give evidence. Mr Stevenson's question was an appropriate one to start off with because a key fact to note about Family Mediation is that, since it began more than 20 years ago, it has significantly developed the services that it offers to families who experience parental separation. We began by offering mediation—in other words, we helped parents who were in conflict to manage that conflict sufficiently to allow them to make decisions about their children. However, as we have come to recognise the growing needs of parents and children who experience the situation of parental separation, we have developed a range of other services. We provide a great deal of information to parents, other family members and other professionals about the impact of parental separation on children, how they are affected by it and what can help them to manage their way through that process most effectively.

Over the past 10 years or so, we have become more involved in developing contact centres for those parents who are in situations in which, for a range of reasons, the conflict between them is so severe that they cannot meet in the normal way, but there is still a desire for contact between the child and the parent with whom the child does not live. The contact centres provide an opportunity for children to have time with the parent with whom they do not live, while being protected from their parents' conflict.

We offer a range of direct services for children and young people. A number of our local services give children and young people support in making sense of their experiences once their parents no longer live together. Sometimes we provide support to assist their involvement in a legal process, which can present a range of difficulties for them. We also offer direct counselling support. As I said, we have developed the services that we offer to families over the years. We have done so in response to demand from the people who use family mediation services and because of our perception of children's and parents' needs.

12:15

We have quite wide geographic coverage, with a service in all the former local government administrative units. We have services in the Western Isles and Orkney and we hope to develop a fuller service in Shetland. At present, the service for parents and children in Shetland is provided by our service in Aberdeen.

It is possibly worth mentioning that, although the range of services that we provide across Scotland operates within a framework of quality assurance under which we aim to provide a consistent protected service to parents and children, the situation of each service area is very different in terms of how they obtain resources. Ten of our services receive direct support from the Scottish Executive and all but one get some local authority support—indeed, one service is funded exclusively by its local authority. We can provide the committee with details of the funding structure of the different services.

The Convener: Although I am happy to receive that information, today we need to deal with issues of principle, not funding.

Stewart Stevenson: Before I hand on to other members, I have one further issue to raise. At present, courts can refer partners in cases of family dispute to mediation. How much does that happen in practice? Do you have the kind of relationships with individual lawyers and the legal profession as a whole to make mediation an effective way forward?

Carol Barrett (Family Mediation Lothian): Again, that is an interesting question. Initially, the rule of court was widely used—certainly, that is the case in the Lothian area—and its use encouraged people to come to mediation. However, in many, if not all areas of Scotland, solicitors are now more likely to talk to parents about using mediation services prior to making a court action. Solicitors have come to realise that, when a case goes to court, sheriffs will suggest that they try family mediation.

We find that many families are using us at the stage before they access the court. That said, they also come to us through that route: 75 per cent of cases that come to the 11 contact centres in Family Mediation Lothian do so as a result of a court order, by which I mean a court order to use a contact centre and not a court order to use mediation. People cannot be forced into mediation.

Stewart Stevenson: Is the trend up or down in terms of mediation that is driven by the legal process, either before a case comes to court or from a court order?

Carol Barrett: In many cases, it is up. That said, the evidence that we have gathered from our referral rates is that most of the people who come to us now are self-referrals. People are finding out about family mediation through one route or another. Unfortunately, we are seeing an increase in the number of families who use our services because their parents used our services. We have now been around for more than 20 years.

Stewart Stevenson: Is that the case across Scotland, Maureen?

Maureen Lynch: The trend across Scotland is up and down. That is for two reasons: the first of which relates to referrals to mediation through the legal route, either through the rule of court or through solicitors. Those referrals depend very much on individual legal practitioners or sheriffs. The trend therefore goes up or down, depending on who the sheriff is at the time.

Secondly, as Carol Barrett said, although we appreciate referrals that come through a rule of court or through initial contact with solicitors in the legal process, we promote the idea that it is useful for parents to have access to mediation services as early as possible in the separation process. We seek a wider understanding in the legal profession that mediation is not just about helping parents when they have got stuck and are unable, without support, to sort out issues in relation to children. Mediation services can provide people with information to help them to make decisions and avoid getting to the point at which they are stuck. In our relationships with solicitors, we help them to become as aware as possible of the range of other services that family mediation offers, in addition to our being there when parents who are in the legal process find that it is not satisfactory and need an alternative.

Margaret Mitchell: I turn to divorce. In your helpful submission you state that you are in favour of the proposed reduction in the periods of separation. Will you comment on Scottish Marriage Care's view that one year is not a sufficient period of time for people to sort themselves out emotionally? What part will mediation play in the reduced periods of time? I take your point that mediation should be a positive starting point as opposed to a last resort.

Maureen Lynch: First, we should look back and consider the reasons why it was identified that action needed to be taken on the periods of separation. Although there has been a steady movement towards use of the non-cohabitation grounds for divorce, with just over 80 per cent of people who seek a divorce using those grounds, there is a tendency among those who have children to use the fault grounds of adultery or unreasonable behaviour, because people can get a divorce much more quickly if they use those grounds. That is why our response to the proposed reduction in the period of non-cohabitation is favourable. On the one hand, it is not satisfactory to maintain children in a broken relationship. On the other hand, embroiling children in a messy process in which one parent has to blame the other in order to get a divorce is not satisfactory either. Our approval of the proposed reduction in the periods of separation comes from our desire to promote a legal framework that is more supportive of children.

Margaret Mitchell: Do you therefore favour a no-fault ground for divorce, with a joint petition? If so, would you want that to be in every circumstance or do you favour a mixed system, with both fault-based grounds and joint petitions? Arguably, the pursuit of a defender unnecessarily adds to the acrimony.

Maureen Lynch: I listened to the comments on fault in divorce that were made by one of the speakers in the previous panel. The matter is complicated. As you know, the UK Parliament tried to change the divorce law recently to get away from fault and go down an administrative route.

Divorce is not only a legal process, but an emotional and psychological process of relationship breakdown. When the UK Parliament considered the matter during the consultation process on the proposals for England and Wales, there was discussion about the matter and research was undertaken that indicated that in some circumstances children would not necessarily be supported by an approach that meant that they could not think about the divorce in terms of fault. It was suggested that the emotional and psychological process that some children needed to accomplish required them to find a way of understanding what was happening in terms of someone being to blame. We are more comfortable with a legal framework that promotes the use of no-fault grounds for divorce, particularly for people with children, while acknowledging that there will be situations in which individuals need to approach the divorce from a fault perspective.

In many ways, we might argue that there is never enough time for parents to sort things out, because divorce is a process that goes round in circles rather than in a straight line. A year is long enough to enable parents to negotiate contact and residence arrangements for their children, provided that the parents who require the support of agencies such as Family Mediation Scotland are able to receive that support. The availability of family mediation services will be crucial if the bill is

to have its intended effect of reducing acrimony for the benefit of children.

Carol Barrett: The most damaging thing for children is for their parents to be in conflict. If someone wants a quickie divorce they have to up the ante, which leads to more conflict and blame. The children can be caught up in the middle of all that. Family Mediation Scotland is not a counselling agency, but sometimes we see couples who are not ready to separate, or note an ambiguity in the response of one of the partners. We do not tell parents that going down the family mediation route means that they will have to separate. Parents have individual appointments when they first come to us and if the mediator thinks that the parents are not ready or willing to separate, they do not say, "Okay, we'll get you separated, because that's what we're here for"; they explain that we work closely with Couple Counselling Scotland. We have a fast-track system for families in crisis who need help quickly, so we can signpost families to support that is about keeping families together. We do not think that all the couples who come to family mediation should separate.

Margaret Mitchell: My understanding of family mediation is that the mediator would first consider whether there was something to preserve and then, if there was not, consider how the couple might resolve the situation.

Carol Barrett: Most definitely.

Margaret Mitchell: The Scottish Executive seems to favour the allocation of more resources for mediation. How best would such resources be spent?

12:30

Maureen Lynch: If parents who agree to divorce are to have only a year in which to sort out the arrangements for the children, a great many demands will be placed on family mediation services. There is obviously a need to expand resources in individual services—for mediators, for example—so that the service can be sufficient to meet the needs of what will undoubtedly be an increased demand as a result of the bill.

We also feel strongly that there is a need for significantly greater resources to be put into the development of contact centres. In the experience of family mediation services, many couples cannot even think about coming together to make arrangements for the children. Contact centres provide a stepping stone to help maintain the relationship between the parent and the child at the same time as allowing the other parent, with whom the child lives, to feel comfortable about that. It often reaches a point where the parents feel able to discuss what the future arrangements for the children should be.

In some areas of the country, the family mediation service must cover a wide geographical area. We have just developed a new service in Argyll and Bute, for example, where there is only one member of staff. We would be looking to expand family mediation services at the same time as exploring ways of refining and developing our service better to meet the needs of families, as we have done over the past 20 years. That also needs resources.

Margaret Mitchell: Are there any accreditation issues? Mediation services seem to come under a wide umbrella.

Carol Barrett: All the mediators who are employed by family mediation services in Scotland are members of the UK College of Family Mediators. The college is the regulatory body for family mediation in the UK, and applies standards that we must meet in our practice and supervision. All our mediators go through Family Mediation Scotland's national training course and must have regular continuing professional development and supervision. We all have professional indemnity insurance.

Margaret Mitchell: Do you think that that should be the exclusive route? Is there a role for the voluntary sector in mediation?

Maureen Lynch: Family mediation services obviously are voluntary sector services. They are out-of-court services. They are supported to a degree by central Government funding, but they are still technically voluntary sector organisations. We feel strongly that it is necessary for the protection of families who use mediation services that a system of regulation and accreditation applies to the voluntary organisations that provide those services. Those people who come to use mediators will have the protection of knowing that the mediators have a certain level of training and supervision. People who do not have that training or who are not supervised in that way will not be able to get involved in providing mediation.

Margaret Mitchell: So people not working for Family Mediation Scotland might not come under your umbrella but could still be accredited by you. A local authority group might start up, for example, but it would require the same accreditation and standards as must apply with your organisation. Is that correct?

Maureen Lynch: We believe that to be the case. Over the past 20 years, family mediation services have developed in affiliation either to Family Mediation Scotland or to an organisation of solicitor mediators who operate outside Family Mediation Scotland's framework, although they have their own system of accreditation. I do not

know whether independent mediators are the future. The important point for us is that people who use mediation are at a vulnerable point in their lives. They rely very much on being in touch with people who have professional training and who operate within a framework of supervision and accreditation, where recourse is offered should anything go wrong. We would be loth to consider developments that might in some way jeopardise that framework.

Margaret Mitchell: You put a strong case, based on your experience and track record.

Maureen Lynch: Yes.

The Convener: I have two quick questions, and would like brief answers, if possible. What are the criteria for family mediation? Do people have to declare that they are facing separation?

Carol Barrett: They have to be either separating or divorcing and have children. Although couples arguably are a family, we do not work with them to resolve their conflicts. We also work with grandparents and step-families in mediation.

The Convener: Have you counselled same-sex couples where children are involved?

Carol Barrett: Yes, we have worked with same-sex couples, but we do not counsel, we mediate.

Mrs Mulligan: Carol Barrett mentioned referring people to couple counselling if that was more appropriate than mediation. Is referring people on straightforward and joined up, or are there problems with the availability of the service?

Carol Barrett: It is joined up in the Lothian service. I cannot speak for other services in Scotland, although most mediation services do have a relationship with Couple Counselling Scotland. Resources are an issue, but Couple Counselling Scotland is keen that we work together, and it feels that referrals from family mediation are important. It is about the two agencies supporting families through whatever their transition will be, whether they decide to stay together and therefore need counselling or they come back to mediation. Couples in the past have used the threat of coming to me as a mediator to stay together.

Mrs Mulligan: I ask the question because you may have heard our discussions with the previous panels, when there was a lot of talk about timescales and the ability for people to become involved in couple counselling or mediation. I wondered whether it was readily available, or whether we were talking at cross-purposes.

My main question is about unmarried fathers. I note from your written submission that you support the Executive's proposal to grant parental rights and responsibilities to unmarried fathers. What might the impact of that be on the service that you deliver? Will you face increased demands? If so, how will you address them?

Carol Barrett: That is a really interesting question. It is difficult, because my experience of working in the family mediation field is that many unmarried fathers do not realise that they do not have parental rights and responsibilities until a separation happens. We have seen an increase in the number of unmarried fathers who are using family mediation, which is due to a lot of things, such as the threshold for legal aid and people not wanting to go down the adversarial route. They see mediation as a way forward. A lot will depend on the amount of publicity to inform people of the legal position. However, we encourage people to use mediation.

One of the interesting points is that the rights and responsibilities bit is a piece of paper, and it is sometimes difficult for people to wave about that piece of paper saying that they have rights and responsibilities. Putting those rights and responsibilities into practice can be examined through mediation. It is difficult to say that because someone has that bit of paper it will make a substantial difference to them, but it is a starting point.

Mrs Mulligan: It is interesting that many people do not realise that they do not have rights and responsibilities at the moment. It is a question of education, to which no doubt we will return.

Maureen Lynch: If the legislation results in a lot of publicity about unmarried fathers and the change to the law so that people who jointly register births from the implementation of the legislation will have parental rights and responsibilities and there is an intention to encourage unmarried fathers not to use the legal process but to use parental rights and responsibilities agreements, we would want family mediation services to be part of that promotion, although there would be significant resource implications as a result of the significant increases in demand for family mediation services that I think there would be.

Mrs Mulligan: Do you have a view on the Executive's proposal that parental rights and responsibilities should not be granted retrospectively? At the moment, unmarried fathers can register, but your experience of their not recognising that they do not have rights and responsibilities probably means that not many of them do so.

Carol Barrett: That is difficult. There are a number of families out there for which granting parental rights and responsibilities retrospectively would not be in the child's best interests and in

which the child and its mother would perhaps be put at risk, particularly if there has been domestic abuse. That is a big issue for us and for many of the services throughout Scotland with which we work. We work in an area in which domestic abuse is an issue. Such abuse might be the result of separation, which might have caused increased conflict, or it might always have happened. If rights and responsibilities were retrospective, we would be concerned that fathers who perhaps should not have automatic rights and responsibilities in relation to children would have them, which would potentially put children and mothers at risk.

Maureen Lynch: We are concerned that the Executive thinks that there should be an option for a birth to be re-registered and for the father's name to be put on the birth certificate if it is not there. However, that would not seem to be possible if the birth was originally jointly registered. We would be interested in more consideration being given to the possibility of using a simple way—at least from a practical point of view—of getting the consent of both parents, but giving retrospective parental rights and responsibilities to both parents.

Mrs Mulligan: I have a brief question about step-parents—I am conscious of the time. The Executive does not suggest that parental rights and responsibilities should be extended to step-parents. What are your views on that? How much do step-parents make use of your services?

Carol Barrett: In the Lothian service, we have recently developed a pilot project with Family Mediation Scotland and Family Mediation Tayside in which we have successfully piloted the use of mediation with step-parents. The project has involved step-parents and stepchildren where that has been appropriate. There was a perception, particularly among families, that mediation once used was done, but we have tried to encourage people to think about mediation as something that they can dip into at all times. Step-parents have come to mediation when they have been through mediation with their partners but are having difficulties with the step-family relationship, particularly with young people and the threat of young people becoming homeless as a result of their not getting on with a new step-parent. Step-parents are using mediation. A publicity leaflet is about to be produced to encourage step-families throughout Scotland to use family mediation.

Mr McFee: I will cut to the chase on grandparents. Should grandparents have a right of contact with their grandchildren? I have a copy of your submission, but will you briefly outline your views on the proposed grandparents charter? Will it be effective? Should we adopt the proposal in Australia to amend existing legislation to provide that the court should consider time with grandparents when determining what is in the best interests of a child?

12:45

Maureen Lynch: We would be more inclined to talk about contact and residence in terms of the children's rights than the adult's rights. There is sound evidence that grandparents play an important role in children's lives, and that the importance of that role often increases when the parental relationship breaks down.

The problem with a right to contact is that, because family mediation works within the relationships of the family, when the parental relationship breaks down, the right of contact is less important than the relationships within the family working in a way that enables contact to take place. We promote the importance of children maintaining contact with grandparents in the work that we do through family mediation services. However, we would want to avoid putting children in a situation in which they are part of yet another dimension of the adult conflict. We would be reluctant to talk about grandparents' rights; we would rather talk about creating a framework of understanding and information within which parents recognise how important grandparents are to their children and, with the help of mediation services if required, contact between grandparents and children is made possible.

Mr McFee: Children can often be used as pawns in an horrendous game that is going on between the two parties. What do you do when one of the partners is determined that there will be no mediation and that they will exclude one set of grandparents, perhaps for perverse reasons? Is there ultimately a role for the court in that situation, or should it always be resolved through mediation?

Maureen Lynch: Married fathers have a right of contact with their children. They can go to court if they are unable to execute that right and can get a contact order that gives them the right to exercise the right of contact. However, in the experience of family mediation services, that by itself does not promote contact between a parent and child, because there are many ways in which a parent who wants to resist contact can make difficulties.

Our dilemma is that we know that contact between parents and children, and between grandparents and children, supports children, but we also know that conflict is the single biggest factor that is to the detriment of children in such situations. We need to find a way of getting a balance between promoting contact and limiting the opportunities for conflict between parents and grandparents. Over the medium term, it will be more useful and more effective to promote an

understanding among parents and grandparents of the importance of contact so that those relationships work in a way that enables contact to take place. Our anxiety would be that providing a right of contact for another group would serve to increase the amount of conflict in which children are likely to be involved. Whether there would be a corresponding increase in the amount of contact between parents and grandparents is uncertain.

Mr McFee: That is useful. In effect, what you are saying is that we should rule out the right of contact for grandparents immediately. You are very much going down the line of mediation. Can you conceive of any circumstances in which a grandparent should be allowed to resort to the law?

Maureen Lynch: As things stand, grandparents have an opportunity to resort to the law if they want to, and many grandparents find themselves in a situation where achieving contact is so important to them that they do that. We would not rule out the option of taking that course of action. At the moment, there is an opportunity to examine the nature of the relationship with the grandparents and for the child's interests to be considered within that. If there needs to be recourse to the law, the present law perhaps provides a better framework than would a blanket right for grandparents to have contact with their grandchildren.

Carol Barrett: Even when grandparents feel that they have to go to court and use the legal route, at the end of the process they must work out how the contact will happen and manage it. That is why many grandparents whom we work with use our contact centres. One does not want children to be part of that conflict. If families have had to go to court, one assumes that it is because there has been a level of conflict. That is why grandparents use our centres. The grandparents charter is saying that grandparents are important. Another way of introducing that would be in connection with the work that is going on in relation to parenting plans. Many parents whom we work with are keen to do parenting plans in which they consider all aspects of the children's lives, and family and extended family would be part of that. That is another way of ensuring that the wider family is important for children in Scotland.

Mr McFee: Thank you. That is useful.

Marlyn Glen: You have already touched on domestic violence, which is an important issue. Will you expand on your written submission and give your views on the reforms to matrimonial interdicts and the introduction of domestic interdicts?

Maureen Lynch: We very much favour the changes, because through our work we recognise that the period immediately after a relationship has broken down—when a woman has decided that the relationship is over and that she wants to move on—is dangerous, and probably for longer than the time involved in the divorce itself. We also work with a great many unmarried couples, so we are well aware that interdicts have not been available to women who are not married. We very much favour the extension of interdicts to cover a period beyond divorce, locations beyond simply the matrimonial home, and unmarried parents.

Marlyn Glen: I take it that you are not advocating a presumption of no contact in situations such as that.

Maureen Lynch: No. We do not advocate a presumption of no contact, because we believe that, in the majority of cases, contact with a father who no longer lives with a child will be good for the child. We feel that we need to rely on the court process to consider the whole picture, to take account of the needs of the child and to identify cases in which there should be no contact. We also seek the development of a court process that is a bit more sophisticated than the current system in identifying issues around domestic abuse and situations in which no contact is the best disposition.

Carol Barrett: We also want to consider the process of assessing the difference between supported contact and supervised contact. We have been running a pilot in Scotland with two of our mediation services to provide supervised contact, where children are supervised on a one-to-one basis by a trained member of staff. In terms of child protection, we should be looking to provide a greater range of contact services.

Down south, there is a network of contact centres, in which £3.4 million was recently invested. In Scotland, we have an organisation called the Scottish Association of Child Contact Centres, which gets no funding at all. Nevertheless, we are looking to roll out supervised contact across Scotland in cases in which child protection issues and domestic abuse are involved.

The Convener: I am afraid that we must leave it there. What you have said has been very valuable. I hear what you are saying about the funding issue, but the committee needs to explore further the principle and the effectiveness of mediation. There might be one or two issues, particularly from your experience, on which we would like to get back to you, if that is okay.

Carol Barrett: Fine. I am happy for you to do that.

The Convener: Thank you both for your evidence. We are very grateful.

Last but not least, our final panellist is Tim Hopkins, who is the legislation and policy worker for the Equality Network. He has given evidence to the justice committees on a few occasions. Only a short time is available to us—about 15 to 20 minutes.

The committee has not had time to consider a range of issues in connection with the bill, and that has been the subject of argument with the parliamentary authorities that determine the timetable. We are conscious of the need to intertwine some of the issues that we have been talking about with equality issues. I think that I speak for all the committee when I say that we are committed to issues of equality. The fact that we are taking evidence from the Equality Network at the end of the process is not at all symbolic of how we see equality intertwining with relationships and their regulation in law. I imagine that there are some significant issues that Tim Hopkins will want to get on the record.

Marlyn Glen: I will try to roll my questions into one, so as not to be too complicated. First, I invite Tim to give a response to the view that there is no need to increase protection for same-sex cohabitants, as they now have the option of registering a civil partnership. Secondly, the policy intention is to treat unregistered same-sex cohabitants in the same way as opposite-sex cohabitants. Does the bill achieve that?

Tim Hopkins (Equality Network): My answer to the first part of your question is that a civil partnership is, in essence, the same-sex version of marriage. Civil partnership law is modelled on civil marriage law, and exactly the same issues arise for same-sex couples who choose not to enter a civil partnership as arise for opposite-sex couples who choose not to marry. People will make assumptions about what legal protections they have and do not have, and some of those assumptions will be wrong. There is already some legal protection for same-sex cohabitants, which has been put in place over the past five years, concerning issues such as tenancy succession and so on.

It is right to have a more limited set of protections for cohabitants than exists for married people and those in civil partnerships. Where protections are introduced, they need to be the same for same-sex and mixed-sex cohabitants. The bill almost gets it right from that point of view. Where it does not, that is due simply to oversight on the Executive's part. I mention in my written submission the Civil Evidence (Family Mediation) (Scotland) Act 1995, which I think is the last piece of primary legislation to cover mixed-sex cohabitants but not same-sex cohabitants. The other act that I mention is the Administration of Justice Act 1982. Those two acts are not covered by the Civil Partnership Act 2004.

The Executive has rightly included the Administration of Justice Act 1982 in the Family Law (Scotland) Bill, but it has left out the Civil Evidence (Family Mediation) (Scotland) Act 1995. The latter is especially important, because that is the act that says that information that comes up in family mediation cannot be referred to in civil proceedings. When the Family Law (Scotland) Bill comes into effect, there will obviously be rather more civil proceedings involving cohabitants and, for example, financial provisions. It is very important that the same family mediation rules apply to same-sex cohabitants as apply to mixed-sex cohabitants.

Generally speaking, the bill does a good job. In my written evidence, I mention one other area of concern—the Fostering of Children (Scotland) Regulations 1996. Secondary legislation can be amended by statutory instrument and it is very important that those regulations are amended. It is now pretty clear that not having the same provisions for same-sex and mixed-sex cohabitants is likely to be in breach of the European convention on human rights.

13:00

Marlyn Glen: Thank you for that answer; you have covered a great deal of ground. We will get through a lot at this rate. You are suggesting that some things are lacking from the bill and that some amendments will be needed.

Some respondents have pointed out that the definition of cohabitant in the bill refers only to children who are the children of both cohabitants, which would exclude, for instance, a female couple who were bringing up a child together. Will you outline the disadvantages of the definition?

Tim Hopkins: Our evidence refers to sections 18 and 21. Section 21 deals with financial provision when cohabitants split up and directs the court to take into account the future needs of a child. In essence, the provision is copied from the provisions for when a couple divorce or for when a civil partnership is dissolved. However, there is a difference. When a marriage or a civil partnership is dissolved, the legislation that deals with the future costs of looking after a child covers any child who is being brought up by the couple. But, as it stands, the Family Law (Scotland) Bill, says that when cohabitants split up, the only children for whom the costs of future care can be considered are those who are the children of both cohabitants.

Many mixed-sex cohabiting couples are bringing up children who are not the children of both cohabitants; such cases are referred to in the

policy memorandum to the bill. For same-sex cohabitants, it is obvious that the couple will not both be the biological parents. As it stands, adoption law in Scotland means that it is not possible to have step-parent adoption within a same-sex couple, therefore all the children of same-sex couples will be excluded.

If a couple, mixed sex or same sex, have brought up a child who is not the biological child of both parents; and if another couple, mixed-sex, have brought up a child who is the biological child of both parents; and if both couples have done that for 10 years, since the child was born, and if all other circumstances are equal, then the court will be able, when considering financial provision, to consider the future costs of bringing up the child in one case but not the other. That does not make any sense and is inconsistent. I have suggested that it is inconsistent not only with the way in which children are dealt with under the financial provisions for divorce and dissolution of civil partnership but with other parts of the bill that deal with cohabitants. It is inconsistent with the treatment of children under the Matrimonial Homes (Family Protection) (Scotland) Act 1981—both as it stands and as it will stand after the amendment to section 18 to widen the provisions on domestic interdicts to cover same-sex and mixed-sex couples. In that act, the situation of any child who is treated as a child of the cohabitants would be taken into account. However, under section 18 the Family Law (Scotland) Bill and under section 21, on financial provisions, that would not be the case.

Mr McFee: I want to ask about one or two other issues. Do you think that equalities issues arise from the Executive's decision not to abolish marriage by cohabitation with habit and repute? If so, how can they best be resolved, or are they insignificant?

Tim Hopkins: About four years ago, we consulted widely on civil partnership—before the issue was on the agenda for possible legislation—to find out what lesbian, gay, bisexual and transgender people thought was needed. There was no call whatever for irregular civil partnerships or common–law civil partnerships—in which people suddenly find themselves in a civil partnership because of something that they have been doing rather than because they have registered. People do not want that.

A very small number of cohabiting mixed-sex couples can find themselves married by cohabitation with habit and repute. In practice the situation arises most commonly when one person has died and left no will and the only way in which the other person can get financial provision from their estate is to go to court to establish that they were married by cohabitation with habit and repute. That can happen only in the specific circumstance that the couple held themselves out to be married and everybody believed them to be married. The number of cases of that per year is tiny. Given that the bill introduces a proper framework for financial provision in cases in which one of the cohabitants has died without a will, the fact that same-sex couples do not have the equivalent status of marriage by cohabitation with habit and repute does not pose a significant problem. However, to have complete equality, the right way to fix the problem would be to abolish marriage by cohabitation with habit and repute.

Mr McFee: Section 3 extends the jurisdiction of the sheriff. You do not see any need to amend the provision to include civil partnerships.

Tim Hopkins: I would not say that. As I understand it, the declarators, which section 3 covers, are not just declarators for marriage by cohabitation with habit and repute. There could be declarators of civil partnership. For example, a couple could have entered into a domestic partnership abroad that is not in the list in the Civil Partnership Act 2004 of civil partnerships in other countries that are recognised in this country. The act states that if people have registered a civil partnership in another country that is sufficiently similar to civil partnership in this country—the act sets out certain rules—they are, in effect, in a civil partnership in this country. However, if people entered into a civil partnership in Catalonia, for example, a dispute could arise over whether it would be recognised as a civil partnership here. I can think of cases in which a couple would want to go to court to establish that they are in a civil partnership in this country because they have entered into a civil partnership in another country. That is an example of people who would want to seek a declarator of civil partnership.

The legislation does not say what the jurisdiction of the courts is in dealing with those cases. My understanding is that under the common law the sheriff court would have jurisdiction. There is a question about whether there should be a more explicit equivalent to section 3 for civil partnerships. As I understand it, section 3 states that the sheriff courts have jurisdiction for declarators of marriage, except where both parties to the marriage are dead. Should we have the same rule for civil partnership? Should there be a rule that only the Court of Session has jurisdiction where both parties to a civil partnership or purported civil partnership are dead? We have not consulted on that and I do not have strong feelings about it. In section 3 and a later section that deals with declarators for recognition of certain decrees, such as nullity of marriage, that are obtained abroad, the same issue could arise with civil partnership. There is a technical issue about

whether the jurisdiction sections should be extended to cover civil partnerships.

The Convener: I kind of lost you in the middle of that. You are saying that if the provision stays in the bill—which is the Executive's position, regardless of whether you think it should be there—there should be an equivalent for civil partnerships.

Tim Hopkins: For complete equality, in section 3 and the later section that deals with jurisdiction for declarators, civil partnerships should be treated in the same way as marriage. However, on the scale of important issues, it is probably the least important.

Stewart Stevenson: Sections 18(2) and 18(3) define "cohabitant". Could issues come into play where previous relationships of cohabitation, marriages or civil partnerships are still on the books? It appears that the bill provides for multiple relationships to be recognised simultaneously. Is that likely to cause difficulties?

Tim Hopkins: That is an interesting question. I am not sure that two simultaneous cohabiting relationships would be recognised. You do have to be living with the other person to be recognised as their cohabitant so it would have to be someone who is living with two other people and claiming to have either a husband-and-wife type or a civil-partnership type relationship with both at the same time.

Stewart Stevenson: My concern is that section 18(2) uses the words "or was" in brackets, meaning in the case of decease. I do not think that it was intended to mean simultaneous partnerships, but the wording could be brought to bear on serial partnerships, whether civil partnerships or marriage. I suspect that the issue is complex.

Tim Hopkins: You are absolutely right. It is certainly the case that, under that definition, someone could be a cohabitant at the same time as being in a civil partnership or married to another person.

Stewart Stevenson: Is that the difficulty?

Tim Hopkins: Certainly a difficulty could arise if someone died without a will and two people made a claim on their estate. The question is the right way to deal with that. Other Scots law deals with cohabiting couples—mixed sex and same sex—and, in effect, creates a hierarchy. If the person is married, the spouse is number one on the list. Then there are questions of what happens if people are separated and have been separated for quite a while. Again, there are pieces of legislation to deal with that, which spell out some rules.

The other way to deal with the situation is to leave the decision up to the courts. It seems to me that section 22 gives the courts a huge amount of discretion, because it says only that the maximum that a person can be awarded is the prior and legal rights that a spouse would get. Perhaps that is the best way to deal with the issue.

The Convener: It always ends there. We have a minute to take a final question from Margaret Mitchell.

Margaret Mitchell: On the international aspect, the Equality Network has said that it seeks an amendment to section 27 to include civil partnerships. Do any equality issues flow from sections 28, 29 and 30?

Tim Hopkins: That is an interesting question. I think that the policy memorandum indicates that the Executive is planning to lodge an amendment at stage 2 to deal with the issue. I want to wait and see what the Executive comes up with because the situation is quite complicated.

Civil partnership is not like marriage. Every country has marriage. There are significant differences, but there are fairly well-established rules in common law about country of domicile and the country in which the marriage is registered. That is not the case for civil partnership, because few countries have civil partnership at the moment. Some have same-sex marriage and others have forms of civil partnership that have different effects.

It is difficult to see what kind of general rule we could come up with and I certainly do not have a suggestion for that. I would like to see what the Executive comes up with at stage 2 and then pass comment.

Margaret Mitchell: That is helpful; thank you.

The Convener: We are just trying to handle stage 1 at the moment.

I have been advised that there is a technical issue around gender recognition; you mentioned that in your submission. However, in principle there is no fundamental inequality in relation to gender recognition.

Tim Hopkins: That is right. There is a difficulty with the Gender Recognition Act 2004 as it stands. For someone to get gender recognition, they must dissolve the marriage if they are married or the civil partnership if they are in a civil partnership, so that a same-sex marriage or a mixed-sex civil partnership is not created. There are some practical issues about being able to convert a marriage to a civil partnership and vice versa. However, the only issue around gender recognition in the bill is the one that we mentioned in our written submission, which is a technical point to do with making the forbidden degrees for civil partnership work correctly when someone has had gender recognition, which relates to the repeal of section 86 of the Civil Partnership Act 2004.

The Convener: That is helpful. I just wanted to ensure that that was on the record.

Unfortunately we have run out of time. I thank you for being so clear; it has been helpful to get some clarity around the issues. As I have said to other witnesses, I am sure that there are issues on which we might want to come back to you if that is okay. Do you think that everything has been covered?

13:15

Tim Hopkins: One of the key issues for us is the little things that are left over from the Civil Partnership Act 2004. The committee did a good job of considering the Civil Partnership Bill in limited time when it considered the Sewel motion last year. At that point, the Executive said that if anything had been left out, it would return to it in the context of the Family Law (Scotland) Bill. We cover that in the third section of our written submission, which there has not really been time to talk about today. There are one or two things that can be dealt with only in primary legislation. Some of the details could be tidied up by orders under the 2004 act, but we are quite keen that those issues should be dealt with in the bill.

The Convener: We have been made aware of that and I am sure that the committee will address those issues as far as we are able to. Thank you very much for your evidence and written submission. I am sure that we will come back to you on a few of the details.

Tim Hopkins: Okay, thank you very much.

The Convener: That brings us to the end of our session this morning. I remind members that the next meeting of the Justice 1 Committee will be on Wednesday 18 May when we will take further evidence on the Family Law (Scotland) Bill from representatives of Children in Scotland, Children 1st, Families Need Fathers, Grandparents Apart, Stepfamily Scotland, and Scottish Women's Aid.

Meeting closed at 13:16

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