JUSTICE 1 COMMITTEE

Wednesday 14 September 2005

Session 2

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JUSTICE 1 COMMITTEE
26th 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)
*Mike Pringle (Edinburgh South) (LD)

COMMITTEE SUBSTITUTES

Brian Adam (Aberdeen North) (SNP)
Karen Gillon (Clydesdale) (Lab)
Miss Annabel Goldie (West of Scotland) (Con)

*attended

THE FOLLOWING GAVE EVIDENCE:

Alan Finlayson (Child Law Consultant)
Joyce Lugton (Scottish Executive Justice Department)
Dr Claudia Martin (Scottish Centre for Social Research)

CLERK TO THE COMMITTEE

Callum Thomson

SENIOR ASSISTANT CLERK

Douglas Wands

ASSISTANT CLERK

Lewis McNaughton

LOCATION

Committee Room 5

Scottish Parliament

Justice 1 Committee

Wednesday 14 September 2005

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

Item in Private

The Convener (Pauline McNeill): Good morning. I welcome everyone to the 26th meeting this year of the Justice 1 Committee. We have received no apologies this morning. I remind members that, if they have not switched their phones off, they should do so for the purposes of getting the maximum sound.

Item 1 is to consider whether we want to take item 4 in private. Item 4 is consideration of whether we are going to continue to appoint a committee adviser in relation to the Family Law (Scotland) Bill. Is it agreed that we will take item 4 in private?

Members *indicated agreement*.

Proposed Human Rights Commission (Scotland) Bill

10:11

The Convener: Item 2 is on the proposed human rights commission bill, which, as committee members will be aware, we have been allocated. As is normal at this point, it is up to the committee to decide whether we wish to appoint an adviser. If we wish to do so, we will consider potential candidates for that position at a future meeting. I invite members to comment on whether, in principle, they wish to appoint an adviser.

Stewart Stevenson (Banff and Buchan) (SNP): Agreed.

The Convener: Margaret Mitchell looks as though she is about to say something.

Margaret Mitchell (Central Scotland) (Con): The whole issue is fraught with problems. I see the bill's proposals as unnecessary—as a duplication of the existing commissioners—and I question the value of spending £1 million on something that has no powers.

The Convener: You will get a chance later to say whatever you want about the bill. At this stage, we are discussing whether we want to appoint an adviser. Are you happy to agree to appoint an adviser?

Margaret Mitchell: I suppose that, if we are going ahead with the bill, the answer is yes.

Marlyn Glen (North East Scotland) (Lab): The bill deals with an area in which there have been lots of changes, right across the board in the United Kingdom and in Scotland. It is important that we have an adviser to clarify all the points.

Stewart Stevenson: Yes, we should have an adviser. I suggest that we look for someone who can give us advice on the interaction between what is proposed in Scotland and what is happening at Westminster. The two clearly have to dovetail if the bill is to work in any way, shape or form. That is without my taking any position on the matter of the bill at this stage.

The Convener: That is helpful. As well as links to Westminster and the rest of the UK, there may be an international perspective that the committee will want to look at. We might consider whether we want an adviser who has some working knowledge of similar human rights bodies in other countries. Members will have the opportunity to discuss candidates at a future meeting. We normally do that in private to protect the candidates, so I ask for the committee's consent for us to do that in this case.

Members *indicated agreement*.

Family Law (Scotland) Bill

10:13

The Convener: Item 3 is consideration of the Family Law (Scotland) Bill. I am delighted to welcome Dr Claudia Martin of the Scottish Centre for Social Research. This is a key time for the committee to look at the centre's findings, given that we have just completed stage 1 of the bill and are about to move to stage 2, when we might decide to take further evidence. It is pertinent that we have the opportunity to look at the research that has been done. Dr Martin, I invite you to make a brief presentation to the committee, after which members will ask questions of you.

Dr Claudia Martin (Scottish Centre for Social Research): Thank you for inviting me. I am here instead of Dr Fran Wasoff of the centre for research on families and relationships. She was the senior author of the study and has substantive expertise in the area; my role was more methodological. I am the research director at the Scottish Centre for Social Research. We are an independent social research organisation that is run not for profit and we aim to carry out research that can inform the development of policy.

The Scottish social attitudes survey has been running since 1999. It is a modular survey, by which I mean that it is not continuous—each year, it has different components that are funded by a range of different organisations. A core element is funded by the Scottish Executive; individual components are funded by the Scottish Executive or by charitable trusts. The family law module that I will talk about and which was included in last year's survey was funded in part by the Scottish Executive and in part by the Leverhulme Trust.

The survey covers a wide range of issues and each year rather different issues are covered. Last year, we looked at youth and crime, family and law, and smoking and alcohol. The concern of the survey is to gather broad attitudes to various issues. The advantage of the survey's structure is that there are core questions that can be used to help to understand answers on any one module. Therefore, we have a great deal of information.

The context for the family law module was the changes that have taken place in relationship structures in Scotland. There is more cohabitation; there is greater awareness of same-sex couples and the demand for recognition of their partnerships; there is a high level of extra-marital births jointly registered by both parents; and there are more unmarried fathers. There has been a shift in attitudes towards sexual relationships outside marriage. There have also been demands for the recognition of the contribution of other kin, such as step-parents and grandparents, to children's well-being.

Last year's survey included interviews with 1,600 people. That was a random sample that returned a 61 per cent response rate. The data were weighted to take account of variations in the sampling, such as rurality and gender. The aim was to make sure that we had a representative sample using statistical techniques.

The data that I will talk about were within the survey of 1,600, so there are limits to the analysis. There are also limits to the amount of detail on the questions, because each module contains only 40 questions. Of those, 20 were funded by the Scottish Executive and 20 by Leverhulme. If there seems to be a paucity of questions on certain issues that the committee regards as particularly important, I can only apologise in advance. We were focusing on the areas of interest that seemed most pertinent. There will be times when we have some broad results, but the committee will need to understand that we were unable to get the full context.

We try to gauge attitudes by using face-to-face computer-assisted interviewing. We use what is called a scenarios approach. By that I mean that we give people familiar situations and ask them for their response to questions such as, "In this particular context, do you think that this should or should not happen?" We try in each scenario to get to the core attitude or the core value. We are very careful.

We asked about marriage and cohabitation, same-sex couples and the responsibilities of step-parents and grandparents. We also asked about general attitudes to sexual relationships in different circumstances. We analysed the data according to the gender and educational level of the respondent. We divided people into those who had no qualifications and those who had some—that seemed to be the main division. We took age into account, looking at responses from people under the age of 40 and people above the age of 40. We also analysed the results according to social class.

In order to understand people's attitudes to various relationship configurations, we asked them about their views on marriage as a baseline against which their attitudes to other forms of relationship might be compared. For example, the first question in our scenarios approach asked about financial obligations when a marriage relationship breaks down, by presenting the following scenario, which was then copied for other configurations:

"a married couple … have been together for 10 years. They have no children, but one of them has a much higher income than the other. They then split up. In these circumstances, do you think the partner with the lower

income should be able to claim financial support from the other partner?"

The question created a clear context about the duration of the relationship and about the fact that there were no children before asking about the right to claim financial support.

I do not know whether this will be a surprise, but only 50 per cent of our sample felt that the economically weaker partner should have a right to claim financial support in the event of marriage breakdown. Although there was an awareness that the law gives a married person such a right—it was not clear knowledge, as only 61 per cent believed that such a right existed—only 50 per cent felt that a right to claim financial support should exist.

Two thirds of the sample knew that a cohabiting partner does not have the same rights as a married person. We presented a similar scenario involving an unmarried couple who have lived together. When we asked people whether an unmarried couple had the same legal rights as a married couple, only 51 per cent believed that they had. Basically, when asked, 51 per cent believed that there was such a thing as common-law marriage.

As I said, we asked about the scenario in which there is breakdown in the relationship between a couple who have lived together for 10 years, who have no children and one of whom has a higher income than the other; we asked whether, in those circumstances, the person with the lower income should be able to claim financial support. We also posed that question in relation to a same-sex couple by asking half our sample about a female same-sex couple and half—the allocation was made randomly—about a male same-sex couple.

Whereas 50 per cent of the sample believed that married persons should have the right to claim financial support, some 40 per cent believed that such a right should exist for someone who had been cohabiting. That is somewhat lower, but it is not markedly so, if we bear in mind the fact that only 50 per cent of the population seemed to believe that such a right should exist. When asked about a same-sex couple, a third of people—34 per cent—believed that there should be a right to claim financial support following the breakdown of a 10-year relationship.

There were differences in respect to age, with more older respondents believing that there should be a right to financial support in the case of both married couples and cohabiting couples. There were no gender differences on that variable, although gender differences were apparent on other questions. People with fewer or no qualifications were more likely to believe that there should be a right to financial support following a relationship breakdown.

We then moved on to situations following the death of one partner of a cohabiting heterosexual couple or cohabiting same-sex couple. Respondents were asked to think about the situation in which, after a married couple have lived together for 10 years, the man dies and the company that he worked for pays his occupational pension to his surviving wife after his death. We asked whether people thought that the surviving partner of a cohabiting couple should be entitled to receive a pension on the same basis. With respect to a cohabiting heterosexual couple, 87 per cent believed that the survivor definitely or probably should be able to receive the pension in the same way as a married person. With respect to a same-sex couple, two thirds—68 per cent—believed that the surviving partner should have a right to receive such a pension on the same basis as a married couple.

We then asked about inheritance tax. Again, we asked about a cohabiting couple who live in a house that was bought in the man's name—when he dies, he leaves the property to his partner in his will. We asked whether people thought that the surviving partner should or should not be exempt from paying inheritance tax on the property, in just the same way as a married person would be. With respect to a heterosexual cohabiting couple, 76 per cent believed that there should be a right to exemption from inheritance tax; 65 per cent felt the same way with respect to a same-sex couple.

We asked about a situation in which two men or two women have lived together for 10 years as a couple—10 years was our marker to imply a long-standing relationship—and the one who owns the house dies without making a will. We asked whether the partner should or should not have the same right to keep the home as they would have if they had been part of a married couple. Something like 75 per cent believed that they should have the same right to keep a home in that context.

We asked a small number of questions with respect to parenthood and different relationship configurations. In particular, we asked about adoption rights for same-sex couples—for example, two men or women, both in their early 30s, who have been living together for five years as a couple. We asked whether it should be possible for such a couple to adopt a child in exactly the same way as a married couple could. Perhaps it is no surprise that, although there was great support for the responsibilities associated with partnership in different circumstances, there was somewhat less support for parenthood rights.

Overall, 37 per cent of our respondents believed that such a couple definitely or probably should

have the same opportunity to adopt a child. However, there was a clear difference depending on whether we were talking about a male couple or a female couple, with much greater support for female couples being able to adopt: 46 per cent believed that a female couple should have the ability to adopt, whereas only 29 per cent believed that a male couple should have the same right.

Again, there were differences with respect to age, gender and educational level. Generally speaking, people with higher qualifications, women and younger people expressed what might be called more liberal views. We found that women consistently tend to be more tolerant about different kinds of sexual relationship. Those who were younger and those who had qualifications also had a more liberal approach.

Finally, we asked various questions on the rights of and obligations on step-parents, which I am not presenting here. I have the material, which should be available in the report.

We asked about grandparenting and grandparents' access. I will try to give some context. We took the example of a child who no longer lives with their father and asked whether the law should give the grandparents on the father's side the same rights as the father to stay in contact with the child. Ninety-two per cent said that those grandparents definitely or probably should have right of access.

By way of clarification, I remind the committee that we were able to ask only limited questions around certain topics. We were able to ask a range of questions around cohabitation for heterosexual and same-sex couples, which gave a broader context, whereas we were able to ask only that one question about the right of contact. Qualitative research carried out by others suggests that when people are presented with more complex scenarios—as we had with some of our other issues—the responses vary and people have a more nuanced appreciation of the rights and roles of grandparents. However, when we asked whether

"grandparents have the same legal rights to stay in touch with their grandchild",

about a third believed that they definitely or probably did.

10:30

The Convener: Thank you. That was very interesting.

Marlyn Glen: Dr Martin, your summary was helpful because it is difficult for us to get the time to study such surveys in depth. I was interested to hear your comments on the way in which you ensure that your survey covers a representative sample of the population. When we are talking about legislation, particularly on family law, we should be aware that that representation is not mirrored by members of the Scottish Parliament—we should always consider the views of the general population.

The survey gives the committee some comfort because it seems that the Family Law (Scotland) Bill is broadly following the changes in society's attitudes, so I welcome it from that point of view. I know that you said that your role was to do with the methodology, but were you surprised by any of the survey's findings? You said that the survey has been running only since 1999, which is not a long time, but will you say a little more about the changes in people's attitudes?

Dr Martin: We did not necessarily ask the same questions in 1999. However, there are some comparable questions in other Scottish surveys and in the British social attitudes survey. In general—without wanting to commit myself to figures, because I do not have them in front of me—I think that there has been a shift towards what we might call a more liberal view of the rights and obligations in various circumstances. There is also a greater knowledge of the law. Comparing the 2000 and 2004 surveys shows that more people seem to know what the law is and therefore to appreciate that it is not necessarily in line with their attitudes.

Marlyn Glen: Were there any surprises?

Dr Martin: There are many differences between men and women. Those differences are not huge or pronounced, but they are consistent. On the whole, women seem to have a rather different view. That was the biggest surprise.

Stewart Stevenson: My questions are about your methods rather than your conclusions. First, to what extent are your methods—in general and in the 2004 survey in particular—peer reviewed?

Dr Martin: Very much so. The reports are published widely and papers are written. The surveys for both England and Wales and for Scotland have been running for a long time and they form a cornerstone for a lot of policy thinking and development. They are peer reviewed to the extent that published papers arise from them and those papers are reviewed methodologically.

Stewart Stevenson: So the peer review is a little indirect, but in essence the approach that is taken is the academic one of openness and preparedness to answer for the method and to be subject to scrutiny.

Dr Martin: Absolutely. The data are also available for secondary analysis.

Stewart Stevenson: Okay. Of necessity, you are looking at the status quo and the status quo

ante. To what extent does that enable you or others, including us, to project forward and predict the effect of changes that might be made in the law?

Dr Martin: There are a few things bundled in that question.

Stewart Stevenson: It is a difficult question, but it is meant to be.

Dr Martin: The data suggest that the changes that are being proposed are in line with public opinion. There is awareness that the law is not in line with the current situation in Scotland or with current attitudes.

Stewart Stevenson: Do you therefore conclude that the survey should suggest—I use that weak word deliberately—that the public are prepared to contemplate changes in the law to allow it to catch up with attitudes or to set a new framework for further change in family law?

Dr Martin: In as much as research can ever make that kind of claim, our research would seem to suggest that people support the changes—

Stewart Stevenson: Does it suggest that people would support changes in general, if not necessarily specific ones?

Dr Martin: I cannot answer that. I would say that there is a preparedness for a shift, because there is an understanding that the law is not necessarily in line with current attitudes or the prevailing configuration of relationships. However, the response is not uniform. One never gets 100 per cent; there are always variations in the population. Research is about understanding such variations.

Stewart Stevenson: I have just one more technical question. You said that you selected randomly from within your group of 1,600.

Dr Martin: No. Sorry. There was a random sample of 1,600 throughout Scotland. There were randomly selected households and within each household there was a randomly selected informant.

Stewart Stevenson: Sure. Then you normalised against the profile of the population.

Dr Martin: We wanted to ensure that the data took account of the fact that, for example, in rural areas the numbers are small. We weighted our data to ensure that in the final results they were represented appropriately.

Stewart Stevenson: What confidence level do you seek to achieve?

Dr Martin: That varies. The results that I have reported were all statistically significant at less than the 0.01 level—one in 100.

Stewart Stevenson: So it is well above the one in 20 that you would seek as a minimum.

Dr Martin: Absolutely. Any of the results that I have said might be significant are at that level; some are at much higher levels.

Stewart Stevenson: So the word "significant" is used in its scientific, statistical sense.

Dr Martin: I mean it statistically.

Stewart Stevenson: I think that you said—I did not make a note, unfortunately—that you selected 84 people for in-depth questions.

Dr Martin: No.

Stewart Stevenson: In that case, I will surrender the baton to a colleague.

Dr Martin: There are no in-depth questions in the sample. Sorry.

Stewart Stevenson: No, no. It is perfectly possible that I misheard.

Mr Bruce McFee (West of Scotland) (SNP): Good morning, Dr Martin. I refer you to table 2.3 of the survey.

Dr Martin: I may not have the same version as you.

Mr McFee: I hope that the tables are the same. It is the one about financial support.

Dr Martin: Is it one about an unmarried couple who have been together for 10 years and have no children?

Mr McFee: Absolutely. You asked:

"Do you think the partner with the lower income should or should not be able to claim financial support from the other partner?"

What was the definition of financial support?

Dr Martin: We did not give a definition. The question was about whether the person should have a right to financial support; it was asked initially in relation to the breakdown of marriage. The understanding was that the support would be alimony of some sort.

Mr McFee: I am trying to establish whether financial support means on-going maintenance or a one-off payment. The bill distinguishes between the two types of support and I am trying to see how far your report is relevant to the bill. There is a set of assumptions in all your questions, which is that we are talking about an unmarried couple who have been together for 10 years and have no children. Those assumptions are not used in the bill, which is not written on the basis of that scenario. I am trying to see to what extent your research and what is in the bill marry up.

Dr Martin: We did not give the respondents a strict definition of financial support. The more that definitions have to be given in a questionnaire, the less good the questions are. People seemed to understand the term "financial support". We were considering the underlying right to something after a breakdown, whether it was in the form of a lump sum or continuing maintenance. The question was whether there should be such an obligation or right.

Mr McFee: In table 2.3, 40 per cent say that that obligation or right definitely should or probably should exist, and 57 per cent say that it definitely should not or maybe should not exist.

Dr Martin: Only 50 per cent believed that such support should follow from the breakdown of a marriage. That surprised me.

Mr McFee: That was the surprising statistic for me, too.

I want to test table 2.3 against what is in the bill; I am not expressing an opinion. Your research shows that the majority of people thought that there should be no right to claim financial support even after a couple had been married for 10 years. That is not in line with what is in the bill. I am wary that too many false comparisons might be drawn, although that does not prevent us as legislators from passing what we think should be good law.

The Convener: An important point has been raised, which I would like to clarify. Bruce McFee asked about the definition of financial support and you said that you did not give a definition. Your question included the specific term "lower income". Under the financial provisions in the bill, the property that the parties have accrued during the term of the marriage or cohabitation is divided between the parties. Were people asked about that? That would be a different question. The provisions in the bill do not consider the parties' relevant incomes and seek to even them up; they split what has been acquired during the marriage. Would there have been a different response to the question if income had not been mentioned?

Dr Martin: I tried to explain some of the limitations of the survey approach. This type of embedded survey has to compete with other modules and only a certain number of questions were funded. We can ask only the number of questions for which there is funding. Had the Scottish Executive or any other organisation wanted to ask such questions in more detail, it would have had to agree them in advance. The questions were determined with the broad involvement of those who were connected with the process; they were not developed in isolation.

Mr McFee: We can understand the limitations to which you were subject while you conducted the survey. My concern is about whether we can extrapolate your results and fit them nicely with the bill—I hae ma doots about that.

Pensions come next in the survey. Again, the scenario is of an unmarried couple who have been living together for 10 years. The man dies and is survived by his partner. He has an occupational pension. Should his partner be entitled to receive the pension on the same basis as they would if the couple had been married? Eighty-seven per cent of respondents answered that the partner definitely should or probably should be so entitled. That is a huge number. What does the bill say on that?

The Convener: We do not deal with pensions. Different pension schemes have different requirements.

Mr McFee: That is correct—that question cannot reflect what is in the bill, because pensions are outwith the Parliament's remit. I just wanted to touch on that.

The next question got the same response. This poor bloke dies, again, and his partner survives; 76 per cent of the respondents said that the partner should inherit the house. The provisions in the bill are unclear, are they not? It is really for a sheriff to decide the level of inheritance. As the bill stands, is that summation reasonably accurate?

The Convener: Yes. The claimant can inherit a proportion of the estate once any children have received their settlement.

10:45

Mr McFee: So the bill would not necessarily allow an automatic transfer of the house to the partner.

We may be reaching the conclusion that the survey backs up what is in the bill, but I wonder whether that is true. People's attitudes might be in line with some of the provisions in the bill, but some of the hard evidence in the survey is almost diametrically opposed to the provisions in the bill. I do not expect Dr Martin to comment on the bill, but—

Dr Martin: I was going to say that that is not my area.

Mr McFee: I understand that.

A high level of support is shown for the proposal in table 2.6, on the right to exemption from inheritance tax, for which the bill does not provide, but a low level of support is shown for the proposal in table 2.3, on the right to financial support, for which the bill does provide. I leave it at that and pass the baton to another member.

Mrs Mary Mulligan (Linlithgow) (Lab): I will ask a quick supplementary to Stewart Stevenson's

question about the methodology. Dr Martin used the word "significant". Is 1,600 not a small sample?

Dr Martin: It is, but that is all right so long as the sample is representative.

Mrs Mulligan: There was a 61 per cent response rate from the 1,600.

Dr Martin: That is a 61 per cent response rate from a sample that was compared with the profile of the population as a whole.

Mrs Mulligan: Sorry, I am smiling because my colleague Stewart Stevenson is quoting figures at me. Since your opening statement, he has been working out exactly what 61 per cent of 1,600 is.

Dr Martin: The figure is not 61 per cent of 1,600; 1,600 was the achieved sample.

Mrs Mulligan: It is useful to clarify that point, but I have to say that you caused Stewart Stevenson extra work.

Dr Martin: I am sorry. If I had had PowerPoint I could have put up the figures, but I was told that I could not use PowerPoint. Do you want some figures? I can bore you with figures, but they are all in the report.

Mrs Mulligan: It might be useful to provide the figures, but that is fine. I wanted to clarify that issue.

You said in response to Marlyn Glen that you felt that more people knew about the law and knew that it did not necessarily fit with their attitudes. Why do they think that they know about the law? Secondly, you said in your introductory comments that two thirds of respondents know that cohabitants do not have any rights. That is surprising to us, because throughout the debate we have assumed that the majority of people in Scotland do not know that cohabitants do not have any rights. That has been one of our concerns. However, clarification may be required of what rights that two thirds of respondents think people have and whether they are correct. Do they think that cohabitants have all rights or just some rights?

Dr Martin: The picture is complex. People's knowledge of the law is always complex. Two thirds of respondents are aware that cohabitants have fewer rights, but they were not asked to specify all the rights. One cannot assume that people have a sophisticated understanding of the complexities of law, especially if they have not had to deal with the situation themselves. If someone has come face to face with the issues, they may well have a better knowledge and understanding of the situation.

We asked people whether they believed that there was something called common-law marriage. In 2000, 58 per cent of respondents said that people who had been together for a long time constituted something that they believed to be a common-law marriage; 58 per cent said that there definitely were or probably were common-law marriage rights. In 2004, the figure had fallen to 51 per cent, but nevertheless the majority—albeit a small majority—still believed erroneously that there is something called common-law marriage.

The Convener: Do you agree that the 51 per cent of people in 2004 who thought that common-law marriage exists were not entirely wrong, and that the issue of whether people think that they are in a common-law marriage is a different question?

Dr Martin: We did some analysis of the results by people in different relationship configurations, but I do not have the figures in front of me; the figures got quite messy and we started to get into the numbers game, which one must always be careful about. A sample base of 1,600 is good when one is dichotomising by age, gender or qualification, but once we start to break up the results even more, the numbers become messy.

The Convener: Yes, but such information would be useful. Although people might not use the right terminology, there is such a thing as marriage by cohabitation with habit and repute, which is what people probably refer to when they talk about common-law marriage—the 51 per cent of people were right that the concept exists. However, the issue of how many people think that they are in that state is a different question. We are interested in that, because we are considering whether to abolish the rule about marriage by cohabitation with habit and repute. We would welcome figures on that matter, if you have them.

Dr Martin: We asked people what their situation was. If they were living with someone but were not married to them, we asked how long they had been living together. I would have to look at the results again, but I will take a note of the question if you would like me to explore the issue.

Mr McFee: On that exact point, will you confirm that a substantial majority of the people in the sample realised that cohabiting couples have fewer rights than those who are married have, even though 51 per cent believed that people could gain more rights through common-law marriage, which does not exist.

Dr Martin: You assume that people's attitudes are completely coherent in all sets, but they are not. That is one of the interesting features of our survey—many of the questions tried to get at core values rather than what might strictly be called attitudes, because attitudes are complex.

Mr McFee: Is it correct that more than half of those who were surveyed believed in something that does not exist in law?

Dr Martin: When people were asked whether unmarried couples who live together for some time have a common-law marriage that gives them the same legal rights as married couples have, 51 per cent said that they do.

Mr McFee: I wanted to establish that, because the issue is important.

Margaret Mitchell: Is it true that the various scenarios that were posed were fairly uncomplicated and straightforward and that there were no competing rights in the scenarios?

Dr Martin: Yes. It is important that respondents to surveys do not feel stupid, so that they can give their views and answers without feeling that they are going to be caught out. There is a limit—a survey must be aimed to meet the ability of the vast majority of the population. If we carried out more detailed work, we would look only at one issue and construct more complex scenarios.

Margaret Mitchell: One of the bill's core principles is safeguarding children's rights. However, in intestacy law, cohabitants may acquire rights, the result of which may be a scenario in which the child's share of the estate is adversely affected. As that scenario was not put to the representative sample, with how much confidence can we say that the bill reflects attitudes, when attitudes about such competing interests have not been tested? Sadly, life is not easy and straightforward—complex issues and competing interests are more likely to be the norm.

Dr Martin: The attitude survey was never intended to deal with such complexities—it attempted to get at core values and attitudes. For example, it asked about marriage and then asked about a range of different scenarios. Marriage sets the norm, as it were, for the values and we can then consider attitudes that follow on from that. The more detail that we go into with the scenarios, the more complex the picture becomes.

Margaret Mitchell: I recognise that, but from our point of view, as legislators whose fundamental position is that we do not want to do anything to undermine marriage, the fact that we have not been able to probe that little bit further is frustrating.

Dr Martin: I am afraid that that is a matter for you to take up with the commissioners, not with us.

Margaret Mitchell: Absolutely.

The Convener: You said that the Scottish Executive funded 20 of the questions that you asked. Does that mean that the Executive gave you the text for the questions?

Dr Martin: No. Absolutely not.

The Convener: You got to decide what the questions were.

Dr Martin: The Executive had a role in the development of the questions, but we had a steering group of people who are closely involved not with the policy but with the application of law, including academics, to help us to develop the questions.

The Convener: I just wanted to check that.

You said that, in the sample, across the board, women tended to give a marginally different view, as did young people. Their views tended to be more liberal. In relation to young people, I wonder whether you assume that that is a generational issue. In other words, do you think that people who are in the 40-plus category would have given a different answer when they were younger, and do you think that the people in the younger category will give you a different answer when they are older? What is it a sign of—the fact that attitudes are changing or the fact that those people will change their attitudes when they are 40?

Dr Martin: That would need longitudinal research, but I think that both things are true. There is what we would call a cohort effect—there are generational differences that reflect the different experiences. The under-40s have grown up in a different moral and social climate to that in which the older group grew up.

The Convener: Do you think that, as the younger people that you questioned get older, their views will stay the same and not change with age?

Dr Martin: There is always a shift in people's views as their life experiences alter, but I would expect the cohort effect to carry right through.

Mr McFee: I challenge the assertion that the younger generation have become more liberal. In table 2.11, on whether the economically weaker partner should receive financial support from the other partner if their relationship has broken down, your evidence is diametrically opposed to that assertion. If the couple are married, 39 per cent of 18 to 39-year-olds say that the economically weaker partner should receive such support, whereas 56 per cent of over-40s hold that view. The same trend is repeated in the figures for all four questions.

Dr Martin: It depends on what you mean by liberal.

Mr McFee: Am I being liberal with the term "liberal"?

Dr Martin: I think that the figures are a reflection of the shift in women's experiences and

backgrounds. There is now an assumption of women being independent.

Mr McFee: Fine. I understand where that comes from. However, the evidence shows that there is less support, in the younger age groups, for financial support.

Dr Martin: Following the breakdown of a relationship.

Mr McFee: Yes.

Dr Martin: Not following the death of a partner.

Mr McFee: No; the results for the questions on death are quite different. Such a huge majority of people are in favour of the surviving partner receiving support that the age breakdown makes little difference. However, in table 2.11, the younger the respondent is, the less likely they are to favour financial support.

Dr Martin: It is what we call a cohort effect. It reflects the changing experiences of women in terms of their opportunities, education and expectations. A lot of women would argue that the younger people's response to that question represents a liberal view.

The Convener: Did you ask any questions in the survey about the value of marriage?

Dr Martin: There was a set of questions about attitudes to marriage and relationships in general. I even made a note of it.

Mike Pringle (Edinburgh South) (LD): Is that table 6.1?

11:00

Dr Martin: Yes. From there onwards, you will find attitudes towards sexual relationships in various circumstances. People were asked a range of questions about the value and role of marriage and about the role of different kinds of sexual relationship. There is a series of tables on that.

The Convener: I want to get something on the record on that point, because it relates to the bill that we are considering.

Dr Martin: What sort of information do you want? It depends on the attitudes that are expressed in response to the questions.

The Convener: Based on the survey, is there any evidence that people regard marriage, or indeed a civil partnership, as a relationship that is more important than any others?

Dr Martin: My interpretation of the data is that there is continuing support for the role of marriage. That is particularly the case with respect to children. Marriage is seen as the superior relationship, as it were, for bringing up children. Nevertheless, there is no denigration of those who are not married, if that makes sense. In 2004, nearly 50 per cent of people agreed with the statement that

"People who want children ought to get married".

However, a quarter of respondents neither agreed nor disagreed.

The Convener: My next question is on step-parents. Mike Pringle, too, has an interest in step-parents in relation to the bill. It was interesting that your survey showed that people thought that step-parents should have financial obligations but, correspondingly, that they also thought that step-fathers should have access rights.

Dr Martin: There was a view that, when a step-parent is caring for a child, they have an on-going financial responsibility. If there was a result that surprised me, as a step-parent, it was the view that a step-parent's income should influence the natural father's financial obligation. That quite surprised me, but it is there.

The Convener: The committee has had loads of correspondence about issues that are not contained in the Family Law (Scotland) Bill, but which are big social issues. One of those issues is access rights—we shall call them rights for the purposes of the debate—for grandparents. You have commented on that, which is quite interesting. Your survey seems to suggest that there should be rights for grandparents. That is the first time that I have seen in writing an acknowledgement that grandparents on the paternal side are at the heart of the problem.

Dr Martin: That question was carefully framed, but the caveat that I would give is that it is one of the issues in which more detailed questions would have gone to the heart of that complex issue. That is exactly the point that you raised before.

The Convener: My final question is about access rights for separated parents who do not have custody. The parent in question could be a father or a mother, but we have had lots of correspondence from fathers who do not think that the court system is fair to them or that they get the same rights to argue for custody as mothers do. Have any surveys been done in that area?

Dr Martin: I do not know. I am sure that it is a continuing issue. That is where Dr Fran Wasoff would be able to help you. When she returns, I am sure that she will be able to direct you towards any relevant research.

The Convener: So there might be some research on that?

Dr Martin: There may well be research that could help you.

Stewart Stevenson: I have just a wee geeky question at the end. When you had normalised the 1,600 responses, what was the effective size of the sample?

Dr Martin: It shifted upwards by about—I am sorry, I cannot remember the exact figures. I do not have them in front of me.

Stewart Stevenson: Upwards?

Dr Martin: Yes, because of the increase for those in rural areas, for example.

Stewart Stevenson: So, you normalised the responses in that direction. I would have expected it to be done the other way.

Dr Martin: It was done to ensure adequate numbers in order that the sample would be representative, which is always difficult.

Stewart Stevenson: So, you increased the weight of underrepresented subsets.

Dr Martin: Yes.

Stewart Stevenson: Okay. Thank you.

Mike Pringle: Dr Martin, you made no comparison between people's attitudes to the rights of a parent and those of a step-parent. The point also relates to cohabiting couples. There is a lot in the bill about the rights of cohabiting couples, but those rights are not to be extended to step-parents. Did you make any such comparison?

Dr Martin: I would have to look. We analysed the data to give the information that our funders required. The data exist: further analysis could be done if other people wished to do it or if the funding were to be made available. I am sure that specific topics could be explored further. We did not do that in this report, as it was getting very long already.

The Convener: We have asked all our questions. The survey is valuable to the committee as we move to stage 2. There may be one or two issues on which we would like to come back to you if we need further information. On behalf of the committee, I thank you for your evidence.

Dr Martin: Thank you.

The Convener: I welcome our second panel: Alan Finlayson, who is a child law consultant; and Joyce Lugton, who is from the Scottish Executive's civil law division. Thank you both for appearing before the committee this morning. Alan Finlayson said that he would come back to talk to us—thank you for sticking to that promise.

I invite Joyce Lugton to make a short introductory statement on the work of the stakeholders group, which she chaired. She will address the drafting of the parenting agreement and the charter for grandchildren. I will then invite Alan Finlayson to make a statement.

Joyce Lugton (Scottish Executive Justice Department): If I may, convener I will first give a little bit of a health warning about my evidence: my area of expertise is not family law. Although I chaired the stakeholders group, and I am happy to field questions on that, it would not be helpful for the committee to ask me more general questions.

The purpose of the stakeholders group was to assist in the development of the non-legislative measures that ministers recognised would be helpful as part of a general package, which includes the bill. The group consisted of about eight representatives of the various constituent stakeholders, including Grandparents Apart self-help group, Families Need Fathers, Couple Counselling Scotland, Family Mediation Scotland and the Family Law Association. I will not give the entire list, but that gives members a flavour of the people who were on the group.

The group was charged with two tasks. Mr Finlayson was always to be the parenting agreement's author, but it was thought that it would help him if he were able to touch base with a wider group who could provide supplementary information, advice and reaction to his thought as it developed. The second piece of documentation that the group was charged with assisting in the production of was a charter for grandparents. It was written by Scottish Executive officials, who—far more than Mr Finlayson—needed the help and support of external experts.

I think that the group met four times. The product of all that work is the two documents to which the convener referred and which were attached to Mr Henry's letter of 22 August: the draft parenting agreement and the draft charter, not for grandparents, but for grandchildren. The intention is that both those documents should be widely consulted on in the next few months before they are published, so that other people will have a chance to comment on them.

The letter from Mr Henry explains that the charter developed from the initial thought that it should be a charter for grandparents into a draft charter for grandchildren. That was because, as the group continued to think about the matter, it concluded that all the work was intended to produce something to help children. The legislation puts children and their welfare at the centre. It seemed intuitively wrong to produce something about the status of grandparents rather than children. That is why the charter developed in that way.

As a result, we feel that a particular kind of consultation is needed before the more traditional consultation takes place. We propose to have

focus groups with children so that we are secure that the document reflects the voice of the child and is not just an imposition of adult perceptions. With the assistance of the commissioner for children and young people, we hope to run a couple of focus groups fairly soon, before the paper is disseminated for wider consultation.

I do not need to say much else, except that, at the end of the process, both documents were shown to the group, which had the opportunity to comment. Given that the group was disparate and represented a wide range of interests, it was rather surprising that it gave unanimous and, it is fair to say, enthusiastic support for the form of both documents as they appear before the committee.

11:15

Alan Finlayson (Child Law Consultant): The draft parenting agreement is now with the committee. When I gave evidence previously, the convener expressed some concern—and I was a little worried, too—about my ability to produce it timeously. However, I have been able to do so.

I acknowledge the considerable assistance that I got from the group to which Joyce Lugton referred. I was very pleased that although the group's members come from different perspectives, when the draft parenting agreement was put to them, there was virtually unanimous agreement. They were helpful enough to make certain suggestions that are now reflected in the agreement that is before the committee.

I also acknowledge the considerable assistance given to me by officials in the Scottish Executive Justice Department, with particular reference to their help with condensing a huge number of words into a format that we hope will represent a relatively consumer-friendly document to assist parents.

We have tried to stress a number of issues in the agreement, including the importance of parents reaching agreement and of their avoiding confrontation and conflict with, and criticism of, their partner. Throughout the document, we reflect the need for the views, interests and wishes of children to be considered. I have tried to humanise and depersonalise the document by putting in some quotes so that parents who are considering it can reflect on what children in similar situations have said. That takes away from the personal situation that they are in.

We have tried to recognise and reflect the importance of members of the extended family. One of the reasons why I included the wee diagram was to bring home to children the importance of members of the extended family. We hope that that might encourage children to participate in the decision-making process by saying who is important to them. Document 2—the plan—is not written just for married or separated couples, but reflects the interests of step-parents. One particular quote was inserted with them in mind. Mr Pringle was interested in that aspect when I appeared before the committee previously.

We have tried to stress that the interests and involvement of both parents are genuine and not token. Committee members raised worries about parents being forced into making agreements, and I have tried to stress that aspect. I have reflected the importance of the safety of children in situations in which a child might be at risk because a parent has had to agree to something that, frankly, is not in the child's best interests.

I have also tried to reflect the need for change and flexibility. There is still a bit missing from the draft agreement about the availability of assistance and guidance, on which the Executive continues to work to try to ensure that a composite list is available.

Those are some of the values that I have tried to include in the draft agreement. I will leave my introduction at that.

Mr McFee: Thank you for allowing us sight of the draft agreement—both the guide and the plan. That has been useful. I have read the documents, which seem to contain some commonsense measures. I understand that at times of separation and disagreement, common sense sometimes goes out the window and people need to be reminded of it.

I refer back to the evidence that you gave previously when we discussed the matter. It is clear that this will not be a legal contract.

Alan Finlayson: That is correct.

Mr McFee: It is also clear that it is not intended that the parenting agreement will be enforced by the court. However, you thought that there might be circumstances in which a court would look at it with a degree of expectation that an attempt had been made to fulfil the agreement, which might influence the court. The second paragraph of the introduction to the guide amounts to a pretty definite statement. Have you given further thought to whether a court might rely on a parenting agreement? Has your position been tested? Have you spoken to any members of the legal profession?

Alan Finlayson: Indeed I have.

Mr McFee: Have you spoken to any sheriffs?

Alan Finlayson: I meet sheriffs from time to time, because I was a sheriff and, indeed, I am still an honorary sheriff. Every time I have met a sheriff over the past three months, I have tested out my

position on them and they have agreed with the reflection that I made in response to Mr Stevenson's questions when I appeared before the committee previously. They have said to me that, if parents who had agreed matters subsequently came to court and wanted to change an agreement, they would want to know what material change had taken place that would merit altering the agreement.

Mr McFee: Right. We are quite clear that the court cannot enforce a parenting agreement, but would it not be more accurate to flag up to parties that were considering entering into such an agreement that a court may—I put it no stronger than that—be influenced by their signing up to it? I do not know what the implications of that would be, or whether it would make it more likely or less likely that an agreement would be entered into.

Alan Finlayson: I am trying to avoid the courts altogether.

Mr McFee: I understand your reason for wanting to do so.

Alan Finlayson: The less I say about courts, the more I like the document. In light of the reflections that emerged in our previous discussion, I thought that I had better put in a health warning. It would be a balanced judgment as to whether that warning should be spelt out in more detail.

Mr McFee: I invite you to reconsider the issue.

Alan Finlayson: I am always considering it.

Mr McFee: I am sure that you are. It is just that I am wary of a statement that appears to be quite definitive, but is not.

Alan Finlayson: I appreciate your point.

The Convener: I hear what you say and I know what your aims and objectives are. I have a question that is theoretical at this stage. Would you object if the Justice 1 Committee were to amend the bill at stage 2, if a way of referring to the parental agreement could be found? Would you be against that?

Alan Finlayson: I could not possibly object to that.

The Convener: I simply seek your opinion.

Alan Finlayson: I hope that everyone will focus on parents reaching agreements by themselves. It is difficult to legislate for what courts might do in certain circumstances.

Mike Pringle: I will follow up what Bruce McFee said. In the second paragraph of the introduction to the guide, you say:

"The Parenting Agreement for Scotland is not a legal contract".

Have you given consideration to whether it should be a legal contract?

Alan Finlayson: I have always considered that the parenting agreement could not be a legal contract. When parents enter into a minute of agreement that is registered in the books of council and session, courts cannot be bound by anything that has been agreed about the interests of children, because those interests may vary from day to day. I have never visualised the parenting agreement as being part of a legal contract.

Mike Pringle: I just wanted you to put that on the record.

Stewart Stevenson: May I say at the outset that the document has exceeded my expectations and that I am delighted to see it. However, there is an issue that I would like to explore, perhaps with Joyce Lugton rather than with Alan Finlayson. What do you think will be the level of educational attainment of parents with whom the document as it is currently worded is likely to fit most naturally?

Joyce Lugton: I do not think that I am particularly well qualified to answer that question. However, one of the things that I have in mind is to run the documents through some kind of testing procedure in which people who are, or have been, in such a situation go through the documents with a view to seeing how useful they are and how they might be changed to be more helpful. That does not entirely answer your question, of course, but it would be quite difficult to run an IQ test before people read the documents.

These documents are meant to help people, and Alan Finlayson has used language that is as simple as he could have made it. However, it might be that a simpler version could be developed through some sort of testing procedure.

Stewart Stevenson: I accept that. Indeed, the language that is used in the documents is substantially more accessible than that which is used in many documents. However, it would be useful, in the interests of ensuring that they are fully used, to simplify the language further. Perhaps you could use American software that can tell you what school grade a piece of writing is suitable for. In any case, the testing that you have described is important in that regard.

You say that the documents are quite simple and I accept that, for a university graduate such as myself, it is. Nonetheless, on page 4 of the guide, there is a four-line sentence that reads:

"You mustn't keep trying to push your former partner into accepting any arrangement which they're not comfortable with but neither should you agree to something you're not comfortable with just to satisfy the other parent."

I would like you to agree with me that it would be possible to break down the concepts in that

sentence into bite-sized chunks that would increase the document's accessibility. For example, the neither/nor construction is a difficult one for people of quite limited educational attainment to deal with because it sounds a little like a double negative. I am not focusing on that sentence, however; I am merely using it as an example to make a more general point. I think that I am reasonably satisfied with what you said about testing.

To what extent do the witnesses think that it will be necessary for voluntary agencies or the legal advisers of the parents who are involved to provide support to people for whom the documents simply cannot be made accessible? Obviously, one cannot simplify them to the point at which they would achieve 100 per cent coverage.

Alan Finlayson: On that sentence that you do not want us to focus on, I should say that I have an appalling record for writing sentences that are far too long. I recognise that, even though, obviously, I do not do as much as I should to rectify the situation.

We tried to write the agreement in such a way that it would not be so simple as to be patronising. There was a balance to be struck in that regard. I tried to reflect the fact that people could and should seek assistance from the various people who could assist them. That is the bit that is missing at the moment, of course. However, it is essential that that point is included in the agreement so that people are helped.

The representatives from Women's Aid were talking about the need for assistance for people who might feel at risk, but assistance from an outside person is also important for other people who are having great difficulty with the situation. Again, I want that point to be covered in the agreement.

Marlyn Glen: On accessibility, it is essential that the documents are available in different formats, such as cassette tape. That would be an easy way for people to access them. The parental agreement is lengthy, although I accept that it is in plain English. The long sentence that Stewart Stevenson quoted, on which we are not focusing, is important. It is crucial that its meaning is clear.

11:30

Alan Finlayson: I could have split it into three sentences.

Marlyn Glen: That would be a good idea. It would also be good for the agreement to be available in formats such as Braille and in other languages. We must consider that, because it could be used widely.

I appreciate what is said on page 5 about when the agreement is not appropriate. An essential aspect of the child-centred approach is that such an approach must be taken by agreement, but we sometimes lose sight of that. If there is no agreement, such an approach does not work.

Mike Pringle: I liked how the guide uses quotes. The quote that struck me most is on page 7:

> "I wish I could spend more time with my Dad. I know he's busy but once a fortnight for 4 hours doesn't give us time to do much."

I felt that that humanised the whole issue.

Following on from Stewart Stevenson's point, who is going to be responsible for the agreement and ensure that the parents get together? I was at a presentation yesterday at which several groups talked about the cost of mediation, couple counselling and so on. They felt that there was a serious lack of funding. The agreement is extremely good and I hope that it is used widely, but it has cost implications for various organisations. Have either Mr Finlayson or Joyce Lugton thought about that?

Alan Finlayson: My task was only to write the agreement. The responsibility for what happens to it is the Executive's and not mine. However, I entirely agree with the principle. There is no point having an agreement unless it is properly and widely available. Discussion of that issue could incorporate questions about who might be required to assist—some people will not need assistance, but others will.

Margaret Mitchell: I welcome the realistic and commonsense approach that the two documents take, as well as their flexibility in recognising that there are different family situations in which the presence of both the children's biological parents is not the norm. How early would people enter into a parenting agreement? For example, would that happen when divorce proceedings are initiated?

Alan Finlayson: It should not happen when divorce proceedings are initiated. Many people ought to enter into agreements whether or not any legal process is attached to the situation. I regard the time of separation as the important point. Indeed, some in the stakeholders group suggested that, before a couple comes together, they should sign up to such an agreement. However, we rather took the view that most people enter into a relationship with a bit more optimism than that and that it would be wrong to have an agreement at that point.

Your question on timing, however, is important. If the agreement was widely available, I would like to think that people who decided to separate would be talking about and entering into the agreement at that point. That is why I want the agreement to be as widely available as possible. I

want parents to reflect on what separation will mean for their children. A couple might have a barney, fall out and decide to live apart, but they should start thinking at that point about the children's interests. I do not know whether that helps.

Margaret Mitchell: I was a step ahead. I was thinking that the earliest point at which an agreement would be entered into would be the point of separation. The assumption in the bill is that people go straight into mediation after separation. However, that often does not happen, and one of our criticisms is that provision of conciliation services is not adequate.

Given that early intervention, agreements and mutual co-operation are to be encouraged, what support can be offered when it is clear that there is acrimony? How can we step in to smooth ruffled feathers and to encourage people to be a little more reasonable and consider agreements?

Alan Finlayson: I do not know that I can go much further than I did when I spoke about the agencies that will assist. I have raised the possibility of the agreement being available in public libraries, doctors' surgeries, citizens advice bureaux and social work departments. Anyone who made the agreement available would be able to assist.

Margaret Mitchell: A third person being present with both parties could take the heat out of a situation and could help to channel discussion. It is a question of how early that could be done.

Alan Finlayson: Family Mediation Scotland, for instance, would be very pleased to get involved at that stage of the proceedings. It would prefer to get involved early rather than too late.

Margaret Mitchell: Couple Counselling Scotland is also an option. Thank you. That is very helpful.

The Convener: The discussion is certainly helping me to firm up my own view about the importance of the agreement. Although the witnesses might think that what they say is so obvious that it does not need to be restated, their remarks are important in reminding us that the best chance of parents or guardians entering into an agreement is during the separation period when people are still talking.

If the agreement is to be widely available, it must be tied into the delivery of services that the Executive funds. It is not a major jump from delivering services such as conciliation, family mediation or legal aid to entering into an agreement as part of the standard code. It should be the first thing that a couple is asked to do.

Alan Finlayson: You would hardly expect me to disagree with you.

The Convener: I do not.

Alan Finlayson: All I would say is that that is someone else's responsibility and not mine.

Mrs Mulligan: I did not want you to go away thinking that perhaps I did not approve of your approach: it is an excellent document. I feel very positive about it. However—as with Stewart Stevenson, there is always an however—my concern is that we must ask you to prepare a second stage for parents who have not come across the document early enough or who, because of their circumstances, are already in battle, in order to help them to resolve the difficulties that their children face. Children must be able to continue to have the support of both parents.

In your discussions with the group that Joyce Lugton chaired, did possible solutions arise to the problems faced by children and young people whose parents have not had early support and intervention or who may not know about your document?

Alan Finlayson: It is difficult to give a definitive answer. If people cannot be helped to reach agreement, I do not know how you can make them reach agreement. That has always been one of my worries. In cynical moments while I was preparing the agreement, I thought to myself that those who need the agreement will not obey it, and those who do not need it will just go ahead anyway, so what am I doing?

Mrs Mulligan: I have to be clear and say that the agreement is very helpful. We are talking about a time that is traumatic for many people, and being able to focus on the plan in the agreement will assist many of them. It is very positive. However, I accept that I am asking the unanswerable.

Committee members have talked about this issue frequently—among ourselves and with the minister, Hugh Henry. We have wondered what we can do about access to children when there is no agreement and when adults are being deliberately antagonistic. It is the children who suffer and, because we have started from the premise that the bill should be about improving circumstances for children, I wanted to give you the opportunity to comment.

Alan Finlayson: In all my previous careers, I have worried greatly about children who are left in situations such as you describe. From experience, I know that it is much better for the future of the children if parents can be helped to reach agreement. I also know about children who get caught up in the middle of intractable situations that go on and on and on. I have not been able to solve that one yet, but if another crack at it might do it, I will have a go.

Mrs Mulligan: Come back and tell us if you do.

The Convener: That was a pertinent question. I agree with Mary Mulligan that an agreement such as the one in the document—if it is widely available and is taken seriously—will at least increase the options that are open to parents. As a result, the number of couples who cannot reach agreement might decline a little.

As Alan Finlayson says, the key point is that while the parents are still speaking, they can complete an agreement and can agree when the child will stay overnight, for example. However, they can then change their minds. I have seen many cases in which both parents were initially thinking about the interests of the child, but that has changed. How can we toughen up the importance of the agreement? I would not like to think that your colleagues, the sheriffs, will have to ask, "Why did you agree in 2005 in the interests of the child but now you do not agree?" The agreement has to be given some teeth. I think that we could reduce the number of disputes

In annex B of your document, the part about keeping in touch is first class. On page 9 there is a diagram in which you suggest that younger children be asked to fill in the names of people who are important to them. I want to understand your thinking. Obviously, if babies are involved, someone has to speak for them. Do you envisage that parents would sit down and agree on which people are important to their three-month-old child? In many cases, could there not be a standard format for the people whom it would be in the interests of the child to see?

Alan Finlayson: I tried to avoid the standard format lest it produced a standard family, as it were. I have tried to reflect the fact that many different people might be important to a child. For cases in which the children are not old enough to express a view, we have tried to reflect the fact that the question is important for parents to consider.

The Convener: That makes perfect sense. However, if the parents of a three-month-old baby cannot agree on who is important to the baby—the grandmothers or grandfathers, for example—that cannot be shown on the diagram.

Alan Finlayson: If they do not agree, they do not agree. The diagram is in an agreement, which means that they have agreed.

11:45

The Convener: They may have agreed, but I presume that you accept that, ultimately, the person with whom the child has residency will have more power in the discussion than the person with whom they do not reside. Is it fair to say that, if the person with whom the child resides does not agree that the grandparent is important, that will not be recognised? If the young child, who cannot speak for himself or herself, has residency with one parent, and there is no agreement about which relatives are important to the child, does not the parent with whom the child resides have most power in the decision? That parent may make a decision that is against the interests of the child. My worry is that an agreement would not solve the problem.

Alan Finlayson: One of my difficulties is that I cannot think who could sign the agreement on behalf of the three-month-old child.

The Convener: Yes. However, the importance of the agreement is that if a dispute goes to court and a contact order is sought, it would be legitimate for the sheriff to refer to it.

Alan Finlayson: I have tried to indicate that the agreement is relevant regardless of whether the bill eventually includes a requirement on the courts to have regard to it. I have reflected on the situation before now. One of the most significant advances under the Children (Scotland) Act 1995 is the development of child welfare hearings. Sheriffs have taken on board the principles of the 1995 act and are endeavouring to operate them within the context of child welfare hearings, which are not attended by the public. They are trying to get resolutions by having people sit around a table.

If the parents had agreed matters in 2005, but in 2006 one wanted to change the agreement while the other wanted to stick to it, every sheriff whom I know would have asked what had changed and why certain arrangements had been agreed the previous year. The answer could be that a parent was forced into the agreement; that pressure was put on them, that they did not think it through at the time and that they now recognise that it does not serve the interests of the child. I have no doubt that, regardless of whether a requirement is included in the bill, the question would be asked. To that extent, the document would have validity, although it is not a contractual matter. I am sorry to keep repeating myself on this point—I may not be making myself very clear.

The Convener: We are all repeating ourselves to some degree. We are trying to resolve certain issues and it is important for us to be clear about which issues we can and cannot resolve.

I have some questions for Joyce Lugton, but before I ask them I will take questions from members on the same topic.

Mr McFee: My question goes back to the issue with which we started—the status of the document. I am unhappy about a document that may acquire a status that is unclear. I am

pondering Pauline McNeill's question about whether reference should be made to the agreement in the legislation. Is it intended that the document should be lodged somewhere?

Alan Finlayson: No.

Mr McFee: So if Mr and Mrs X decide when they are separating to sign up to an agreement and there is one copy of it—

Alan Finlayson: Each of them would get a copy.

Mr McFee: So there is no intent to lodge the agreement anywhere. My concern is that the agreement is great for those who want to work out their problems but not for those who sign up to it for a quiet life or with the intention of doing the exact opposite. There is nothing to pull such people back into line because there is no sanction and I am concerned that that devalues the document. I do not have the solution; I only pose the question.

Alan Finlayson: I keep coming back to the basic premise: unless the parenting agreement helps people and they own what they sign up to, it will not be worth the paper that it is written on. The intent is to try and get parents to do just that, and the document, frankly, is as far as I thought I could take it.

Joyce Lugton: The stakeholders group was interested in the fact that children's needs change over time. A parenting agreement that is signed when a child is six will not be of much relevance when the child is 12. Children's needs change in all sorts of ways, partly in relation to their financial needs and partly in relation to whether they still want to see the same people in the same ways. That is relevant to the setting in stone that might happen if a document were lodged.

Mr McFee: I accept that. The idea of lodging the agreement is not to set matters in stone. I am aware that anything involving children is a moving target and that, by the very nature of the child, the agreement will have to change as they grow. I am thinking more of a case in which somebody clearly wants to break everything that has been agreed and says, "I might have signed up for four hours per fortnight but I am actually going for 14 days." There will always be changes and the agreement will grow and mature but that will be done by consent. My concern is that the status of the agreement will be low.

The Convener: That is a matter for the committee to consider at stage 2.

Stewart Stevenson: As we have returned to the contract, I will ask a couple of questions on that. On page 21 of the draft parenting agreement, under the space for the signatures, is the following disclaimer:

> "the Parenting Agreement for Scotland is not a legal contract … By signing above, you are simply confirming what you have jointly agreed and there is no legal commitment made in doing so."

Do you agree that it is not a contract and that the courts will not view it as one? If it was a contract, it is likely that there would be an associated set of penalties for failing to fulfil its conditions.

Alan Finlayson: Yes. I agree with that.

Stewart Stevenson: That is almost a test of whether it is a contract or not. However, notwithstanding the fact that the disclaimer says that there is no legal commitment—and bearing in mind that to make legal commitments on such matters might cut across other parts of the legal provisions that surround what is going on—it nonetheless has legal implications that will be taken into account later in other parts of the legal process, including the courts. It is a legal document and it has legal implications. It has that force whatever we choose to do with it. Is that understanding correct?

Alan Finlayson: Yes. On that, and keeping it to a short sentence, one could perhaps add to the agreement the phrase, "It may have legal implications."

Mike Pringle: We have not discussed where we are going with the charter for grandchildren. Joyce Lugton said that the children's commissioner will use children's focus groups. What do you see at the end of that? Will we end up with a grandchildren's agreement, just as we have a parenting agreement? Alan Finlayson may also wish to comment.

Joyce Lugton: We are not going much further than the document as it stands. It is just a document that will provide some guidance and comfort to people in difficult situations. It will also provide a template for the kinds of relationships and understandings that will be helpful to children. It is not designed in the same way as the parenting agreement—it is not to be signed or anything like that. It is just a document that people can read to help them. The intention is that it will be widely available in the usual places—citizens advice bureaux and so on.

Mike Pringle: We would be interested in receiving feedback from the work with focus groups.

Joyce Lugton: Certainly. We would be happy to write to you to let you know how it is progressing.

Mrs Mulligan: Do you have any idea of the timescale? We will soon be going into stage 2, and it might be useful to know the outcome of that work.

Joyce Lugton: We hope to set up focus groups fairly quickly—within the next month or so—but I

would be happy to undertake to come back to you before stage 2.

Mrs Mulligan: That would be helpful.

The Convener: Two members have questions, but before I call them, are there any other questions on the grandchildren's charter? Is your question on that subject, Margaret?

Margaret Mitchell: No, it is not; it is on the parenting agreement.

The Convener: I have one question on the grandchildren's charter. As you will know, there has been a lot of discussion about the role of grandparents. Committee members and other elected members have been lobbied heavily by grandparents groups, who feel that they should have rights. Have you taken any soundings as to whether those groups are happy with the content of the charter for grandchildren?

Joyce Lugton: The steering group had two members from Grandparents Apart self-help group, and they were happy with the document that emerged. In particular, they were happy with the change in focus from grandparents to grandchildren. They have lobbied you, and we have seen a copy of the lobbying document; it would be fair to say that they would like to go further, but they are happy with the document as it stands, which they feel reflects well the relationship that they would like to see between grandparents and grandchildren in separation situations.

The Convener: We received evidence earlier on the social attitudes survey. One thing that came out of that was something that we had already assumed, which is that grandparents on the paternal side are the ones who feel most aggrieved, for reasons that you will probably know. Has there been any incorporation of that into the grandchildren's charter? Is it a factor at all?

Joyce Lugton: The charter does not distinguish between paternal and maternal grandparents. I am quite sure that the scenario that you describe will be the more common but, in the case of two of our regular correspondents, it is the maternal grandparents who have been excluded from having a relationship with their grandchildren. The document is completely non-discriminatory on that point.

12:00

Marlyn Glen: I turn to a practical point, going back to the parenting agreement and the matter of signatures, which Bruce McFee was discussing. The copies of the agreement are to go to both parents. Are you going to allow copies of the agreement to go to the children as well, given the importance of ownership? I am thinking about pupil agreements in school, which are signed in that way. That is really important for the young person, who could perhaps be as young as six or seven. If the child had ownership and knew exactly what should be happening, that would apply huge pressure on both parents.

Joyce Lugton: As it stands, the parenting agreement provides for children to sign it. If someone is a signatory, they should get a copy. The question of who would arrange for copies to be given to the various parties is another matter. It would certainly be helpful for children who are signatories, and for children in other cases, to have a copy and to be involved in general.

Marlyn Glen: I suggest that there should be an extra page for more signatories. You would have a signing page for a standard family, with two parents and two children. Lots more people might want to sign it.

Margaret Mitchell: Has any consideration been given to incorporating a timetable for the purposes of checks and balances? It has been suggested that people could sign up to the agreement simply to pay lip service to it, without having much intention of following that through. There will also be cases in which they are not prepared to sign up initially. Is there any provision for bringing the parties back after a month, for example, to review the situation and see how it is working, so that we are not necessarily waiting until the situation has broken down before there is intervention? I am aware that if that proposal were considered, there would be a certain amount of pressure on the courts. Would you favour one of the proposals or suggestions that we have been examining under the bill for specialist family courts, involving sheriffs who have a particular expertise in family law?

Joyce Lugton: I will start, although Alan Finlayson might also wish to come in. If we were to focus on timing, reviewing, having a month's grace and so on, that would deal with the document the wrong way round. It is supposed to be a self-help document, not something that is imposed from outside: that approach would not feel right.

The plan contains a section called "Making changes". I referred earlier to the way in which circumstances change. The thinking was that it would be helpful if people could recognise at the beginning that circumstances will change and that the needs of the children will alter, and it would also be helpful if people could agree how they will deal with that in the future.

Margaret Mitchell: I was not thinking of anything really draconian, but of a much more informal setting, where people might be asked, "Right, we're a month into this. How have we all

been doing?" The family law court and the sheriffs who have expertise in the area might be more sensitive to such a change of emphasis.

Joyce Lugton: There will be varied situations and varied solutions to them and, no doubt, varied non-solutions. The document is not supposed to be prescriptive; it is supposed to be an aid. I would not like to speak on the question of family law courts—that is something that the committee might wish to ask my minister about, rather than me.

Margaret Mitchell: Does Alan Finlayson have a view on the family law court?

Alan Finlayson: Before we go to that question—which I am not going to answer, although I will find a long-wound way of dealing with it—I draw the committee's attention to page 22 of the guide. It contains questions such as:

"Will you arrange to regularly review the arrangements you have agreed on?"

and

"What kind of changes … do you each consider will require you to look again at the arrangements you have made"?

It tries to encourage people to look at their situation again.

On the specialist family court, I will say only that I have debated the issue many times with colleagues. Let me put it this way: there are pluses and minuses.

Margaret Mitchell: You would make an excellent politician.

Alan Finlayson: At one time, it was suggested that I should act as a fly-in sheriff for various places. People thought that, as one who ought to know something about child law because of my background, I could just fly off to Lochmaddy or wherever. Although that might sound attractive, my complete lack of knowledge about the culture of Lochmaddy—or Banff or Buchan or wherever it might be—would have detracted from that. There are pluses and minuses; I have no doubt that those will be made clear to the committee by a number of agencies and individuals.

The Convener: Joyce Lugton pointed out to Margaret Mitchell that the parenting agreement is a self-help document. I do not disagree that many parents who do not know what to do should have a self-help document that gives them something to focus on, but I believe that the state is entitled to go a wee bit further in its expectations of parents. If we genuinely agree that the focus should be on the child, I do not see why we cannot go further by saying that if parents forget the interests of the child, they will be expected to look at the document. I would be disappointed if the parenting agreement was seen only as a self-help document that could be taken or left. If parents forget that the focus should be on the interests of the child, some pressure should be put on them by suggesting to them that they have an obligation to sit down and consider what is in the child's best interests in the current situation. However, I know that those two things need not be mutually exclusive.

Joyce Lugton need not comment on that. I can perhaps put the point to the minister in due course. Do members have any other final questions?

Mrs Mulligan: Mr Finlayson's point about the family law courts is an issue that the committee discussed when we went to Glasgow to speak to people about the situation there. I appreciate that people should not be parachuted into an area with which they have no connection. However, it has been suggested that there could be a circuit of such courts. That would allow people to visit a number of places regularly and to build up knowledge of, and a relationship with, an area. Could that work or are you still dismissive of the idea?

Alan Finlayson: I will not be drawn any further.

Mrs Mulligan: Okay.

The Convener: There are no further questions. We have had a very valuable session and we are grateful for the work that the witnesses have done. The committee agrees that both the charter and the parenting agreement are high-class pieces of work, on which we congratulate you. As you will see, we have more work to do on how our committee might assist you in taking on that work. I thank you both for coming to give evidence to us this morning.

Alan Finlayson: Thank you. Personally, it has been a privilege for me to be able to discuss critical issues with the committee.

The Convener: Our fourth and final agenda item is to consider, in private, whether to request that the contract for our adviser on the Family Law (Scotland) Bill be extended.

12:08

Meeting continued in private until 12:10.

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