JUSTICE 1 COMMITTEE

Wednesday 28 September 2005

Session 2

£5.00

Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by Astron.

CONTENTS

Wednesday 28 September 2005

JUSTICE 1 COMMITTEE
† 29th 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:

David Brand (Law Society of Scotland)
Dr Janeen Carruthers (University of Glasgow)
Dr Elizabeth Crawford (University of Glasgow)
Louise Miller (Scottish Executive Justice Department)
Claire Newton (Scottish Executive Justice Department)
Mrs Janys Scott (Law Society of Scotland)
Shona Smith (Law Society of Scotland)
Dr Gordon Wyllie (Law Society of Scotland)

CLERK TO THE COMMITTEE

Callum Thomson

SENIOR ASSISTANT CLERK

Douglas Wands

ASSISTANT CLERK

Lewis McNaughton

LOCATION

Committee Room 4

† 28th meeting 2005, Session 2—joint meeting with Justice 2 Committee.

Scottish Parliament

Justice 1 Committee

Wednesday 28 September 2005

[THE CONVENER *opened the meeting at 11:32*]

Item in Private

The Convener (Pauline McNeill): Good morning and welcome to the 29th meeting in 2005 of the Justice 1 Committee. I apologise for the late start—the committee had a meeting in private to scrutinise the budget process, which ran over.

We have received apologies from Mike Pringle, who cannot join us because he is dealing with a member's bill that he has proposed.

Under agenda item 1, do members agree to take agenda item 4, on the evidence that has been received on European Commission green papers, in private?

Members *indicated agreement*.

Family Law (Scotland) Bill

11:33

The Convener: Agenda item 2 is consideration of motion S2M-3332, which is in my name, on the Family Law (Scotland) Bill.

I move,

That the Justice 1 Committee agrees to consider the Family Law (Scotland) Bill at Stage 2 in the following order: sections 1 to 7, sections 10 to 23, sections 8 and 9, sections 24 and 25, schedule 1, sections 26 to 33, schedules 2 and 3, section 34 and the long title.

Motion agreed to.

European Commission Green Papers

11:33

The Convener: Agenda item 3 is to take evidence on European Commission green papers. I thank the witnesses for joining us to discuss such an important subject and welcome our first panel, which consists of Dr Janeen Carruthers, Dr Elizabeth Crawford, Mrs Janys Scott and Shona Smith. Witnesses will switch places when we come to discuss succession and wills, and we will hear from David Brand and Dr Gordon Wyllie. The latter four witnesses are from the Law Society of Scotland.

The committee has a number of questions for the witnesses, whom I thank for their thorough submissions, which have helped the committee to understand where they are coming from.

Margaret Mitchell (Central Scotland) (Con): Good morning, ladies.

I want to explore issues surrounding the green paper on divorce, particularly the applicable law and choice of law.

I am aware that both sets of witnesses have submitted a paper. Much of my questioning is therefore intended to get their views on the record. Do Dr Crawford and Dr Carruthers feel that the case has been made for harmonisation of applicable law on divorce at European Union level?

Dr Janeen Carruthers (University of Glasgow): I refer you to the written evidence that we have submitted. Page 1 of our letter of 30 August responds specifically to the Scottish Executive's key issues. In reply to Ms Mitchell's question, we are not aware that there is a particular problem in relation to jurisdiction in relation to forum shopping or in relation to applicable law. The current rule of Scots international private law—that the lex fori principle, the law of the forum, applies—seems to present no problems in Scottish courts as far as we are aware.

Dr Elizabeth Crawford (University of Glasgow): I concur with that. The written submission is a joint paper that also represents my views.

Margaret Mitchell: What is the view of the Law Society of Scotland?

Mrs Janys Scott (Law Society of Scotland): From a practitioner's perspective, we are not aware of problems concerning applicable law, save perhaps in the area of nullity, where there has been a recent decision; however, that is a

rather esoteric area. For the most part, Scottish courts are dealing with matters of divorce and we are not aware of any problems.

Shona Smith (Law Society of Scotland): I concur with that.

Margaret Mitchell: On 13 September, the committee took evidence from Commission officials. It was suggested that the proposals to harmonise applicable law on divorce could be justified on the ground of increasing legal certainty and party autonomy, as opposed to focusing on, for example, forum shopping. Do you have any views on that opinion?

Dr Carruthers: The currently applicable law of the lex fori is one of the most certain connecting factors that applies. There is no problem in terms of Scots international private law vis-à-vis a lack of certainty. If a different choice of law rule were proposed and approved across Europe, ex facie—on the face of things—harmonisation would bring certainty; however, the real test is whether the connecting factor that is chosen is a certain connecting factor. The lex fori is a certain connecting factor. However, if what we might term a softer connecting factor, such as the law having the closest connection to the marriage, were chosen, that would be an amorphous concept that would not, in itself, bring certainty. The appearance of certainty might not be reflected in the reality of applying that harmonised choice of law rule.

Margaret Mitchell: So there has to be complete clarity.

Dr Crawford: That addresses the certainty issue, but I do not understand the reference to greater party autonomy as a result of the proposals. I do not know to what extent party autonomy is exercised, except in the sense of a choice of forum from those that are currently available. I presume that, once the choice is made, the parties will be aware of the attitude to applicable law of the forum that they have chosen. Although I am not against party autonomy as a tool in the conflict of laws, I do not see its having any particular relevance here.

Margaret Mitchell: Thank you. That is helpful.

Mrs Scott: Looking at the issue from a domestic perspective, the introduction of these rules would reduce certainty. As far as Scots law and Scottish courts are concerned, we know that we will apply our own law in a divorce case. If it became uncertain which law was going to be applied, that would cause difficulties from a domestic perspective. We do not know what law would apply if the rules were introduced.

There is also the difficulty that a domestic court that was required to apply a foreign law would face a problem. I am thinking of the issues that would arise if a sheriff, let us say in Alloa, was required to apply Italian divorce law. I do not think that the measures would increase party certainty from a domestic perspective. The Law Society is not entirely convinced that divorce is an area in which party autonomy is entirely desirable. We would rather see certainty than a pick-and-mix approach to applicable law in divorce matters.

Margaret Mitchell: You will perhaps be aware that the Commission's alternative proposal is that individuals should be permitted to choose from the laws of various jurisdictions to which they are most closely connected. What is your view on that proposal?

Dr Crawford: I will respond to that but, if I may, I will add to what Mrs Scott said about the difficulties of a forum in discovering what the foreign law is. Few jurisdictions do not permit divorce at all, but there are difficulties with proof of foreign law and with the conscience of the court. If a court has to apply a law on divorce that is against its conscience, such as that in Malta, that may be a problem. At the current development stage of conflict of laws, we have not encountered that problem. Problems would arise with proof and application of foreign law in any given divorce jurisdiction.

On the parties' choice, was the question whether parties in a divorce forum should be entitled to agree between themselves, if they can, which law should apply?

Margaret Mitchell: We are given to understand that, under the alternative proposal from the Commission, parties would be able to decide, on the basis of closest connection, which law was to be used.

Dr Crawford: That seems imponderable and difficult to achieve. One of the fiercest fights is for jurisdiction; for the parties then to agree on applicable law seems unrealistic.

Dr Carruthers: If a harmonisation project were thought to be necessary and if the need for it could be vouched for by hard evidence—I am not sure that the Commission has done that to date, which is a major issue—rather than introduce a new or softer choice-of-law rule, it might be preferable to introduce a choice of court provision. In the civil and commercial spheres, parties can agree a choice of court to prorogue the jurisdiction of a particular forum. That might be a preferable route in divorce cases. However, there would have to be limitations on the forums that the parties were able to prorogue. Evidence of a connection would be required, which naturally would be a difficulty.

As soon as party choice of court were permitted, the question would arise as to the extent to which a choice of court could be enforced if another

court had first been seized by one of the agreeing parties, in breach of the agreement. That question would have to be addressed. Similarly, could parties choose a non-European Union forum, or would the choice be restricted to an EU forum? What would be the timing of the choice and the manner in which the choice was made? Many questions would require worked-out answers, were choice of courts permitted.

Margaret Mitchell: That is helpful. Does the Law Society have a view?

Mrs Scott: I am thinking about the practical situation of a party who is faced with the breakdown of a marriage. They might be struggling with the implications for the children and the financial implications and would then be faced with difficult and esoteric issues about choice of law and court. From the practitioner's perspective, the choice might be all very well in the commercial sphere, but the proposal would pose special difficulties in areas in which parties have difficulty with objectivity and struggle with their personal circumstances.

Our worry is that the proposal is not practical. If the parties could not agree on their choice of law, would the court or the sheriff have to determine that matter? If the parties could not agree what the law said, would the court have to reach a decision on that and then apply the law to the divorce, the children and the money? The practical difficulties are huge.

11:45

We have a similar view on prorogation. I hear what Dr Carruthers has said on the prorogation of a particular forum. If there are rules on prorogation, they will get the parties tied up in technicalities, which they might not be ready and willing to face. We have serious practical concerns about how the proposed arrangements might work. Things work reasonably well in Scotland at the moment. We are concerned that current practice should not be disturbed without good reason.

Shona Smith: As a practitioner and as a solicitor working with individuals, I would say that the most important thing for the individual is to have some level of predictability and clarity. If we have to start factoring in too many considerations to the initial advice that we give to a client, who will be in a very distressed state, the predictability that we want to have in family law disappears and it becomes more difficult to resolve matters without going to court.

Many of the proposals deal with what happens when people go to court, but we must remember that, in Scotland, the vast majority of matters may be settled amicably, without the need for contested court proceedings. That happens partly because we have predictability. If that is taken away, it makes the job of the solicitor who is dealing with the issues in a sensitive, sensible way more difficult.

Margaret Mitchell: I think that many of us had come to that conclusion, but it is nice to hear it backed up. When we took evidence previously, we were less than convinced that there would be legal certainty. The problems seemed endless.

The Convener: I have a question on the practicalities of the proposed law. I presume from what you are saying that additional costs will be involved in the system. Even from the sheriff's point of view, and using your example of the sheriff in Alloa trying to apply Italian divorce law, it seems that the process will be slower. If a sheriff is not used to dealing with Italian law every day, checks that it is being applied properly will have to be made. Are the costs to the parties likely to increase?

Mrs Scott: Yes. In Scottish courts, if someone wants to prove foreign law, they prove it as a fact. They therefore need somebody to come along and give evidence to the sheriff or judge about that foreign law. If the two sides cannot agree on it, they need opposing experts to come along and tell the court about the foreign law. There are cost implications for the parties, there are implications for legal aid and there are timing implications.

Mrs Mary Mulligan (Linlithgow) (Lab): In answering the convener's question, you picked up on the financial implications for the parties in trying to resolve outstanding issues. My own view is that there is a possibility of putting people at a disadvantage because of their financial circumstances. Would that be right?

Mrs Scott: If legal proceedings are made more expensive, that will of course put people at a disadvantage. It is not just the experts who are affected; people in such circumstances who might otherwise have perfectly happily instructed a local solicitor might feel that they have to bring in counsel, which would make legal proceedings more expensive. On the other hand, such cases are not likely to come up very often. If somebody is going to the trouble to talk about a different applicable law, that suggests that there might be quite a lot of money involved.

Mr Bruce McFee (West of Scotland) (SNP): You probably feel that you have been perfectly clear about your views but, for the record, I ask you each to state, preferably yes or no, whether you feel that the case for harmonisation of divorce law has been made at EU level.

Dr Carruthers: No, I do not feel that the case has been made.

Mr McFee: This is for the benefit of the deliberately obtuse, of course.

Dr Crawford: No, I do not think that the case has been made.

Mrs Scott: No, I do not think that the case has been made.

Shona Smith: No, I do not think that the case has been made.

Mr McFee: I got that drift from you, but I wanted to get that absolutely clear for the record, just in case a failure to agree on that might be interpreted as a requirement to revisit the matter.

Please do not feel that you need to cover the same ground again if you have already done so in your previous answers on the Brussels 2 regulation. Do you believe that revising the grounds of jurisdiction in the new Brussels 2 regulation is a good idea and, if so, what reforms are envisaged?

Dr Carruthers: Mrs Scott and Ms Smith have already said that there is a perception that there is relative certainty in the rules. Under the Brussels 2 bis regulation, there are seven bases of jurisdiction, and some people might say that that is excessive. I am not certain whether there is any statistical evidence on the level of usage of each of those grounds or whether any of them have been found to be redundant in practice, albeit not in theory.

However, the only ground of jurisdiction that could be introduced would be prorogation of jurisdiction: the ability of parties to choose the court. Various scenarios are outlined in the green paper on divorce and the Commission puts these forward as being problem cases that the current regulations will not deal with. They are extreme examples and an ability to prorogue the jurisdiction of a court might be one way of dealing with them. In general, however, I do not think that there is a need for it; I do not think that the grounds of jurisdiction of Brussels 2 bis need to be expanded.

Mr McFee: It is not necessary for everybody to answer if they hold the same view; Mrs Scott has made her position relatively clear as well.

Mrs Scott: My concern about prorogation is a practical one. Under Scots law, one can prorogate without meaning to: if a case has started in a particular court and one puts in defences without putting a plea to resist jurisdiction, one can be held to have prorogated. Those are not the sort of rules that family lawyers are used to working with, and if we are to take prorogation on board we would need to look very carefully at the rules under which we did so. I would be very concerned if one could have an accidental prorogation simply by having failed to put an objection in one's defences.

The Law Society in its response is not particularly keen on prorogation. However, we would welcome a slight relaxation of the present rules in the Brussels 2 bis regulation. At the moment, we work on a first come, first served basis in the regulation. Once a case has been started under the regulation, no case can be started in any other European jurisdiction; you have had it in any other jurisdiction once a case has started.

However, a case may start only for everybody to take a deep breath and think, "We shouldn't have done that." The Law Society would like there to be a possibility of an orderly transfer from one jurisdiction to another. Under the regulation, that is now possible in matters of parental responsibility. That part of the regulation could helpfully be mirrored in the part relating to divorce.

Shona Smith: That was the case before the original Brussels 2 regulation came in. It is helpful. From a practical point of view, it would help to address the rare cases in which this comes up.

Mrs Mulligan: Perhaps you could give us an example of when, having started a case, everybody thinks, "This it is not right; we need to stop and go somewhere else." In what circumstances might that happen?

Mrs Scott: It is difficult to envisage such a case. A family's circumstances might change, or it might move in the middle of a case. They might have been living in Finland when the case started, but have moved to Spain in the middle of it. In such circumstances, the family might much rather continue in Spain.

Shona Smith: Cases start, only to be sisted, or frozen, for a variety of reasons for quite a long time. People's circumstances can change dramatically.

Mrs Mulligan: You say that although such cases are rare, you would still like to be able to deal with them should they arise.

Shona Smith: Yes. It gives us some flexibility. However, if it were left to the discretion of the court rather than to individual choice, there would have to be justification for it. We think that it should be a matter for the court to decide.

Dr Crawford: Dealing with conflicting jurisdictions in divorce law is often contentious. If we were to say in the United Kingdom response that we would like an element of judicial discretion, that would be a proactive stance. The allocation of jurisdiction under the Brussels regime is based on a first come, first served priority process. As Mrs Scott said, however, there is a germ of that in the part of the Brussels 2 bis that relates to children.

If it is a matter of negotiating the best possible result, we could argue for an element of discretion

in the court. We take a very different forum non conveniens approach here, where the judge takes a view as to whether he will retain the case or allow it to go elsewhere. That is not the European way of going about matters and I do not know how people there would react to that kind of change to the jurisdiction rules.

You asked whether the seven bases were excessive and whether anything could be trimmed. One would have to survey practitioners' experience to find out. The bases are rooted in the concept of habitual residence, which is a slightly debatable basis of argument. Whether the bases are satisfactory is perhaps too soon to tell. There has also been change between the old Brussels 2 regulation and the new Brussels 2 bis. I do not know whether more change is desirable so soon.

Mr McFee: Thank you. What do you make of the Commission's alternative proposal that parties should be permitted to choose from one of the various jurisdictions with which they are closely connected?

Dr Carruthers: I think that we have already covered some of that ground this morning when we spoke about the choice of court.

Mr McFee: Yes, but I wondered whether there was any change in view given the previous answer.

Dr Crawford: The question was whether parties should be allowed to choose courts. They choose from among the seven bases according to what is available, but perhaps we have already covered the difficulties of express prorogation: it is debatable whether that would be a good idea.

The Convener: In straight terms, what do you think the Commission is up to? It knows that a number of member states will not accept the draft regulation. I will not pre-empt what committee members have to say because that would not be right and we will hear evidence from other parties before we make a decision. All negotiators, including the Government, put unpalatable proposals in their papers, but there is something behind them and they are aiming at something.

It strikes me that there is something in the draft green paper that the Commission is after. I think that it has included jurisdiction shopping, or the ability to choose jurisdictions, as an extreme proposal in order to achieve something else. Despite the fact that, apart from Stewart Stevenson, none of us as elected members has ever had such a problem case put to us, the Commission seems to think that there could be problems, although it cannot give us hard examples. Do you see what I am driving at? What changes is the Commission really after?

Dr Crawford: I will attempt an answer if it is not overly bold to do so. The Commission proposes a bold European harmonisation programme. Perhaps the good functioning of the internal market did not require that the EU get into family law but, as it did become involved, bases of jurisdiction were set up. Now that there are many bases of jurisdiction, the Commission is worried about choice of law. The programme is an aggrandisement.

The question is, to what extent are substantial numbers of people badly affected by the law as it stands? It is difficult to tell how big a problem it is and the same applies to the wills project.

Dr Carruthers: The amount of statistical evidence in the green paper is limited and the same is true of the green paper on wills and succession.

It is not enough to say that there are X number of international divorces. We have to know how many of them are problem cases, but we have no such evidence. To endorse what Dr Crawford said, there might be a sort of snowball effect. Having created seven bases of jurisdiction, we realise that that opens up a choice of seven law rules, which is to say a separate rule for each forum. We had better harmonise the situation and cut down the choice but, in effect, that could be said to be a problem of the Commission's own making.

12:00

The Convener: I want to ask about the practicalities of Brussels 2 and how you think it is being applied, as I have absolutely no idea how a French or a Scottish court would apply it. If a French national and a Scottish national who live in France separate and the Scottish person goes back to Scotland, they will not be able to start proceedings for six months, under the habitual residence rule, but the French person can go to court in France to start the proceedings immediately. If there are children involved, will the French court favour the French person? Will it try to ensure that the children remain in France rather than go to Scotland? Perhaps I am being unfair in assuming that French courts would not be absolutely above board. I expect that the same thing might happen in reverse and that a Scottish court might favour having the children remain in Scotland. I wonder whether, under Brussels 2, we are going to get fair decisions in the first place.

Mrs Scott: We should have fair decisions. I think that there is an understanding across Europe that decisions relating to children should be based on the welfare of the child. We are already signatories to the Hague Convention on the Civil Aspects of International Child Abduction, under which children are returned to the jurisdiction

where they are habitually resident for decisions to be made about their future. I do not think that we should assume that there will be unfair decisions. However, we can say that the national rules would apply. Those national rules differ not so much in relation to children, but in relation to the grounds of divorce and financial matters.

I would like to add to what Dr Crawford has said about the extent to which Brussels 2 bis is necessary for the functioning of the internal market of the European Union. We have seen one aspect in which Brussels 2 bis goes beyond the functioning of the internal market, in that it purports to allocate jurisdiction between different parts of the United Kingdom. We are already encountering difficulties in that regard and might encounter difficulties in relation to child protection, because there seems to be an unwitting change to the allocation of cases in the UK. It is difficult to see how that can be justified on the basis of the functioning of the internal market. That might be an argument for another day—or, indeed, for the European Court of Justice—but, as family lawyers, we are quite unused to such ideas having to be presented to what is predominantly a commercial court. We are becoming a little anxious about the use in family law of such instruments.

The Convener: I am not sure what you mean when you talk about problems relating to jurisdiction. Presumably, you are talking about jurisdiction problems between England and Scotland in relation to child protection.

Mrs Scott: Article 66 of Brussels 2 bis provides for member states with two or more legal systems. It says:

"With regard to a Member State in which two or more systems of law or sets of rules concerning matters governed by Regulation apply in different territorial units:

(a) any reference to habitual residence in that Member State shall refer to habitual residence in a territorial unit".

Article 8, which is on parental responsibility, allocates jurisdiction in relation to the child to the place in which the child is habitually resident.

In child protection proceedings, we generally regard the presence of the child as being sufficient to raise proceedings. The regulation now applies to placing the children in foster care or institutional care, so there is at least an argument that one could not refer a child to a children's hearing if the child were merely present in Scotland; they would have to be habitually resident here. We have not tackled that issue yet and will have to work it out. My concern is whether it is necessary to raise that sort of uncertainty in national domestic law in the interests of the functioning of an internal market.

Margaret Mitchell: The committee has visited Brussels and entered into dialogue with the Commission, because we realise that, unless we get involved early in the process—at the agenda-setting stage—we will not have a chance to influence legislation, which could become a fact before we have had a chance to comment on it.

One of the conclusions that we reached after our visit was that, given the free movement of goods and people, we could go along with the idea of mutual recognition of domestic law. However, my fear was that mutual recognition was becoming creeping harmonisation. Is it fair to say that you would be quite happy with mutual recognition, because you recognise that in certain circumstances domestic family law should apply to foreigners in this country, but that you believe that going a step further and aiming for harmonisation is outwith what is helpful or desirable?

Dr Crawford: Under Brussels 2 bis, there is pretty well absolute mutual recognition of decrees within Europe, subject to a rather attenuated public policy challenge. One accepts that, because it is important for the free movement of persons and families, but no departure from or embellishment of that is needed. We would be happy for European forums to apply their own laws to the divorces that they hear. A provision in Brussels 2 bis states that we cannot fail to recognise a divorce if it has been granted in a European country on a ground that would not be a ground here. We seem to have accepted that, for reasons of certainty, and I would be inclined to leave the situation at that.

The Convener: You mention the Hague conventions and suggest that some of them are not well used, but that that does not mean that they could not be better used. Should we argue that we should continue to rely on the relevant Hague conventions and make them work?

Dr Carruthers: The fear in this area is overregulation and overlapping international instruments. The 1980 Hague Convention on the Civil Aspects of International Child Abduction is widely viewed to be incredibly successful. More recently, we have the 1996 Hague convention covering a variety of issues concerning children—the interrelationship between it and Brussels 2 bis might be more problematic, as they cover similar subject matter. I am sure that you already know that Brussels 2 bis seeks to change the regime for international child abduction cases within Europe. Effectively, within Brussels 2 bis, there is a gloss on the existing provisions for dealing with international child abductions. Naturally, the more instruments there are, the more complicated the situation becomes. If the aim is certainty—and, arguably, simplicity so far as is possible—multiple regulations are not desirable.

The Convener: It would be helpful to have your opinion on whether a unanimous decision is required for any proposals that come out of the

green paper. If one member state objects, do the proposals fall?

Dr Carruthers: That issue was addressed in relation to the Rome 2 project, on choice of law regarding non-contractual obligations, and the right of the UK to opt out once it has opted into the negotiations. Perhaps a different panel would be better placed to advise on that. However, from the outset of the negotiations, the UK's position must be made clear. Can we opt out, having once dipped our toe in the water?

Dr Crawford: The problem with the Rome 2 negotiation was that we entered into it on delict, tort and restitution without being well advised as to what the consequences would be. Whether one stands back from a negotiation or gets involved is always a fine decision. However, there is a risk in getting involved, because one might be held to the result.

The Convener: The Commission repeatedly talks about the mutual recognition principle, which Margaret Mitchell referred to. Were we lulled into a false sense of security that that principle would apply, but not in all cases, because the agenda favours harmonisation?

Dr Carruthers: That depends on what the object is. For example, Rome 2 was purely about choice of law, whereas the divorce paper is about choice of law plus issues of recognition. It is generally thought that recognition—a free flow of judgments—is a good thing, but only if it is not achieved at the cost of complicating the choice of law rules.

The Convener: That finishes the questioning on the green paper on divorce. I thank Janys Scott and Shona Smith for their evidence, which was excellent.

We welcome David Brand and Dr Gordon Wyllie to the panel to discuss the green paper on succession and wills. Thank you for appearing before us.

Mrs Mulligan: Good afternoon, everybody. I will start by asking questions to which you have probably already responded, in order to get your views on the record. My first question is to Dr Carruthers and Dr Crawford. Why do you feel that the case has not been made for harmonisation of the applicable rules on succession and wills at the EU level?

Dr Carruthers: My view is that it is up to the Commission to make the case. The green paper states that there are approximately 50,000 transnational successions in an average year. That may be so, but how many of those are problem cases? I do not think that that has been shown.

Mrs Mulligan: Is it possible that there could be other ways of resolving those problems, rather than just harmonising everybody to bring them into line? Given that the new developments result from people's greater mobility, should we not be looking for other solutions than just saying that everybody should be the same?

Dr Carruthers: One of the most important aims must be the establishment of certainty. The current rules are certain; the proposed rules are less than certain. The Commission ought to show what percentage of EU citizens are affected by those 50,000 transnational successions. If the percentage is very small, the rules should not be complicated for the protection of that minority.

Dr Crawford: I underline that view. The case would have to be made much more strongly than it has been before it would be in the interests of Scotland to change its conflict rules in this area.

Mrs Mulligan: I invite Dr Wyllie and David Brand to comment on that view. The Law Society of Scotland does not seem to be desperately keen to go down the road of harmonisation, but it is not saying that it thinks that we should not.

David Brand (Law Society of Scotland): The society has not seen any evidence from its members or from members of the public to show that there is a particular problem. Nevertheless, we are aware that more and more transnational successions are taking place and we anticipate that that trend is likely to continue as more and more Scots buy property abroad, live and work abroad and die there, and as more foreign nationals come to work in this country and die here with assets here. We see that some harmonisation is desirable, but we feel that the chances of achieving that aim are rather slim, because of the differences that are involved. We are keen to protect Scots law in that situation.

Mr McFee: Do all those 50,000 transnational successions—which is an estimate—necessarily involve two individuals or a group of individuals who both or all live in EU states? Presumably "transnational" could mean outwith Europe. Do we have any quantification of how many of those individuals live solely in the EU?

I often hear the argument that more and more people are buying holiday properties in Spain, for example, but how did the system survive with Irish immigration into Scotland? Presumably the system at that time coped with people who had come here, some with very limited means. Is there any evidence that there was a huge difficulty in the past?

12:15

Dr Gordon Wyllie (Law Society of Scotland): The system in this country was sorted out by the legislation of, I think, 1971, which made it possible for the administration of estates to be carried on so that the grants of probate in England and Ireland and the grants of confirmation in Scotland were mutually recognised.

Mr McFee: The issue is therefore recognition.

Dr Wyllie: Yes, but it helped that we were under one particular form of government and we had one particular form of rule to regulate a succession. Although Scotland and England have different laws of succession, they end up with the same basic result in most cases. However, most of the continental countries operate a different type of succession system from ours.

Mrs Mulligan: If the applicable law was to be harmonised—and we can tell that everyone still has some doubts—what relevant connecting factors would be needed? What would be necessary and what would be preferable?

Dr Carruthers: The current choice of law rule in relation to succession to property differs according to whether the property is moveable or immoveable. We call that the scission principle. It operates so that immoveable property, such as the house in Spain, will devolve according to the lex situs or Spanish law, whereas moveable property will devolve according to the law of the deceased's ultimate domicile. The scission principle has been the subject of some criticism in the UK and it is unlikely that it would be the agreed choice of law rule in Europe. However, were we to decide on a single connecting factor to govern all types of property, the law of domicile has much to commend it. It is the only connecting factor that takes account of residence and intention. In this area of the law, the deceased's intention is particularly significant.

Dr Crawford: We have to be prepared for strong arguments that there should be one applicable law—we are the odd one out with our bifurcated rule. If there is to be one rule, it has to be a connecting factor that demonstrates a strong connection between the deceased and the legal system. It would therefore probably not be place of death, which would be entirely—and badly—fortuitous. A possibility would be to use habitual residence, but I have strong doubts about that. Having written at length about the nature of habitual residence, I know that opinions seem to vary according to the writer and the court. I would much prefer it if ultimate domicile were the chosen connecting factor, but we have to be realistic, given that we are in a group of negotiating states for which the British concept of domicile is alien. I would certainly not be happy with any factor other than residence in a legal system for a substantial period of time, which I would consider to be many years of residence—it is certainly not five years of residence.

Mrs Mulligan: You said that the scission principle has been criticised. Is that criticism from within Scotland or has it developed in the EU?

Dr Crawford: The idea that land should devolve in a different manner from moveables was strongly held in Scots law. Although changes were made domestically in 1964, the conflict rules—which state that land should be treated according to the lex situs—remained the same.

If we take the case of the flat in Spain, there is a strong argument that, in the end, only the law of Spain can say precisely what is to happen to the title to that flat and can grant the registration and so on. Whatever one's feelings about having a twin or a double rule, it has a practical, underlying basis of good sense. What we would have to find out from the civilian systems is how they manage to get round the problem and to apply to a flat in Spain the law of France, for example, if that were the habitual residence of the deceased at death. We might have an investigative process to go through on that.

Mrs Mulligan: The interesting thing is that such movements must have been made in the past. My colleague referred to movements between Ireland and the UK, but such movements must have taken place on the continent, too, so there must be examples of what people did in those circumstances.

Dr Crawford: That is right. Although we may seem sceptical about the extent of the evidence that exists, it is known to us all anecdotally or through personal contacts that people are buying houses in legal systems that are not those of their own domicile.

Mrs Mulligan: I invite the Law Society to respond; you might like me to repeat the question, as we have gone some way since I asked it.

David Brand: The society considered connecting factors and feels that, although there is a good argument for there to be a single connecting factor, there is also good reason for having a conflict rule that recognises the lex situs of immoveable property. There has been a move away from the division in the law of succession between heritable property and moveables. In its report of 1990, the Scottish Law Commission was not in favour of such a division for Scots law when it comes to succession to property in Scotland. That is no doubt something that the commission will re-examine when it considers succession, which it is about to do.

As far as Scots law is concerned, a division is not particularly important, but it is important for Scots conflict rules. To take an example, some of the civilian jurisdictions, such as France, have a law whereby if someone makes a lifetime transfer of property, that property can be clawed back when the estate comes to be administered. That means that there is a potential problem with immoveable property that was transferred before death and then has to be clawed back in the distribution of the estate. We are keen to have the conflict rule—whereby immoveable property is governed by the lex situs—continue for that reason, although, as I said, we recognise that a single connecting factor would be better.

In regard to what the connecting factor should be, we were in some difficulty because nationality, domicile and habitual residence are not ideal. In our submission, we opted for habitual residence as opposed to domicile, but that would depend largely on the definition of habitual residence that was used. We reckon that it is possible to come up with a definition of habitual residence that might be more satisfactory than domicile, but our view is that there is not much to choose between domicile—the current position—and habitual residence, which many other countries prefer.

Mrs Mulligan: I think that my second question was answered during that response.

I am struck by the issue that Dr Crawford raised, which was the length of time that it takes to establish residence. Nowadays, some people do not stay in the same place for long—in the space of 10 years, they may have been to three different countries and bought property in each of them. I feel that it would be a further complication to deal with such circumstances if some kind of connecting principle were not established.

Dr Crawford: That is a good point. In such a situation, the domicile at death could be used as a fixed point for regulating the estate. We make the point in our written submission that it is necessary to consider what the connecting factor determines—the validity of the will, the extent of family provision and so on. If we choose a relatively transient connecting factor, we choose to determine the extent of children's rights to the deceased's estate according to the law of a country in which they might have been resident for three years. The matter must be considered from that angle as well. It is not just about choosing a connecting factor; it is about looking at what that connecting factor governs. In other words, appropriateness should be sought.

Dr Wyllie: It is, of course, possible that habitual and domiciled residents verge very much on the same territory. It is sometimes a moot point whether, when someone has been habitually resident in a country, they have not become domiciled in it.

Dr Crawford: Yes, that is interesting. It is easier to change a domicile now, but there have been striking cases in which people have lived in England for 40 years without acquiring English domicile. I am sure that that would not appeal to our European counterparts. They would say that, if somebody had been resident in Liverpool for 40 years, his estate should be distributed according to English law. I do not suppose that we would disagree with that, would we? I do not know.

Dr Wyllie: There was a case in which somebody lived in England for 60 or 70 years but still regarded herself as a domiciled Scot; her estate was wound up in Edinburgh under the Scottish rules of succession.

Stewart Stevenson (Banff and Buchan) (SNP): Right, let us go for some slightly simpler things. I take it for granted that the panel will suggest that mutual recognition and enforcement are a good idea. Are there, at present, any practical difficulties for Scots citizens that changing the law on a Europe-wide basis will assist with?

Dr Wyllie: People can own property in any of those countries, but the rules of succession in the various countries are so different that there are bound to be difficulties. One of the most difficult countries for people to own property in is France. Although the rules there have been simplified slightly recently, there is a strong system of forced heirship, such as we used to have here, with equivalent rights of terce and courtesy. A surviving spouse is entitled to life rent the property in a system known as usufruct, and the children and remoter descendants are entitled to take the fee, eventually. However, that can lead to great complications, especially in situations such as those to which David Brand referred earlier, in which there is a clawback, under the law, of the deceased's estate on the continent. Particularly in France, someone can be asked to give back, under the rule of hotchpot, everything that they received during the deceased's life.

Stewart Stevenson: At the risk of opening up a can of worms, I ask whether that issue should not be dealt with at the point of purchase by the purchaser's advisers.

Dr Wyllie: Yes, and it frequently is. There are ways of getting around that. In some cases, one can get round it by purchasing a property. In France, one can try to buy in a tontine system, although that sometimes does not work; people need to be of a fairly equivalent age for a tontine to work.

Stewart Stevenson: Would it be fair to say that the French are not going to allow the law to be materially changed anyway?

Dr Wyllie: It would be unlike them.

Stewart Stevenson: Fair enough. That sort of deals with that.

Dr Carruthers: It is important to recognise the distinction between the administration of an estate—the personnel who deal with that—and the substantive distribution of the estate. As Dr Wyllie has said, there is an established system in the UK for recognising the grant of authority to the executor—the personal representative of the deceased. In the Commonwealth and beyond, we have rules that deal adequately with the administration of estates. If that is made easier by anything that the Commission may propose, that is a good thing that we cannot criticise. However, we are critical of the choice of law factor in governing the substantive distribution of estates. That distinction is important and should be borne in mind.

12:30

Dr Crawford: On substantive distribution, recognition really does not come into it. A Scottish court that is administering the property of somebody who died while they were domiciled in France will follow the French rules. It is certainly not up to us to criticise the French or think, "What a strange rule" about clawback or whatever. Similarly, if the lex situs is removed as a connecting factor and we say that the law of France—if it is the domicile of the deceased, or whatever other connecting factor we choose—is to rule, we almost have to stitch into the document acquiescence in advance by any European lex situs to whatever the country of a person's last habitual residence says on land. It is an ambitious project.

Stewart Stevenson: People who work with the register of sasines might enjoy that.

Do you think that there is a need for increased clarity on the rules of jurisdiction for Scots citizens? In our narrow perspective, I do not think that we are terribly interested in the benefits to others, but we are interested in the benefits to Scots citizens.

Dr Crawford: The green paper is concerned with the large-scale, important issue of choice of law in succession. I am puzzled by the references to jurisdiction, as most administrations are not contentious. The presence of property in Scotland will clothe the court here with jurisdiction to deal with that property, as required under the lex causae—such as French law. I do not quite understand what the document is about when it ventures into jurisdiction and then into helpful administrative matters, particularly with regard to jurisdiction.

Stewart Stevenson: Right. In that case, we will not go there.

Let me ask about the proposal for the registration of wills. I cannot see the benefit to my late mother-in-law's quite modest and entirely moveable estate of her having to have registered her will. What benefit is there for people who rely on relatively informal wills, which may not be with a lawyer, or very simple wills such as my late mother-in-law's, which simply said, "My two daughters get half each"? What are the benefits and disbenefits of the proposal for wills to be registered?

David Brand: The only benefit to having a register is in cases in which it is not certain whether there is a will. If it is a requirement that a will be registered, at least it will be possible for someone to go to the register and determine whether a person has made a will. That is the only advantage to the proposal. There can be problems in practice when someone thinks that a will has been made but has difficulty in tracing it.

Nevertheless, the Law Society would be strongly against any system of registration of wills, as that would impinge on our existing substantive law, which encourages testacy. We have an informal system for determining the validity of wills in which informal writings can be regarded as wills as long as they are signed by the testator and are clearly of testamentary intention. That is all that is required. There are further formalities to be observed that make that document self-proving when it comes to obtaining confirmation; however, as far as the basic validity of a will is concerned, we have a very informal process. We would be strongly against any requirement that a will had to be registered before it was valid.

Stewart Stevenson: Does anyone have a different view?

Witnesses *indicated disagreement.*

The Convener: I have a couple of questions—or observations. The proposals are supposedly designed to create a better Europe in which we can all move around; however, their net effect seems to be to undermine our culture. Whether or not the French or the Spanish have criticisms of Scots law—as you may have and as I am sure that we do—it is our law, which has grown out of centuries of tradition and is part of our culture.

My observation about the proposal is that it seems to run contrary to the approach of the European Union. We are all supposed to be European—as long as we adopt someone else's law. I am not against some changes to Scots law,

but what is most objectionable is that the proposal runs contrary to our culture, not just our law. Do you agree?

David Brand: Some of the implications of the green paper affect substantive law as opposed to conflict law. One of the problems with the green paper is that if the Commission were able to achieve what it sets out to do in the paper, that would undoubtedly affect our substantive law; we would agree that, for better or worse, we would rather have it the way it is.

The Convener: I do not understand bits of the green paper. Stewart Stevenson talked about the proposal on the registration of wills. Does the green paper rely on the registration of wills to make the rest of it work?

Dr Crawford: No. My impression is that such proposals are just rather unwise additions at the end. They might even have been put in as neutral ideas, of an optimistic nature, on which everybody would agree. That is the opposite of what you are saying, which is that the Commission is deluding us as to the implications for our substantive Scots law. In addition to what David Brand has said, how do we know that the will that is in the register is the last one that a person made? The provision is of doubtful value. However, it is an anodyne provision at the end.

Dr Wyllie: Even in the European systems that already exist, it is possible to make wills in various different forms, not all of which would be registered. For instance, one can make a holographic will—as it is referred to—in Germany or Switzerland, much the same as we could make a holographic will here until fairly recently. Such a will would not be registered; it would be kept in somebody's office or at home.

The Convener: The arguments over applicable law—albeit in a small number of cases—would suggest that someone will argue that this law should apply and not that law. Is that likely to lead to the striking down of some wills in Scotland? As I understand the situation, if someone challenges one part of a will, the rest of it falls. Will we lay the way open to the striking down of more wills as a result of more complicated law?

Dr Carruthers: Only in so far as the essential validity of a will will be governed by the law fixed upon. If the law fixed upon—which might not fall within the expectation of the testator—said that the will was in some way essentially invalid, that would lead to the ineffectiveness of the will. There might be problems with party expectations.

Dr Crawford: A party might be surprised to find, 30 years on, that his will is to be decided upon under the law of France and that the provisions agreed on are no longer acceptable. It is possible that the will could be struck down in whole or in part.

The Convener: Presumably, if a person's spouse and children were arguing over an estate, both sides could argue different aspects of the law. The spouse could argue that French law applied and the children could argue that some other law applied. Such cases will be complex.

Dr Crawford: Yes, absolutely. That is where conflict cases in succession are at now. The most contentious aspect is the extent to which the spouse and children are entitled to a portion of the estate. That is probably where substantive laws diverge most.

Dr Wyllie: I am sure that Dr Crawford is right. In the cases that I have come across, the spouse and the children usually have completely different rights—with different values—under, say, French, Spanish, German or Scots law. By no means is it always to the spouse's advantage to go for the Scots provision, except on tax matters. Usually they get a better deal out of our tax law.

The Convener: That is good advice.

Mr McFee: I will try to encapsulate the issue. If you were given a free hand and were not bound by anything that has gone before, would you touch anything in the proposals with a 10ft bargepole?

The Convener: That is not a loaded question.

Dr Crawford: I am more strongly against the proposal on wills and succession than I am against the proposal on divorce. I would not touch the former proposal.

David Brand: There are useful provisions on administrative matters. It would certainly assist if there was more uniformity in the practicalities of winding up an estate once it had been established under which law and where it would be wound up. There are some useful proposals on trying to make the administrative process simpler, but other than that the Law Society of Scotland has no great desire for the implementation of the proposals.

Dr Wyllie: We have no desire to change the substantive law of Scotland in any way, but I agree with my colleague David Brand that aspects of the proposals could be useful to us. In our submission, we have suggested a way in which the appearance of the documentation under which someone is given rights either as an heir or as an executor could be standardised to some extent, which would make it easier practically to know what one is dealing with when one deals with documentation from another country.

The differences in substantive law between systems such as the English and Cypriot systems, those such as the French and German systems and our own system, which is a mixed system,

make it difficult to apply the same documentation across the board. Perhaps there could be a form of document that would be acceptable in the common-law countries and another for countries such as France and Germany. We think that our system of confirmation would be a good system for those countries to adopt.

Dr Carruthers: I put it on the record that an existing 1989 Hague convention deals with succession to the estates of deceased persons, but comparatively few countries have ratified it. Relatively recent efforts to harmonise this area of law have proved difficult—the UK has not gone in with the instrument. We are likely to meet the same problems—or even worse—with the green paper's proposals.

Margaret Mitchell: Is there any concern about what would happen if a will were registered but subsequently a later will was found to exist? The validity of the later will might be compromised because the earlier will was on the register and therefore deemed to be a more valid document or one that carried more weight.

Dr Crawford: That is a problem with registers and would be a disaster.

Dr Carruthers: I presume that it would be for the forum to ascertain whether a subsequent unregistered but formally valid will trumped an earlier registered one.

Dr Crawford: We would accept a register as a helpful administrative procedure up to a point, but it would certainly not be determinative of succession to an estate.

The Convener: We have to leave it there. I thank the panel members very much for their evidence, which has been robust and helpful to the committee. We will try to put a report together by the end of the day. The Commission has extended the deadline for us so that we can put in a submission on behalf of the Scottish Parliament. I thank the witnesses for their very clear evidence.

I welcome to the meeting our second and final panel of witnesses. Claire Newton and Louise Miller are from the justice and home affairs international action team, which is part of the Scottish Executive Justice Department. We will again discuss issues of mutual interest with regard to the European Commission's green papers on divorce and succession and wills.

12:45

Marlyn Glen (North East Scotland) (Lab): I want to ask about the background to the green papers. What response has the Scottish Executive had to its consultation on them, and have any themes emerged?

Claire Newton (Scottish Executive Justice Department): We have received a good spread of responses to and views on our initial request to key stakeholders, from academics in particular and from the Law Society of Scotland, other practitioners, an advocate and the judiciary.

On emerging themes, in its member state explanatory memorandum to the Rome 3 green paper, which was issued in May, the UK Government highlighted its grave concerns about the applicable law aspect of the green paper. The responses that we have received have systematically borne out that view. On the question whether jurisdictional aspects should be overhauled or tweaked or whether a prorogation clause should be inserted, the responses have been more mixed. Perhaps we can discuss that matter later.

As far as the succession and wills green paper is concerned, the previous witnesses perhaps expressed the main views that have been set out in the responses that we have received. On the applicable law aspects, we should take one step back and consider the matter globally. I do not think that an instrument on wills and succession would pose particular problems; however, we would need seriously to examine the conflict rules before we could think about the administration and distribution of estates. Indeed, that has been the consistent view in most of the responses that I have received.

Marlyn Glen: Given that the Commission's deadline for response to both the green papers is the end of September, when does the UK Government think that it will be in a position to submit its response?

Claire Newton: I am glad that you asked that question, because I must give the committee an update.

Because we submit one member state response from the UK, I have been co-ordinating with my colleagues in the Department for Constitutional Affairs on this matter. However, they have experienced problems with slippage in the timing and submission of responses as a result of ministerial timings, the parliamentary recess and other internal issues to do with their consultations. My current understanding is that both responses are likely to be submitted in mid-October.

As for our draft response timings, I am already on track and have had no problems with the drafts that I need to produce. As a result, I have kept to my side of the bargain; however, unforeseen circumstances in London mean that the timings will slip considerably—by another two weeks, I would imagine.

Marlyn Glen: So you are okay in that respect.

How will the Executive ensure that its views on the proposals in the green papers are fed into the UK Government's response?

Claire Newton: Under the protocol for submitting what could be described as a joint response in the UK member state response, the UK Government and the Scottish Executive will initially reach an agreed overall UK Government position that accommodates the Scottish Executive's position.

In a covering letter to the UK Government response, the UK permanent representative in Brussels, Sir John Grant, will set out that there are two sections to the response: the UK Government position and the Scottish Executive position. Therefore, the Scottish Executive position will have a dedicated separate section within the response. That is why it is so important that we co-ordinate closely with our colleagues in the Department for Constitutional Affairs.

Marlyn Glen: In some ways, that is reassuring, but it also brings me to my next question. What happens if there is a disparity of views between the Scottish Executive and Whitehall, given the differences between the legal systems?

Claire Newton: Any difference of views would probably be divergences of opinion on procedural matters. Greater disparities of view would need to be resolved between the Executive and the UK Government, but those are unlikely to exist on the matters that are dealt with in the green papers. Procedural differences will be highlighted as such in the response and will be accepted as such by the Commission.

Mr McFee: I have another question on that point, but I will be a bit more blunt. Do you have any feedback on the type of response that the UK Government has received from other parts of the UK?

Claire Newton: No. I have tried to elicit such information from my colleagues, but they have received only provisional or draft responses to date. As they do not have concrete responses, they have been unable to firm up their position.

Mrs Mulligan: Moving on, I want to ask about the Executive's position, given the responses that it has received. Given the wide differences that exist between member states on applicable law rules in divorce and legal separation, is it feasible to harmonise applicable law rules at an EU level?

Claire Newton: At this juncture, I do not think that it will be feasible to harmonise the rules on applicable law because, as the committee heard in the previous panel's evidence, applicable law rules diverge so much and are so disparate across member states. In addition, because the proposals deal with family law, I understand that they will need unanimity from all participating member states before they can come into force.

Mrs Mulligan: Has the Executive received any responses that have suggested ways in which the issue might be resolved?

Claire Newton: The only suggestion that we have had is that the lex fori—the law of the forum—should be the applicable law. Obviously, that would suit the circumstances here and in another six member states, as we are one of seven member states that apply the law of the forum.

As I said, there are also questions around the existing jurisdictional rules. As was alluded to earlier, if hard-and-fast statistical evidence showed that the existing jurisdictional laws do not operate satisfactorily or do not operate at all, consideration might be given to changing the jurisdictional rules, perhaps even by the inclusion of a prorogation clause.

Mrs Mulligan: One suggestion is that spouses should be permitted to choose from the laws of the various jurisdictions with which they are most closely associated. What is your view on that? Should we go down that route?

Claire Newton: We would prefer the law of the forum, which would mean that there would be no such choice.

Mrs Mulligan: As you will understand, we are just trying to get the Executive's view on record.

Mr McFee: Does the Executive think that revising the grounds of jurisdiction in the new Brussels 2 regulation is a good idea? If so, what reforms does the Executive envisage might be made?

Claire Newton: I think that I tried to answer that in my response to the previous question. Like the previous panel, I think that more evidence is needed that problems arise with the grounds of jurisdiction in articles 3 and 7 of the Brussels 2 regulation before they can be revised.

Mr McFee: So, given the lack of any evidence to the contrary, is it the Executive's position that that regulation does not need to be revisited?

Claire Newton: It is not our position that it does not need to be revisited. We are considering whether it needs to be revisited, on the basis of some of the responses that I have received and before I co-ordinate with my UK Government counterparts.

Mr McFee: Based on the responses that you have received, what reform do you envisage being required?

Claire Newton: This issue was alluded to earlier: article 19—the lis pendens clause—of

Brussels 2 bis, which is the rush-to-court provision, may need to be revisited, as might the introduction of a prorogation clause.

Mr McFee: Did the Executive consider that to be a problem when Brussels 2 was being consulted on?

Claire Newton: The lis pendens question? Yes. We asked whether key stakeholders found it to be a problem.

Louise Miller (Scottish Executive Justice Department): That was in the consultation on the green paper. The jurisdictional rules in Brussels 2a are just carryovers from the forerunner Brussels 2 regulations and have not been amended at all. Brussels 2a, on matrimonial issues, is basically the same as Brussels 2, but differs because it contains a lot of extra stuff about children. I suspect that there was not much discussion of the jurisdictional rules when Brussels 2a was done. The purpose of doing it then was to cater for a range of children who were not catered for under Brussels 2, because it dealt only with the children of both spouses in the context of divorce proceedings. The aim was to greatly broaden out what was covered.

The previous jurisdictional rules were carried over without much scrutiny. Obviously, they have been in force for a few years now, since the old Brussels 2 regulation came in, but there is not a lot of evidence on how well they have operated. There is certainly room for the Commission to undertake a more systematic examination. Seven separate grounds of jurisdiction with no hierarchy between them is quite a lot, but we do not have concrete evidence that a real problem is being caused.

The only issues that have emerged from our consultations have been the strict first-come, first-served rule—a number of people have suggested that it can push parties to court too quickly to get a particular jurisdiction, rather than encourage them to resolve their dispute—and the possibility of doing something about prorogation. However, we would probably need to be further convinced that there is a good case for doing anything more general than that. We are open to thinking about it.

Mr McFee: But the rush to court and the first-come, first-served question were not identified when the regulations came to us for consideration. I am trying to work out whether the Executive flagged up the issue previously or whether the concern is new.

Louise Miller: It is in the nature of international political negotiations that lists get lengthened rather than shortened; that may not be a good thing, but it is the reality of what happens. That happens because everybody has jurisdictional grounds in their law that they particularly want and do not want to be rejected. Jurisdiction is not like applicable law: with jurisdiction one can have more than one court, but with applicable law one needs one law that applies to the case. The facility exists to lengthen the list and that is what tends to happen, in order that agreement can be achieved. I am sure that everybody involved could see that having a substantial number of criteria might encourage people, at least theoretically, to invoke the courts quite early, so that out of the jurisdiction shopping list they got the one that suited them best. Against that, however, we have every member state wanting their criteria to be included on the list. It is a difficult balancing process.

13:00

Mr McFee: So could this be called an unintended consequence?

Louise Miller: A foreseen, but not directly intended, by-product might be the best way of putting it.

Mr McFee: That might not be the clearest way of putting it, but perhaps it is the best way. I will not press you further on that, but perhaps the convener will.

The Convener: I hear what you say about the reality of negotiating in the EU. The committee gave direct evidence on Brussels 2. We know that the UK resisted strongly a lot of the reforms in that regulation and the outcome was a compromise. However, we could have predicted the rush to court because a principle of Brussels 2 opens up that possibility.

We have heard evidence that, in effect, we stepped on to a slippery slope by signing up to some of the rules in the first place. I think that we signed up to one of the Rome conventions, although I do not know which one—

Louise Miller: It was Rome 2.

The Convener: Then we signed up to Brussels 2, and now the process seems to be unstoppable. What is the UK's technical position? Can it opt out of any further family law reform?

Louise Miller: The UK has the facility to decide whether to opt into negotiations or instruments in the justice and home affairs field. That decision can be taken only in a certain period after the formal proposal has been published, but that has not yet happened. If the UK opts in, there is a separate question of what happens once negotiations start. The position in Rome 3 is that the proposed family law reform requires unanimity, so there would still be an option to opt in and then, ultimately, to vote against the end product if we did not like it. However, those are all questions for further down the road. Consultation in the UK on

whether or not to opt in can begin only when we have seen the proposal.

The Convener: I beg to differ. Because six other member states are involved, we will be in the minority because the formulation of our law is different to theirs—that is what we have heard all morning. If we continue to enter into dialogue on such matters, we will have to compromise somewhere. The language that you are using already is that although you are standing firm on some of the proposed changes, you might be prepared to look at jurisdiction rules.

Louise Miller: There is no reason of principle why we should not consider jurisdiction, and that might be part of the reason why jurisdiction is covered in the green paper. I am sure that the Commission realises that it will be difficult to achieve common agreement on applicable law rules. Rome 3 was supposed to be about applicable law originally and that is still in the green paper, but the Commission has now taken the decision to broaden the scope of the green paper to look at other issues. The Commission might feel that it will be easier to reach agreement on those other issues. That might be part of the reasoning behind it.

The Convener: I want to be clear that it is not too late for the UK not to opt in to the changes. If it wants to do so, can the UK say, "We do not want to opt in"?

Louise Miller: Yes, after the proposal has been published.

The Convener: And if the UK opts in, it can still say, "No, we are not going to sign up to the regulation", because unanimity is required?

Louise Miller: Yes.

The Convener: Does that mean that we will have two opportunities to say no?

Louise Miller: There are some political considerations. The UK Government—and the Executive will have to play its part in advising ministers—will have to reflect carefully on whether it would be a good idea to vote against the whole package if we were to opt in at the start. Questions might be asked about why we opted in in the first place. It might depend on whether we were the only state to act in that way—we are not the only state that applies lex fori in this situation, so we are not the only country that will have problems with aspects of Rome 3. We will need to consider some delicate elements when the proposal is published.

Mr McFee: We get the picture that, if we opt in at the start when the proposal is published, we get into a process. You said that we could decide not to vote for the final agreement. Is there some prospect in the final agreement that would mean that we could not vote again? If we take out all the political considerations, are there elements that influence your reasoning that we could decide not to accept the final agreement because it involves—

Louise Miller: It involves family law. In general, we have qualified majority voting in justice and home affairs matters.

Mr McFee: Could elements be slipped in that would apply to issues that did not involve family law?

Louise Miller: I do not think so. Rome 3, as it stands—we shall have to see what is in the final proposal when it comes out—is confined to applicable law in divorce, and possibly also in separation and nullity, and to jurisdiction in matrimonial cases. It is difficult to argue that those are not pretty squarely family law matters.

Mr McFee: But you can understand why some of us are not keen to put our first foot on the escalator.

Margaret Mitchell: I turn now to the green paper on wills and succession. For the avoidance of doubt, does the Executive agree with the Commission's position that there is a need to harmonise the applicable law?

Louise Miller: A good point has been made by a couple of the witnesses who have given evidence about the lack of a proper impact assessment and lack of hard-and-fast evidence to back up what is going on, both on Rome 3 and on wills and succession. It is true that we would like something more robust in both those areas—about exactly how many international successions we have, how many of them are really problematic and what the problems are. At the moment, our evidence in that area is mainly anecdotal, but some of it suggests that to do some work on wills and succession might be helpful. In my experience of private international law in the Scottish Executive, I do not think that I have ever received a query from anyone about applicable law in divorce, but I have received a couple about succession, although I accept that that is purely anecdotal and does not prove anything.

There have also been previous efforts by the Hague conference to do work on those matters at global level, which ultimately did not succeed. A convention was produced, but it has not proved to be very satisfactory and few states have signed up to it—it is not in force because it has not got the required number of ratifications. However, the fact that quite a large number of countries around the world were prepared to spend time trying to find a solution, even though ultimately that attempt did not bear fruit, suggests that there was enough of a problem for at least a number of states to think that it was worth spending some time thrashing it

out and trying to find a solution. That is anecdotal; I entirely accept that.

Margaret Mitchell: Was that a yes or a no?

Louise Miller: No, we are not fully convinced, but, yes—we are willing to discuss the matter further. I think that is the answer.

Margaret Mitchell: So it is a maybe.

Louise Miller: It is a maybe.

Margaret Mitchell: That is less than satisfactory given the evidence that we have heard this morning, but I shall move on.

What effect would the proposals have on Scots law, as it currently applies, for moveable property being determined by domicile, and heritable property being determined by where it is located?

Louise Miller: That is actually quite difficult to say because there is no clear proposal in the green paper about what the connecting factor should be. At the moment, as you have heard, succession to moveables is governed by the law of domicile, and succession to heritable property is governed in Scots conflict rules by the law of the place where the property is situated. The green paper asks quite open questions about that. Traditionally, the approach of the common-law systems, in which I will include Scotland for our purposes—although we could argue about the extent to which that is accurate—has been to take domicile as the main connecting factor. The approach of many continental systems has been to take nationality as the main connecting factor.

In succession, finding a bridge between those two things will be pretty difficult; we should not underestimate that difficulty. The usual approach is to take habitual residence as the bridge, or compromise concept, that everybody can accept. However, there are big problems with that in respect of succession, where it is not a strong enough connecting factor. It can defeat people's reasonable expectations. If a Scottish worker goes out to Saudi Arabia to do some kind of oil-related job for a few years and takes his or her family, nobody will expect Saudi law to apply to succession to their estate when they die. That would not be appropriate.

The applicable factor might be something like habitual residence plus a certain number of years or plus an intention. Habitual residence plus an intention would not be that far removed from domicile. The word "domicile" is confusing to a lot of continental systems, which do not have that concept in the same way we do. The word often means something quite different in their systems. That does not mean that we cannot incorporate elements of domicile, however.

It will be difficult to come up with agreement and we are not the only member state that will have problems. One of the major reasons why the work of the Hague conference failed was that a number of member states were unwilling to relinquish nationality as a concept. The solution involved a complicated mishmash of habitual residence and nationality, which ended up not really satisfying anybody and which failed to get off the ground. There will be an issue over whether other member states that are very attached to nationality in this regard are willing to move and further negotiations will be difficult.

Margaret Mitchell: Would a fair summation of what you have just said be that you do not know what the implications will be, but that they are likely to be significant?

Louise Miller: I do not now what the implications will be, and it is hard to say at this stage how significant they will be. It all depends on what connecting factor is adopted. It will be difficult to use the word "domicile" because it is conceptually unfamiliar to a variety of other systems. If the connecting factor turns out to be something quite close to domicile, it might not have much impact on our system, at least not in respect of moveables. The more we move towards an habitual residence type of solution, the more significant the impact will be. It is hard to say at this stage, but how far the system here will be affected will depend on the ultimate solution.

Margaret Mitchell: The impact could be significant.

Louise Miller: Yes—as it could be for all the member states.

Stewart Stevenson: Can you suggest how much it might cost to register a will under the proposals?

Louise Miller: I have no idea. I will hand over to Claire Newton on registering wills.

Claire Newton: I have consulted Registers of Scotland, but not on an estimation of a price structure. It has submitted its response to the European Land Registry Association. To my knowledge, the issue did not come up in Registers of Scotland's response.

We would probably not welcome mandatory registration of wills, which would not encompass our informal will system and the fact that we do not register wills. If the system were to be optional, it would not be rolled out across EU member states uniformly, which would have implications. A probable subsequent problem would be that, if a will were registrable, we would want to know who would have access to it. There would be confidentiality issues, and we have concerns about that.

Stewart Stevenson: Would it create considerable difficulties were there to be an optional system, whereby it remained possible for a will to be valid and executable despite its not being registered, if a previous will had been registered or if no will had been registered? In such circumstances, what conceivable benefit to the people of Scotland would derive from having a register?

13:15

Claire Newton: That is another issue. It is obvious that issues will arise if a subsequent will has not been registered and the previous will has been.

Stewart Stevenson: So what do you expect the Executive's response to be?

Claire Newton: I expect that we will not, for the reasons that I have given, be in favour of the proposal in principle.

Stewart Stevenson: Has there been any indication that the rest of the United Kingdom will take a different position?

Claire Newton: I have heard no indications about that, but I suspect that the rest of the UK will share our position.

The Convener: I think that Louise Miller was at our videoconference at which European Commission officials said that an expert group would be set up. Will the Scottish Executive have representation on that group?

Claire Newton: I have highlighted to a number of academics the call for expert witnesses to be nominated to the Law Society of Scotland and I have spread the word as widely as I can in order to encourage people to sign up and to try to obtain some form of representation of Scots law.

The Convener: That is helpful.

Mr McFee: There is a second point. If we assume that there are suitably qualified people who are prepared to do such work, how will the Executive ensure that there is Scottish representation on the group? You may have taken the first steps towards ensuring that appropriate individuals are available, but how can we ensure that they will be on the group once they have been identified?

Claire Newton: That is not within my remit, but there is a useful distinction to make. The expert group is separate from the UK delegation and the negotiation processes, in which I will probably be involved as the Scottish Executive's representative when a proposal from the Commission comes to the table. Therefore, there will always be Scottish Executive or Scottish representation in that respect after the expert group has met to consider—

The Convener: That is helpful. To be fair, we must ask the minister whether the Executive will ensure that there is Scottish representation. The view may be taken that even forming an expert working group would be to accept that we are starting to work on making the proposals workable, but perhaps we should concentrate on why we are going in that direction in the first place.

I think that you said in your evidence that the Commission had not made a "hard-and-fast" case, particularly with respect to wills and succession. Did I pick you up correctly?

Claire Newton: Yes. We need more hard-and-fast evidence.

The Convener: Who will be on the UK delegation? Will either of you be on it?

Claire Newton: Possibly. There may also be representatives from the Department for Constitutional Affairs and there will probably be an academic.

The Convener: Finally, evidence that we have received from other witnesses has borne out that there does not seem to be a great deal of evidence that Scots in general are banging on anybody's door to have changed European law on the issues that we have discussed. I accept that there will be a tiny minority of cases in which a conflict of laws in jurisdictions will be a real problem, but surely the EU has an obligation to act in the interests of the wider community and not to undermine the principles of our culture, which is reflected in our law. I do not expect you to respond to what I am saying, but I hope that such points will be strongly and forcefully made when the time comes.

I am afraid that we have run out of time. Members may have further questions to ask, but I am sure that we can continue our dialogue with you, for which we are grateful.

Claire Newton: Of course.

The Convener: I thank both witnesses for giving us their time. You have, as ever, been clear, which is helpful to the committee. The area of the law that we have discussed is complex and we are grateful for your evidence.

We will continue the meeting in private for a short time, as I think that we have everything that we need to write a report. However, I must check what members want to include.

13:19

Meeting continued in private until 13:24.

Members who would like a printed copy of the *Official Report* to be forwarded to them should give notice at the Document Supply Centre.

No proofs of the *Official Report* can be supplied. Members who want to suggest corrections for the archive edition should mark them clearly in the daily edition, and send it to the Official Report, Scottish Parliament, Edinburgh EH99 1SP. Suggested corrections in any other form cannot be accepted.

The deadline for corrections to this edition is:

Monday 10 October 2005

PRICES AND SUBSCRIPTION RATES

OFFICIAL REPORT daily editions

Single copies: £5.00
Meetings of the Parliament annual subscriptions: £350.00

The archive edition of the *Official Report* of meetings of the Parliament, written answers and public meetings of committees will be published on CD-ROM.

WRITTEN ANSWERS TO PARLIAMENTARY QUESTIONS weekly compilation

Single copies: £3.75
Annual subscriptions: £150.00

Standing orders will be accepted at Document Supply.

Published in Edinburgh by Astron and available from:

Blackwell's Bookshop
53 South Bridge
Edinburgh EH1 1YS
0131 622 8222

Blackwell's Bookshops:
243-244 High Holborn
London WC1 7DZ
Tel 020 7831 9501

All trade orders for Scottish Parliament documents should be placed through Blackwell's Edinburgh

Blackwell's Scottish Parliament Documentation Helpline may be able to assist with additional information on publications of or about the Scottish Parliament, their availability and cost:

Telephone orders and inquiries
0131 622 8283 or
0131 622 8258

Fax orders
0131 557 8149

E-mail orders
business.edinburgh@blackwell.co.uk

Subscriptions & Standing Orders
business.edinburgh@blackwell.co.uk

RNID Typetalk calls welcome on
18001 0131 348 5412
Textphone 0845 270 0152

sp.info@scottish.parliament.uk

All documents are available on the Scottish Parliament website at:

www.scottish.parliament.uk

Accredited Agents
(see Yellow Pages)

and through good booksellers

Printed in Scotland by Astron