JUSTICE 1 COMMITTEE

Wednesday 16 November 2005

Session 2

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JUSTICE 1 COMMITTEE
37th 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)
Mr Jim Wallace (Orkney) (LD)

*attended

THE FOLLOWING ALSO ATTENDED:

Brian Adam (Aberdeen North) (SNP)
Fergus Ewing (Inverness East, Nairn and Lochaber)
Hugh Henry (Deputy Minister for Justice)
Dr Sylvia Jackson (Stirling) (Lab)

CLERK TO THE COMMITTEE

Callum Thomson

SENIOR ASSISTANT CLERK

Douglas Wands

ASSISTANT CLERK

Lewis McNaughton

LOCATION

Committee Room 2

Scottish Parliament

Justice 1 Committee

Wednesday 16 November 2005

[THE CONVENER *opened the meeting at 09:59*]

Family Law (Scotland) Bill: Stage 2

The Convener (Pauline McNeill): Good morning and welcome to the 37th meeting in 2005 of the Justice 1 Committee. Members should do the usual and switch off their mobile phones. No apologies have been received.

Agenda item 1 is stage 2 of the Family Law (Scotland) Bill. I welcome back Mike Pringle and welcome Brian Adam and Sylvia Jackson. Fergus Ewing will join us later. I welcome again the Deputy Minister for Justice, Hugh Henry, and Carol Duncan and Kirsty Finlay, who will assist him. I also welcome David McLeish.

After section 17

The Convener: Amendment 78, in the name of Marlyn Glen, is in a group on its own.

Marlyn Glen (North East Scotland) (Lab): The aim of amendment 78 is to give children the same protection from assault as adults currently have. The amendment meets the requirements of the United Nations Committee on the Rights of the Child, and I will move it particularly because the next bill that the committee will consider is the Scottish Commissioner for Human Rights Bill, which includes adherence to the United Nations Convention on the Rights of the Child, and starting now to consider the rights of children properly will provide a good marker.

The Family Law (Scotland) Bill is the right place to include an amendment that proposes to prohibit the corporal punishment of children. Almost all children's charities support the amendment, for which I thank them. The demand that has been made on behalf of children will not go away, so I urge members to consider the amendment. If we do not grasp the opportunity that exists, the issue will come back—it will not go away just because we might think that the proposal is being made in the wrong place.

The children are unbeatable! alliance believes that the Family Law (Scotland) Bill is the proper vehicle for reforming the law on hitting children and that the legal position should be set out in the context of balancing parental rights and responsibilities—which the law is about—and children's human rights. Children have the right to live free from fear and violence and adults have the right to discipline their children positively without using violence. We spend a lot of time in the Parliament talking about working to counter the culture of violence and bullying, which people are concerned about in Scotland and in the United Kingdom as a whole, and the amendment would be a good marker in beginning to change that culture.

I move amendment 78.

Stewart Stevenson (Banff and Buchan) (SNP): A number of us were involved in the bill that became the Criminal Justice (Scotland) Act 2003. The subject in question was thoroughly debated and investigated when that bill was considered. We made a significant change to the law in passing that act and achieved a position around which all the committee members at the time coalesced. In particular, there were measures to protect children from being shaken, beaten with implements and beaten about the head. Importantly, the Executive committed itself to working with parents and agencies to reduce the incidence of beating. It was recognised then that the problem was largely societal and that it lay with particular abusive parents rather than with shortcomings in the law.

I can see why people might think that the amendment challenges the culture of violence and bullying, but I do not think that changing the law as it proposes will make a whit of difference to the remaining families in which there is a major problem. I am relatively neutral on the amendment but would like the minister, if he can, to bring us up to date on what action has been taken on the abuse of children to follow up the Criminal Justice (Scotland) Act 2003. Rather than our imagining that making further changes to the law will make much difference in practice to children's lives, the practical effects on the ground should perhaps attract our primary attention.

I will listen to what my colleagues have to say in the debate in the light of the extensive debate and large number of consultation responses that we received on the previous bill.

Margaret Mitchell (Central Scotland) (Con): I appreciate that the amendment has been lodged with the best intentions, but it is totally misguided. It would criminalise parents for exercising their legitimate right to chastise their children. Discipline begins at home and parents should have the right to use the force that they think is required for their children. Using such force is not abuse.

I agree with Stewart Stevenson that no legislation will stop parents who are—sadly—abusing their children rather than using reasonable force. For those reasons, I think that amendment 78 is misguided. Further, it is in

danger of bringing the Parliament into disrepute, because it seems to be more about political correctness than it is about children's welfare.

Mrs Mary Mulligan (Linlithgow) (Lab): I sympathise with Marlyn Glen's amendment 78 and I understand why she lodged it, but I have a couple of concerns about it. The first is a technical one, which is that the committee has not taken any evidence on the matter to help us in addressing it; we are discussing the issue only now, which is unfortunate. The position has been partly addressed by the number of telephone calls and letters that, I am sure, each committee member has received over the past few weeks from various people who either support or do not support Marlyn Glen's amendment.

It was interesting to see the breakdown of that lobbying. Specifically, parents said that we should not support the amendment and professionals said that we should support it. It worries me that parents and professionals are out of step on the issue. We need to have more discussion. For that reason, I am interested in Stewart Stevenson's request that we consider how the Criminal Justice (Scotland) Act 2003 has been implemented and how we are protecting children from abuse. I think that all of us would want to do whatever we could to ensure that children are not being abused physically or mentally. The issue was considered before the passing of the 2003 act. I would be interested to see what effect the act has had.

Mike Pringle (Edinburgh South) (LD): I agree with much of what has been said. I am particularly concerned about agreeing to amendment 78 for the reason that Mary Mulligan gave, which is that the issue has suddenly been presented to us without our taking any evidence on it or discussing it. If we had heard evidence on it and discussed it at stage 1, that might have been different. I also agree with Mary Mulligan about the breakdown of the lobbying. In the past 48 hours, I have had a substantial number of e-mails in which a considerable number of parents have said to me, "Please, please, please don't do this."

My other concern is that if we agreed to amendment 78, some cases of abuse would get lost because the authorities would be so taken up with the consequences of the amendment's proposal. So much would be going on that genuine abuse cases might be lost among the large number of general cases that might be reported. For that reason as well, I am inclined not to support amendment 78.

Mr Bruce McFee (West of Scotland) (SNP): I think that the tone of some of the lobbying on amendment 78 has been extremely unfortunate. The implication is that, if we do not support the amendment, we are somehow in favour of beating, bullying or otherwise abusing children. That is not the case. Further, I do not think that ordinary citizens who occasionally feel the requirement to discipline a child physically should be accused of bullying, beating or otherwise abusing their children, as long as the disciplining is done reasonably. I think that the law as it stands can protect children from and stop child abuse; it is certainly against the beating or abuse of children in the way that most ordinary members of the public would define those terms.

I believe that Parliament got the balance right when it considered the matter during the passage of the Criminal Justice (Scotland) Bill. Parliament took a stand, rightly, on acts such as beating and shaking a child and hitting them across the head. However, I do not believe that it is Parliament's job to make the job of parenting any more difficult than it already is, particularly for the many parents who face difficult circumstances in what are sometimes very testing environments in which, without a firm hand, it is easy for a child to go off the rails. I am not about to criminalise people in that position, so I will certainly not support amendment 78.

The Convener: This is a sensitive subject. As members have said, it has been debated before both by the former Justice 2 Committee and by the Parliament. To avoid any doubt about what the law says in relation to harming children, the provisions are now tidied up and there is an absolute bar on hitting a child over the head or using an implement of any kind. That was the law before, but it was restated to avoid any question or doubt. The problem is that there is a difference of opinion among parents about whether there should be a defence in law of reasonable chastisement. That is what the law provides and my concern has always been that loving parents will be criminalised if we remove that defence.

Amendment 78 does not really address that issue, because it does not deal with the existing law or repeal it in any way. It seems simply to add to the Children (Scotland) Act 1995, so my understanding is that it would sit alongside the common law, which allows parents a defence. Having tested that a few years ago at stage 2 of the Criminal Justice (Scotland) Bill, I am satisfied that physical harm to children is dealt with quite fairly by the prosecution through the Crown Office and Procurator Fiscal Service. I have considered a number of cases. Some of them are difficult to call, but I believe that the law is adequate as it is, so even if I felt inclined to support amendment 78, I would see the flaws in it.

Finally, I will mention an issue that emerged in the evidence that the Justice 2 Committee took in the first session of Parliament. Mary Mulligan may already have referred to this point, and I am sure that Marlyn Glen will say something about it in summing up. Amendment 78 refers to "humiliating

treatment", which might refer to the mental harm that could be done to a child by what parents say. The Justice 2 Committee heard evidence on the harm that can be done to a child by what someone says to him or her. Such treatment might not be straightforward; it might just be that someone says, "You're a hopeless child and you'll never ever be any good at anything," but that can have a lasting effect, so there needs to be more discussion about what constitutes harm. Today's debate gives us an opportunity to do that, but I support Mary Mulligan's view that the short discussion that we are having on amendment 78 is not really enough.

The Deputy Minister for Justice (Hugh Henry): Stewart Stevenson was right to put amendment 78 into the context of what has happened before and the debate that took place in the first session of Parliament. It is right to remind people of what happened in the run-up to the Criminal Justice (Scotland) Act 2003.

The long-standing situation in Scotland is that parents have a right of reasonable chastisement, and there is a non-exhaustive list of factors that courts can take into account when considering whether reasonable chastisement is an appropriate defence. Those factors might include the child's age and the nature and duration of the punishment. Following a long, comprehensive, informed, emotional and emotive debate, Parliament came to a conclusion. Everyone had the opportunity to express their views and have them listened to, and Parliament decided that shaking, blows to the head and the use of implements would be banned under section 51 of the 2003 act.

It is right to reflect on the fact that the debate then was high profile, lengthy and comprehensive. Mary Mulligan is right to say that, if we were to agree to amendment 78 now, we would be doing so without having taken any evidence. We would be making a major change to Scots law almost on the nod, without people across Scotland having the opportunity to make an input. Notwithstanding the fact that MSPs have been lobbied—and some members have said that parents have contacted them—I suspect that only a tiny proportion of parents or the general public is aware that the committee is considering such a significant change at stage 2 of a bill. Probably the only people who are aware are those with political contacts who are in the know politically or those who are associated with organisations that have been able to monitor what is going on in the Scottish Parliament. I would be uneasy about making such a change on that basis. It would respond to a very small number of people who would be wielding a disproportionate influence without our having considered what the broad issues are.

10:15

I recognise Marlyn Glen's long-standing and deeply held views on the matter. However, some of the organisations that have proposed change have seen an opportunity in stage 2 amendments to the bill to push through something that the Scottish Parliament has already thoroughly debated. I would be concerned about implementing such change at this time. The 2003 act has not been given a proper opportunity to bed in and to be tested.

Stewart Stevenson asked what we have done. There was a huge information campaign, and leaflets were widely distributed. There was wide recognition in the mind of the public at the time about what we were doing. Of course, one could ask, "What happens when the publicity stops and attention turns elsewhere?" However, one could ask the same question about any piece of legislation. We all need to reflect on how we can continually and consistently remind people of changes to the law and what the law actually says. That is something that we need to think clearly about.

Following the information campaign, we need to think about what we do to remind parents. I am not sure that I would want to harp on at them every six or nine months saying, "Remember what the law says about the physical punishment, chastisement and beating of children." The issue is more about the on-going support that we give to parents in fulfilling their very responsible and onerous duty. It is about broader support and about ensuring that everybody is aware of the restrictions that the law places on physical punishment.

It is too early to do comprehensive research; time is still needed. I am not sure that there would be enough evidence to justify doing research now. However, as with other pieces of legislation, we will continue to consider the legislation that is put into effect.

I am concerned that we could make a major change on the back of an amendment that has not been the subject of adequate consultation. More profoundly—and this touches on a point that Stewart Stevenson raised—I would be concerned about the considered will of Parliament in a major debate being overturned on the back of an amendment that was agreed to today. It is too early to do that. We need time for the legislation to bed in, to be tested and tried.

As I say, Parliament has expressed its view very specifically and very clearly and, therefore, I do not consider it appropriate for an amendment to another bill to overturn the considered will of Parliament so quickly.

I also have a concern—the one that the convener touched on—that we would have two

different codes in civil and criminal law if the amendment were agreed to. That would be a recipe for confusion.

All things considered, I understand clearly the view that Marlyn Glen has sincerely expressed, but I believe that the amendment is not the right way in which to make such a change. I argue that Parliament has spoken on the matter and that we should let the view of Parliament prevail.

Marlyn Glen: The debate has been welcome. I accept Pauline McNeill's point about the phrase "injurious or humiliating treatment", but I disagree with the minister about the timing difficulty. The idea of reasonable chastisement is changing all the time—that is the point. We have moved on since the Parliament last discussed the issue. Nowadays, even popular television goes along with the idea of disciplining children positively and shows parents how that can be done. Discipline does not have to be done with corporal punishment and, in my view, it should not be; a different approach is to withdraw children's privileges by grounding them or not allowing them to watch television.

The committee will soon debate the United Nations Convention on the Rights of the Child when we consider the Scottish Commissioner for Human Rights Bill. I accept that the issue is a difficult one for us to grapple with but, since 1979, when Sweden passed a law to ban the corporal punishment of children, more countries, especially in Europe, have done the same. Hungary was the most recent country to do so, in 2005. The question that we are left with is: when will Scotland pass such a law, if not now? Will we wait until some other establishment asks us to do it? Amendment 78 is not about criminalising parents, nor is it about political correctness; it is about protecting children and changing the culture in Scotland to one of positive discipline. That is a huge issue to which we must return. We talk about countering the culture of violence but, to do that, we must consider where the violence stems from and get our heads round the fact that one form of violence promotes another.

To respond to Mary Mulligan, I will make one or two points about lobbying. Children's workers are already prohibited from using corporal punishment and have been for a long time. Absolutely no one now would want to give them back that right, although it used to be acceptable for them to have it—attitudes change.

I welcome the opportunity to restate the legal position that the Parliament took in 2003. At that time, the Executive committed to working with parents and children to promote positive discipline. The minister talked about the massive leaflet campaign at the time, but what happened to that campaign? If we really want to help children and support parents, the Executive must revisit that commitment and commence an on-going positive media campaign about parenting.

It is obvious that the committee needs much more time to think about the measure before we agree to it. However, we are out of step with most of Scottish society, particularly younger parents. If we ever get round to doing research on the matter, we will probably find that younger parents agree that corporal punishment is not the way in which to discipline children.

Amendment 78, by agreement, withdrawn.

The Convener: Amendment 80, in the name of Dr Sylvia Jackson, is grouped with amendments 81 and 82.

Dr Sylvia Jackson (Stirling) (Lab): Amendments 80 to 82 are an attempt to assist parents in situations in which, after separation, one party has not kept to a contact order agreement. My involvement with the issue started with a constituency case in which a non-resident parent had spent eight years and £50,000 trying to enforce a contact order. Through involvement in the process, I now know of many other cases.

The evidence that I bring to support the three amendments comes from the United Kingdom context. Before anybody jumps on that and says that I am trying to impose something from England and Wales on the Scottish system, I point out that I do so simply because a tremendous amount of research has been done on the issue in England and Wales and we should not try to reinvent the wheel. I know that the committee has had a considerable amount of discussion on these issues, but we should draw on all available research in making a decision on how we can improve the situation.

These measures are being introduced in the UK draft Children (Contact and Adoption) Bill, which was published in February for pre-legislative scrutiny. That scrutiny was completed with the publication of the report of the Joint Committee on the Draft Children (Contact) and Adoption Bill in April. I will read a pertinent extract from that report about breach of contact orders. It states:

> "This issue has been increasingly prominent in the media and in political debate in recent months and years. … around a quarter of the 12 million children in the United Kingdom have parents who have separated or have never lived together. In the vast majority of cases, contact with the 'non-resident parent' is maintained through informal arrangements between the parents. However, in about 10 per cent of cases, agreement between the parents over the non-resident parent's contact with a child or children cannot be achieved by negotiation, and an application is made to the family courts for an order against the resident parent specifying the contact which he or she must allow the non-resident parent to have."

I draw members' attention to one final comment:

"In 2003-04 there were 40,000 applications to court connected with contact, an estimated 7000 of which were the result of alleged breaches of contact orders. At present, if a contact order is breached, the only recourse available to the courts for enforcement"—

and it is the same here—

"is a finding of contempt of court (which may be punished by a fine or imprisonment), or the transference of the child's place of residence to the other parent."

What the draft Children (Contact and Adoption) Bill does, and what I suggest that we should do, is to seek

"to provide other mechanisms for facilitation and enforcement of contact orders."

The UK draft bill includes sections that are very similar to the three that are proposed in my amendments 80, 81 and 82. The section that amendment 80 seeks to insert is about warning notices and is self-explanatory. It seeks to raise awareness of the consequences if there is a breach and, hopefully, will act as a deterrent. That does not happen at the moment, as I understand it.

The section that amendment 81 seeks to insert contains measures for dealing with a first and subsequent breach of a contact order. You will see that the first offence would incur a fine not exceeding level 3 on the standard scale and a supervised attendance order. For a subsequent offence, the fine level would rise and, instead of a supervised attendance order, the person would receive a community service order. I propose the supervised attendance order and the community service order because that is what would be appropriate in our Scottish system, as opposed to what is in the UK draft bill.

The section that amendment 82 seeks to insert concerns the financial penalties that could be payable by either parent. It could be the resident parent who, without good reason, decides to breach the contact order; or it could be the non-resident parent who does not keep to an agreement that has been made. In either case, there would have been a loss of finances. Amendment 82 would allow the courts to investigate that kind of situation.

An additional area that is dealt with by the UK draft bill and which we could consider for the future is the monitoring of contact orders for compliance. I do not think that that happens to the same extent here as is planned in the system down south. Also, family assistance orders can run concurrently with contact orders, so that the officer concerned can give advice and assistance with regard to establishing, improving and maintaining contact. Significant work is also being undertaken, in England and Wales, into the role of various officers in this.

The explanatory notes to the UK draft bill state that the measures on contact orders that are proposed in England and Wales are expected to

"reduce enforcement applications by a maximum of up to 80%, reducing the annual caseload for enforcement applications from around 7,000 per year to around 1,400."

Although the UK document predicts the positive result of a fall in the number of enforcement applications, the best solution will always be found in parenting agreements and mediation as soon after separation as possible. The amendments should be seen as part of a range of measures that include not only the parenting arrangement that we talked about the other week but more parenting skills training in schools, more specialist family courts, more trained sheriffs and a reform of the legal aid system.

I move amendment 80.

10:30

Stewart Stevenson: I thoroughly agree with the analysis that is implied in Sylvia Jackson's comments and amendments that the present system is untenable and we need to find a way of making it work. I do not even say "work better" because at present it barely works at all. Therefore, I congratulate Sylvia Jackson on her amendments, however we dispose of them, because they give us the opportunity to ventilate the issue.

Furthermore, I never have any embarrassment about picking up good ideas from other jurisdictions. In fact, I have always thought it passing strange that although one gets penalised in the academic world for copying people, one gets penalised in the business world for not copying people when they have good ideas. It is to our credit in the Parliament that we are open minded and I hope that that continues. In that spirit, the committee met an Australian parliamentary committee via videoconference to discuss its experience. One of the things that I took from that meeting was that the existence of a more severe sanction led to a higher degree of observance of contact orders. Indeed, it appeared that the Australians had never needed to invoke the ultimate sanction because of its very existence.

On that basis, Sylvia Jackson's amendments provide an excellent basis on which to proceed. I cannot see any reason at the moment for not supporting them, although I will listen with great care to what the minister says. In particular, it would be useful if the minister will assure us that the drafting is consistent with Scots law.

I am pleased to see in proposed new section 11C(10) of the Children (Scotland) Act 1995, as set out in amendment 82, that the recovery of

compensation from one parent by another would be by the system of civil debt. The civil recovery system is likely to be more successful in recovering fines than the current system is. I welcome that process because it is likely to be more effective than the courts recovering the money directly and passing it on to the wounded parent, if you like. I am minded to support Sylvia Jackson's amendments and I congratulate her on them.

The Convener: If members do not mind, I will speak next. I have worked with Sylvia Jackson on the amendments and I have voiced my view on the subject on several occasions. I am grateful to her for the work that she has done and for the amendments that she has lodged.

When the minister responds to the debate, I hope that he will at least recognise the work that has been done to allow us to debate some options. I accept that we are talking about a minority of cases and that, in many cases, even having an enforcement measure would not solve the problem. However, some cases could be solved if there were a willingness to enforce the court judgment in some way.

Part of the difficulty is that, although we have asked for them, we have no statistics for Scotland and no research has been done. I respectfully suggest that that is a weakness in the Executive's current position. We do not know how many contact orders are applied for and how many have been breached. Applications for contact orders are made not just by parents but by grandparents, as we have discussed in the committee on many occasions.

Amendment 79 reflects my worries about whether the process for parents, grandparents and other persons who are seeking in the interests of a child to have contact with that child is just. Failure to comply with a court judgment is contempt of court—it is already a criminal offence. I do not know whether anyone has ever been charged with contempt of court in such cases. We must send the right message. If the bill is about the interests of the child, both parents must respect the decision of the court where the court has been asked to make a decision. The court will have considered all the available facts, and its decision will be based on the welfare test. I want more to happen to ensure that parents respect the decision of the court. That is why the amendments should be debated seriously.

I have always been more concerned about the non-resident parent than about the resident parent. However, there are clearly issues to be addressed where a contact agreement has not been breached but has been disrupted by a non-resident parent who has not complied strictly with its terms. That is an equally important matter. Practising lawyers tell me that it is a common problem and I accept that that is the case. However, it cannot be in the interests of a child for one parent or the other to be excluded from that child's life for a long period. There is a connection with parental responsibilities and rights. On separation, parents have the responsibility and the right to have contact with their child. However, if that right cannot be enforced in any way, how meaningful is it?

We cannot look at the issue in isolation, purely as a matter of family law. That is why the debate that we had last week about mediation, contact and supervision centres is vital. If the right facilities were in place and more centres were available, there could be more agreement on contact with children. I realise that that will not resolve every case, but if one parent does not trust the other, trust can be built up through the use of contact centres. The issues are all interrelated. I seek action from the Executive on this point.

Mike Pringle: Convener, you have said much of what I intended to say. The committee has often been told, both within and outwith meetings, that this is a serious issue. You said that the Executive did not have any figures, but this morning we have received some compelling figures on the issue from Sylvia Jackson. People asked us to let them know if we came up with a solution to the problem, because they wanted it to be addressed.

We all accept that the problem exists. We heard compelling evidence from a group of fathers who had spent as much as Sylvia Jackson has described—tens of thousands of pounds—on trying to see their children. In one case, the father had been seeking contact for nine years and his child was now 10 years old. Lawyers asked him why he was continuing to pursue the matter, given that he had not seen his child for nine years. His answer was, "Because it is my child and I want to have contact with them." Even if we are talking about a small number of cases, it is incumbent on us to address the problem.

As others have said and might say, the problem is that contact orders are never enforced. The Scottish courts are fearful and I can understand why. Most of the cases that I have heard of involve a mother refusing the father the right to see his child. If the court fined the mother, that would have an impact on the child. If it sent the mother to prison, that would have an even more serious impact on the child. There has never been a case where a contact order has been enforced by the Scottish courts, certainly not that I have been told about. The issue must be addressed.

I admire Sylvia Jackson for having lodged this group of amendments. They are well thought out, they address the problem and they will give the courts the ability to address the problem. Only a

small number of cases might be involved, but the issue is a very important one for those people concerned. Surely all of us who have children have some rights of access to those children. Surely we should be doing something to prevent people from refusing parents access. I am inclined to support the amendments.

Mr McFee: I welcome the amendments in the name of Sylvia Jackson and acknowledge the work that both she and the convener have done on the issue.

Sylvia Jackson said that the best arrangement is a voluntary arrangement. I agree entirely. That is why we took the right decision when we debated parenting agreements last week. The amendments offer a positive way forward where there is no agreement, or where arrangements that have been determined by the court have been broken.

Stewart Stevenson mentioned the idea of a supreme sanction, which arose in our discussions with the Australians. The problem with the Scottish courts—if we want to term it a problem—is that sanctions are not applied, as far as we can see. That is sometimes for good reasons, but it would appear that no sanctions apply to those parents who are determined to deny the other parent access. As a consequence of that, the system has fallen into disrepute. That disrepute was added to by the evidence of the Law Society of Scotland, which said that the amount that is required to pursue matters in court in order to gain access to one's children is as low as £500. That figure represents a minuscule proportion of what it costs in reality. It worries me that the professional body seems to be so out of touch with the real costs that are being inflicted on parents who want to gain access to their children.

Questions will always arise over the granting of contact orders in court if violence has been involved. We are right to be cautious about contact being awarded in those situations. However, in cases where a court has determined that there should be access, access should clearly be granted. That applies to both parties—not just to the resident parent but to the non-resident parent. The evidence has been pretty overwhelming that many problems have been experienced by non-resident parents. The non-resident is normally the man and, going by the evidence that we have received from grandparents, we know that it will normally be the paternal grandparents who are in a similar position. We recognise that, in most circumstances, custody—to use the old word—is given to the mother and that most of those who experience problems in gaining access to their children are men.

I do not think that the amendments will resolve all the difficulties; I know that Sylvia Jackson has not pretended that they will. Sometimes children are used maliciously as pawns to settle old scores, so the message has to be sent that the days when people can simply disregard the word of the court with virtually no sanction have to end. The amendments are supportable and worthy of consideration.

10:45

Mrs Mulligan: Like Stewart Stevenson, I think that the committee has always been open to new suggestions and I appreciate the work that Sylvia Jackson has done on the amendments. We have discussed the issue on a number of occasions, both in formal session and informally among ourselves. I have to be honest and say that I do not know that any of us has come up with the solution. Stewart Stevenson said that the Australian Government had introduced a number of measures that it thought would change people's actions. We have sanctions at the moment, but they have not brought about the solution that we want.

There is a difference between the situation in which a sheriff is considering making a contact order but is undecided because of their concerns about the relationship, and the situation in which a sheriff makes the order, which is then breached continually for reasons that are unclear at best and vexatious at worst. There is a pressing need for us to do something about the latter situation.

There are sanctions that the court can use, but we have no evidence that they have been used. The ultimate sanctions would be to send the resident parent to prison or reverse the residence order, but they have not been used, because, we are told, it would not be in the best interests of the child to do so. I accept that and understand what damage it would do to a child to see the parent with whom they were living sent to prison or to be removed from that parent. However, if the decision was taken that it was in the interests of the child for them to see the non-resident parent, it is difficult to say which benefit to the child outweighs which. The child would be in danger of losing contact with one parent or another. That is a dilemma to resolve.

I make it clear that this is not about supporting mums or dads. It is not about our rights as parents but about the right of the child to have each of its parents involved in its life. Undoubtedly adults will act in unreasonable ways. That is difficult to resolve no matter how much arbitration and mediation is put in place, which is why we are struggling so much.

I am pleased that amendment 82 refers to the situation where the parent who is granted contact does not stick to the agreement, because that can

be equally disturbing. It is important that we recognise that.

Pauline McNeill suggested that the use of contact centres could help. That is a possible solution, but are we going to drag a child out of the house to go to a contact centre, knowing that they are leaving behind a distraught parent?

We have to start telling parents that they have to put the child first and I am not sure that we can legislate for that. That is my only reason for being reluctant to support the amendments. I am not sure that the legislation that we pass will make a difference. It is about education and stressing to parents that it is the children who are important. There may be very few cases in which the situation becomes as severe as the examples that we have heard about today, but that does not excuse us from trying to do something about the matter. The minister has given serious thought to this situation and, like the committee, will probably be unable to come up with a solution today, but I hope that he recognises that the committee is sincere in trying to resolve this fraught issue.

Marlyn Glen: The committee has grappled with this on and off for weeks without coming to any consensus. To go back to the basic tenets of the Family Law (Scotland) Bill, at the centre is the welfare of the child. Parents can have parental responsibilities and rights, but they are not absolute. We must be consistent about considering things from the child's point of view. That is what the courts must uphold. We do not have to take our minds back far to see that the loving parent may be the one who walks away. I will not make biblical references, but that is sometimes what one of the loving parents decides to do to further the welfare of the child.

I am not sure whether the amendments would help the courts out, or whether the courts would make use of these ideas. The courts already have different sanctions that they can use, but there is always a difficult balance and the central issue is the welfare of the child. I worry about the idea of imposing fines and of compensation going from one to the other. I also wonder about the idea of a "reasonable excuse" for failing to comply with the contact order. It might be extremely easy for a parent to come to court with a "reasonable excuse" for not complying that week, and then to come back to court the following week with another "reasonable excuse". It does not sound workable.

We are talking about a small number of parents. Most parents manage to have some sort of agreement, whether or not they follow the contact orders for a long time. The idea that contact orders would be monitored for compliance worries me as well, because once contact orders are set up and communications have been re-established between the parents, informal arrangements, which might be much better than the contact orders, may take over. I do not find the amendments to be much help in that situation.

Margaret Mitchell: I congratulate Sylvia Jackson on lodging amendments 80 to 82 because I welcome the opportunity that that gives the committee to discuss the vexing and important issue of breach of contact orders, which are usually sought—as other members have said—by the non-resident parent. My problem with the amendments is what would happen if one party failed to comply "without reasonable excuse". As Sylvia Jackson said, we are talking about contact orders in situations in which it has not been possible to bring about negotiation or agreement. I fear that it would be all too easy for the parent who is entrenched and wanting to be difficult to say, for example, that the children came home very upset—end of story. That parent could say that the situation was damaging the children and that they were upset whenever they saw their father or mother—whichever was the non-resident parent.

That brings me to the existing sanctions, which are contempt of court and the removal of the child, which is the ultimate sanction. I would have thought that any resident parent considering that ultimate sanction would be very focused on it. Mary Mulligan raised the question of just how much attention the courts have given to using that ultimate sanction and to looking for the reasons why one parent has breached the order.

What would a fine add? If the ultimate sanction is the removal of their child, would a fine persuade a person to take a more reasonable attitude? I fear not, and I will be interested to hear the minister's opinion. If a parent is unreasonable and is then given a financial penalty, will that add to financial hardship and ultimately adversely affect the child? I congratulate Sylvia Jackson on her amendments but I have huge reservations about what they would achieve.

In their efforts to bring about mediation and solve the problems, the courts should focus more on the existing sanctions for unreasonable behaviour. At present, people can circumvent the law by saying that the child is upset. We really need to achieve voluntary co-operation.

Hugh Henry: Sylvia Jackson has done Parliament a favour in stimulating a debate on what is undoubtedly a complicated and sensitive issue. I will address a couple of specific points before moving on to more general points.

Stewart Stevenson asked about the drafting. We feel that the amendments would have to be refined for them to work and to be consistent with existing law. As they stand, we would have concerns. However, our concerns go beyond the mere

technicalities of drafting; we have fundamental concerns about the principle behind the amendments.

Mike Pringle said that Sylvia Jackson had presented compelling figures about the extent of the problem. She spoke about 40,000 applications to court, of which 7,000 were to do with breach. If we suggest that, proportionately, that could represent 700 people in Scotland, the figure seems substantial. However, I am not sure whether we are talking about 7,000 individual cases or about 7,000 applications to see a child that were ignored, which might relate to a much smaller number of individual cases and individual people. In some respects, the figure of 7,000 could be misleading because we do not know how many cases it relates to. I will come back to that issue later.

I know that the committee has agonised over the issue both at stage 1 and since then. It is fair to say that it was not able to answer the questions any better than the Executive was. There were no answers to the fundamental question of what to do if someone ignores a court order. Margaret Mitchell spoke about that. Would the court take the child away, because that power exists? Would it jail the person, because that power exists? Would it fine the person, because that power exists? No answers were available to the committee and no answers were available to us.

In our consultation, we asked about court processes and other issues that might need to be addressed. The issue of contact enforcement was not raised as a major concern. That is not to say that some specific cases do not graphically illustrate a problem for individuals.

As Margaret Mitchell and others have said, what we are talking about are intractable cases in which the problem, in a sense, is not the law but the fundamental breakdown in relationship between two adults and their unwillingness to come to any agreement whatsoever. As I have said, sanctions are available when one person defies a court order; however, when two adults are so fundamentally unable to resolve their problems and when one of them is determined, for whatever, reason, to thwart the other, I wonder what it would take for that person to be forced to comply with that order. I am sure that the courts would think carefully about that.

11:00

I return to what Sylvia Jackson said. She has attempted to do what we, collectively, have been unable to do, which is move the process on and come up with something specific that might help. I take Stewart Stevenson's point about being broad-minded and open-minded enough to learn from other jurisdictions and to apply measures from them. If there is any suggestion that anyone is doing anything better than us, I see no reason for us not to follow them. However, the amendments are not simply about looking at what is happening in England and Wales and the rest of the United Kingdom; they are about looking at what is happening in England and Wales and applying that here. Sylvia Jackson is talking about taking processes that apply to the English legal system and attempting to apply them to a very different legal system. However, the processes are not that easily transferable. For example, we do not have welfare officers in Scotland. We are talking about something completely different.

Incidentally, there is no certainty that the draft UK bill will become law in England and Wales, as big differences of opinion have been expressed in the debate about whether it is appropriate. I am unable to give any guarantee yet that the draft UK bill will become law in England and Wales. Therefore, we could make law on the basis of a debate that is going on in England and Wales, and the UK Government might decide, for whatever reason, not to apply that law in England and Wales. Therefore, we need to pause.

We must consider what we are being asked to do. Everybody recognises the heartbreak and trauma that are caused when someone loses contact with their children. Yes, there are people who callously disregard their children, turn their back on them, make no financial provision for them and refuse to have any further contact with them. That is a disgrace, if nothing else. However, there are those who want to play a continuing part in a child's life. I honestly do not know what I would do if I was in that situation and was unable to see my children. I am sure that I would move heaven and earth to remain in contact with them, and I would probably go to any lengths to make that happen. However, what we are doing today is not making an emotional response to that plight, nor are we making a political response to that situation; we are being asked to consider how to legislate in a way that will make a difference. In a sense, whether or not we have been emotionally influenced by what we have heard or empathise with those individuals in the circumstances in which they find themselves, we have to ask ourselves whether the amendments would make a difference that would have an effect and would stick. I do not think that they would.

With regard to warning notices, which are referred to in the lead amendment—amendment 80—I am not sure that it is entirely the role of the court to advise people before they commit an offence of the consequences of their offending. Why not do that with every offence? Should the court say, "We are not saying that you will commit a crime but, incidentally, before you leave this

court, we will tell you that, if you commit a crime, this is what is going to happen"? I do not know that it would be entirely appropriate to put that into legislation. In any case, if we thought that such an approach would make a contribution, the rules of court could be changed to address that.

Amendment 81 makes a breach of contact order a specific offence. I think that Margaret Mitchell hit on the substance of the matter when she asked what would happen if people refused to comply with a sanction in the way in which they sometimes refuse to comply with other court-imposed sanctions. If that were to happen, we would be no further forward, whether or not the amendment were agreed to.

Amendment 81 says:

"A person guilty of an offence under subsection (1) shall be liable on summary conviction—

(a) for a first offence under subsection (1)—

(i) to a fine not exceeding level 3 on the standard scale".

It does not impose a mandatory sentence; it gives the judge the opportunity to impose a fine. The amendment says that the judge will be given an opportunity to impose a fine, which they already have the power to do. However, it does not say what will happen if the judge chooses not to impose the fine. Many judges decide not to impose fines, jail the mother or vary orders for custody, because those things would have an impact on the child.

The Convener: You talked about whether it would be consistent for the court to warn a person about the consequences of committing a crime. We have checked the situation and the amendment seems to be consistent with the situation relating to antisocial behaviour orders and sexual offences prevention orders. In both those cases, the court explains to the person the consequences of their failing to comply with an order. Why is that different from what we are discussing?

Hugh Henry: I am not sure that it is entirely appropriate to include that provision in the bill. We can use the rules of court to establish that procedure if we think that that is what needs to be done. I think that we had a similar debate on antisocial behaviour orders. I could be wrong, because a lot of legislation has gone through Parliament, but I seem to remember having a debate about the use of the rules of court. I can check that, however.

To return to breach of contact orders, amendment 81 takes us no further forward. It talks about the ability to impose a fine that it is already possible to impose.

Let us take community service orders as an example. A sheriff might be minded to impose such an order and make a woman—for the sake of argument—spend 200 hours doing community service. If that woman has other children, what will happen to them when she is doing community service? Who will pay the child care costs? Are there nursery places readily available to her? Have we thought through what will happen? If we are going to put something into legislation, we need to be sure that we have thought through the consequences of doing so.

Mr McFee: I hear what you are saying but, at the moment, the courts jail women with children for defaulting on fines. I can understand the logic of the principle but I wonder why it is not applied across the board.

Hugh Henry: The courts have the power to send women to jail for ignoring such an order. We are talking about circumstances in which the court can send a woman to jail or fine her, but does not think it appropriate to do so. We are not talking about exactly the same thing. If a court decided to impose a community service order—and it might not, in which case we would be no further forward—it would have to think through the implications, such as child care arrangements and the costs. A sheriff might decide not to bother imposing a community service order for those reasons. What would we do if the court did that? I am not sure that we would be any further forward if we agreed to amendment 81.

On amendment 82, on financial compensation, Stewart Stevenson said that he was pleased that compensation would be recovered through the civil process, rather than by a fine, which would be recovered through the criminal process. However, one of our current problems is the sheer burden, and complexity, of cases in the civil and criminal systems. Remember that we are talking about people whose relationship has completely broken down and who are, in many respects, at war with each other. They will welcome the opportunity to inflict punishment on the other person; they will sometimes welcome the opportunity to seek revenge.

A person could argue that they wanted to sue the other party because they bought a concert ticket for £20 or £30, or made other arrangements, but the child did not turn up. A flurry of actions for £15, £20 and £30 could head in the direction of the civil courts, with all the burdens and complexity that exist in the system. In response, the other party could decide that they wanted a lawyer to challenge the action, and we would have to consider how they would pay for that. We would need to have a major debate about civil legal aid, because at the moment it is not available for small claims of that order. Would we be doing anyone a

favour by clogging up our court system with a flurry of claims for relatively small amounts? There are complications.

Emotionally, I can understand exactly what we are trying to do but, practically and legislatively, I am not sure that we have come up with a solution that would work or that the courts would use. In addition, I would hesitate to make such a change without further discussion or evidence taking. We need to reflect further on such complexities. I take the convener's point about research, which was well made. I give a commitment that, following this discussion, we will undertake research on contact arrangements that are made both in and out of court. I will also ensure that the on-going civil justice review considers contact enforcement.

I am with Sylvia Jackson and those committee members who have spoken about the problems that we face. During the progress of the bill, I have been unable to come up with a simple and effective solution. Indeed, the committee itself was unable to come up with a solution. Sylvia Jackson has, at the very least, through a great deal of research and hard work, made a suggestion that attempts to move us forward. Unfortunately, for a whole number of reasons that I have explained, I think that the amendments would not take us forward. We would create more problems by trying to bring in the provisions and, in many respects, we would not move matters forward because the same fundamental problems would still apply.

11:15

The Convener: I ask Sylvia Jackson to wind up.

Dr Jackson: I will go through some of the points that the minister made.

The first was about drafting. I am not saying that I have produced the final, technical wording on the matter; the wording could be developed. I also take on board the fact that we may need to consider the compensation issue a little further, but I think that the substance is in the amendments and that they provide a starting point.

I thank the minister very much for his welcome commitment to provide the statistics and to consider the other court reform agendas and so on. However, I am a little worried that if we leave the bill as drafted, the opportunity could be lost and some considerable time could pass before anything else happened.

I was a little alarmed by the minister's comment that perhaps cases such as that of my constituent, in which the process has taken up a considerable amount of time and money, are those in which the issue will never be resolved. I have to say that I have looked at my constituent's case in quite a lot of detail and I do not agree with the minister's opinion. I also disagree with him when he said that sanctions are available and when he seemed to imply that the courts always make the right decisions. It is clear that, even if the number of cases in which that is not true is relatively small, those cases are difficult and are a tragedy for the parents who do not see their children.

Hugh Henry: I would like to clarify that point. I hope that I did not imply that the courts always make the right decisions—it is not for me to say whether that is the case. I was trying to suggest that the courts make the decision that they see as the right one, having regard to all the circumstances and facts. What the Executive has seen—I am sure that committee members will also have seen this, although they may disagree—is that the courts say clearly that they take decisions with the best interests of the child in mind. People might not always agree that that is the case but that is what seems to motivate the courts.

Dr Jackson: I take on board what the minister says, but I add that there seems to be a general feeling that court orders are not being upheld. Part of the reason for that could be that sanctions are not often used in such cases. Therefore, the intention behind amendments 80 to 82 is to put something in place that the courts might feel more able to use than the sanction of imprisonment, with which they may find great difficulty, owing to concerns about children's welfare and so on. One can understand that to a certain extent, but from everything that I hear the current situation seems to be wrong. The three amendments that I have lodged aim to address some of the issues that I have become aware of in respect of non-resident parents and the enforcement of their court orders.

The minister also spoke about adapting the provisions in the amendments to the Scottish system. I have to say that we tried very hard to do that. I went on to the Executive's website to look at supervised attendance orders and community service orders and see nothing wrong at all, in relation to Scottish law, with the provisions.

I finish by saying that if these small measures—which are only one part of a jigsaw—can help even a few people, we should use them.

The Convener: I ask the minister for clarification on what he said about research. Can you clarify for us that you will have a look at the measures?

Hugh Henry: We will commission research and look at the issue of contact arrangements. What is proposed are contact arrangements that are made both in court and out of court, and the research will try to establish the significance of the problem and how widespread it is. More than that, we need to find out what happens when court orders are not complied with. We need further evidence on the matter, and the research could look into that.

The Convener: Does Sylvia Jackson want to press amendment 80?

Dr Jackson: Yes.

The Convener: The question is, that amendment 80 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

McFee, Mr Bruce (West of Scotland) (SNP)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Pringle, Mike (Edinburgh South) (LD)
Stevenson, Stewart (Banff and Buchan) (SNP)

AGAINST

Glen, Marlyn (North East Scotland) (Lab)
Mitchell, Margaret (Central Scotland) (Con)
Mulligan, Mrs Mary (Linlithgow) (Lab)

The Convener: The result of the division is: For 4, Against 3, Abstentions 0.

Amendment 80 agreed to.

Amendment 81 moved—[Dr Sylvia Jackson].

The Convener: The question is, that amendment 81 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

McFee, Mr Bruce (West of Scotland) (SNP)
Pringle, Mike (Edinburgh South) (LD)

AGAINST

Glen, Marlyn (North East Scotland) (Lab)
Mitchell, Margaret (Central Scotland) (Con)
Mulligan, Mrs Mary (Linlithgow) (Lab)

ABSTENTIONS

McNeill, Pauline (Glasgow Kelvin) (Lab)
Stevenson, Stewart (Banff and Buchan) (SNP)

The Convener: The result of the division is: For 2, Against 3, Abstentions 2.

Amendment 81 disagreed to.

Amendment 82 moved—[Dr Sylvia Jackson].

The Convener: The question is, that amendment 82 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

McFee, Mr Bruce (West of Scotland) (SNP)
Pringle, Mike (Edinburgh South) (LD)
Stevenson, Stewart (Banff and Buchan) (SNP)

AGAINST

Glen, Marlyn (North East Scotland) (Lab)
Mitchell, Margaret (Central Scotland) (Con)
Mulligan, Mrs Mary (Linlithgow) (Lab)

ABSTENTIONS

McNeill, Pauline (Glasgow Kelvin) (Lab)

The Convener: The result of the division is: For 3, Against 3, Abstentions 1. I have, in the past, used my casting vote to vote for the status quo. As I have not said otherwise, I vote for the status quo.

Amendment 82 disagreed to.

The Convener: Amendment 79, in my name, is in a group on its own. The amendment deals with a related issue about the enforcement of contact orders, but the subject is the cost of accessing the courts. One of the things that I found most shocking in studying this subject was the fact that, when the court does not enforce its own judgment and it takes several years for the court to arrive at that decision, the result is often significant costs, especially to the party that seeks a contact order.

I have looked at several cases, including the one that Sylvia Jackson mentioned in the debate in Parliament. In one case, the court costs totalled in excess of £30,000 and the other person received legal aid. In another case, the total cost to the applicant was £20,000 and the other person received legal aid. In a third case, the total amount was £25,000 and the other person did not receive legal aid.

Amendment 79 gives us the opportunity to consider access to justice, about which I have serious concerns. The amendment seeks to allow the parties to apply for a shortened timetable to try to reduce the costs, whatever the decision of the court is. I do not feel that it is justified for the public purse to continue to support an action in cases in which the court has already made a decision and I find it grossly unfair that the applicant—who, after all, in some cases is only seeking to enforce a court judgment or applying to have contact with their child—should have costs of such magnitude. Even when there has been contempt of court and the sheriff has made a decision, it would seem that the action can continue. I admit that I have studied only a small number of cases, but I am at a loss to know what else to do, because little research has been done on the subject.

We have been advised that a special procedure exists for family law cases but, in the cases that I have examined, that procedure can drag on for five, six, seven, eight or nine years and, in the end, the sheriff sometimes has to assist the action because at that point it is not possible to get the parties to agree. If nothing else, I am asking the Executive to address the cost to ordinary people of accessing justice.

The same arguments apply to contact orders involving grandparents. The Executive has said, rightly, that it would not be appropriate to grant a presumptive right in favour of grandparents having contact with their grandchildren and that

grandparents should use the 1995 act to apply for a contact order. As far as I can see, the cost of doing that would be significant and the applicant might not be successful. I ask the Executive to investigate whether there could be a shortened procedure and how we could cut out some of the unnecessary bureaucracy. In addition, we must consider how we can reduce the cost to the public purse when such cases involve legal aid. I do not think that there is justification for the process to be so protracted.

The minister has spoken of the work that the Executive is doing on access to justice. Would that work provide an opportunity for the costs of accessing justice in family law cases to be examined?

I move amendment 79.

Stewart Stevenson: The convener has given a good explanation of some of the genuine difficulties that families experience. A number of members have been involved in speeding up the processing of claims for damages in cases in which people have been affected by asbestosis and mesothelioma. Although that has delivered benefits, I must note—as I am sure that the minister will do—that the changes that have been made have had unintended consequences that need further examination.

I will be interested to hear what the minister says on whether amendment 79 is crafted in a way that would allow it to deliver what we seek. The minister has an opportunity to help us to understand what he and his colleagues can do to ensure that parents are not held at bay from exercising their parental responsibilities by the speed at which the court proceeds. I use the word "speed" in the absence of a word for indicating lack of speed, which I think is the issue.

Margaret Mitchell: I am tremendously sympathetic towards amendment 79. It seems that, on top of experiencing the heartache of being denied access, the person who wants to have an order enforced receives a double punishment in that proceedings can drag on for so long, which results in increased costs. I will be interested to hear the minister's comments on an amendment that I find attractive.

11:30

Hugh Henry: I know exactly what Pauline McNeill seeks to achieve. As she indicated, it is already possible to have an expedited hearing—the child welfare hearing can be used for that specific purpose. That facility is available.

The issue that the convener outlined, and to which other members alluded, has more to do with the rules of the court than with legislation. To some extent, amendment 79 would cut across the existing provisions for making rules of court, which, for the sheriff court, is done by act of sederunt. We believe that it is right for the judiciary, rather than ministers, to determine the court procedures. That helps to maintain the independence of the judiciary. However, I know that complications arise from time to time. Stewart Stevenson mentioned the issue of asbestosis and mesothelioma and the judges, to their credit, considered speeding up the process. Credit should go to the campaigners and politicians who have helped to highlight that issue and to make the judiciary aware of the extent of the problem.

Notwithstanding the significance of some of the cases that have been mentioned, it is important to remember that such cases are pretty rare. There are not many cases, but when they happen they can happen with a vengeance. That is a problem. The convener has spoken not just today but in the past about the way in which access to legal aid can be used by one of the parties to prolong the process or to inflict damage on the other party, who might not have access to legal aid. If one party believes that the legal aid process is being abused by the other party, they can ask the Scottish Legal Aid Board to review the case and legal aid could be withdrawn. However, it would be sensible for me to have a discussion with the Legal Aid Board about the specific problem that the convener has identified to see whether it can do anything to tighten up its application of the rules to ensure that such abuse does not continue.

The Convener: I thought that you would say that. I am pleased that you said that you will talk to the Legal Aid Board. There certainly seems to be a problem with the unnecessary continuation of public funding in cases that have clearly run their course. As an example, I cite the case that Sylvia Jackson mentioned. I can let you see the papers on that case, if you want to see them. In that case, even though the court has made its order and one party is in breach of it, attempts continue from the other side to vary the contact order even though that side is in contempt of court. The legal aid budget seems to be funding that process. That is not justifiable.

You said that such cases are rare. I do not know whether they are rare, but I have seen enough of them—10 or 11 at least. I am happy to let the Executive see the evidence that we have of astronomical costs. I do not know enough about court procedure to comment on whether the costs are necessary or not, but it worries me that they are a barrier to justice for a lot of ordinary working-class people who are simply making their case in court in order to see their child. The court has to make a decision one way or the other, but I would like the Executive to examine the matter to see whether the costs could be reduced.

In relation to grandparents, the position that we have supported is that we do not want a presumption in favour of contact so grandparents will have to go to court and argue under the Children (Scotland) Act 1995. We have to make the route easily accessible to enable people to do that.

I will seek leave to withdraw amendment 79, but I ask the Executive to consider the matter as part of the access to justice agenda.

Hugh Henry: We will examine a range of access to justice issues in our civil law review. We are concerned that, too often, people do not have sufficient and speedy access. There are long-overdue changes in relation to small claims and we can improve the way in which justice is dispensed, but there are bigger issues that need to be considered in the civil law review. The matter that you raise could clearly be contained within that.

However, there is another issue that we need to recognise. You talk about costs, but in a sense the cost is a function of the time. You are right to talk about trying to get speedier decisions, because the longer a case goes on, the longer the lawyers are involved and the higher the costs will be. The costs are racked up by legal fees rather than by anything else. We need to try to get early resolution to court procedures.

We have already made significant changes, for example in the High Court and criminal law. We are looking at summary justice and when we examine civil procedures we want to consider how we can speed up the process. Indeed, Cathy Jamieson and I are committed to considering the use of arbitration and mediation to resolve disputes. Where that is possible, that is the best way forward. A problem will always arise when cases cannot be resolved in that manner, but we will certainly look at the matter.

The Convener: Thank you.

Amendment 79, by agreement, withdrawn.

The Convener: If we are to have a break, I propose that we take it now before the debate on section 18. Is that agreed?

Members *indicated agreement*.

11:37

Meeting suspended.

11:48

On resuming—

Section 18—Meaning of "cohabitant" in sections 19 to 22

The Convener: Amendment 45, in the name of Cathy Jamieson, is grouped with amendments 46, 47 and 69 to 71.

Hugh Henry: Section 18 defines the word "cohabitant" and subsection (4) describes the factors that courts will take into account when determining whether a person is a legally relevant cohabitant for the purposes of sections 19 to 22 of the bill.

When the bill was introduced, the expectation was that it would be commenced before the Civil Partnership Act 2004. In the circumstances, it was not considered to be appropriate to refer to civil partnerships because doing so would have delayed commencement of some parts of the bill. In the event, the 2004 act will be commenced first, so that constraint has been removed. Amendment 45 will therefore remove the reference in section 18 to couples who live together

"in a relationship which has the characteristics of the relationship between husband and wife except that the persons are of the same sex"

and will replace it with a reference to couples

"living together as if they were civil partners."

Amendment 46 is a technical amendment. As I have said, section 18(4) seeks to describe the factors that courts will take into account when determining whether a person is a legally relevant cohabitant. Making reference under section 18(4)(b) to a cohabitant when the court is in the process of determining whether or not cohabitation exists could be considered to be confusing. We therefore seek to remove the word "cohabitation" and to replace it with "relationship" to make matters clear and simple.

Amendment 47 is also a technical amendment that is designed to reflect better our policy intention that the focus should be on couples who are in committed relationships whose characteristics point clearly towards the parties' involvement in each other's lives and their lives having been intertwined. Section 18(4)(b) of the bill describes that in terms of a couple's dependence on one another. On reflection, it was felt that that would be better described in terms of the couple's interdependence, so amendment 47 seeks to do that.

Amendment 47 also seeks to remove section 18(4)(c), which refers to a child of the relationship. Committee members will remember that I fully explained the background to that in my letter of 22 August. In section 18(4) we seek to focus on the qualities of the relationship between the adults. The existence of a child of the relationship seemed to be a powerful expression of trust and

commitment between the adult partners, which is why section 18(4)(c) was drafted in those terms. However, that appears to have caused considerable confusion during stage 1. We have considered the issue further and have concluded that the section cannot be drafted in terms that satisfactorily reflect our intention. We are therefore removing the reference to children from the list of determining factors. The court's consideration will rest on the nature of the cohabitation as at section 18(4)(a); we believe that that will include consideration of the existence of any children.

Amendments 69 to 71 also arise from the earlier-than-expected commencement of the Civil Partnership Act 2004. Section 23 of the bill will amend the Administration of Justice Act 1982 so that same-sex partners are included in the definition of a relative who can make a claim in the event that a person is injured. However, as it is drafted, section 23 of the bill defines same-sex couples as being

"in a relationship which had the characteristics of the relationship between husband and wife"

except for the fact that they are of the same sex. Although that description was appropriate when the bill was drafted, it is no longer so. Amendments 69 and 70 will tidy up the definition by removing the reference to couples who are living together in a relationship that has

"the characteristics of the relationship between husband and wife except that"

the persons who are living together

"are of the same sex",

and by inserting reference to people who are living together as though they are civil partners.

Amendment 71 will change the long title of the bill to include a reference to civil partners.

I move amendment 45.

Stewart Stevenson: I accept that the intention of the group of amendments relates to the committee's stage 1 consideration; on that general basis, I am relatively content.

However, the drafting of amendment 47 gives me considerable concern, although I know that I might be making a relatively technical point. We are seeking to remove from the bill the extent, if any, to which one cohabitant is financially dependent on the other, and to put in the words:

"the nature and extent of any financial arrangements subsisting, or which subsisted, during the relationship."

That would remove any reference whatever to whether the financial relationships that are referred to had anything to do with the relationship, other than that of calendar. For example, it might be that one of the cohabitants was a partner in a business enterprise and that other financial relationships subsisted during the relationship, but they might not be of any relevance in determining whether people are cohabitants. The minister is seeking to use the word "interdependence".

I have to say that the existing wording seems more satisfactorily to express interdependence, although it uses the word "dependent". I wonder whether the minister will reconsider the words that have been used, which seem to cast the net well beyond cohabitation and matters that are material to it, and which seem also not to make the point that the minister suggested we are trying to make about interdependence.

Mr McFee: I agree with Stewart Stevenson's remarks. Although this looks like a small change, it is a radical change. How do we define when a relationship began? It would be fairly clear to most people when cohabitation began, but when does a relationship begin? Are we introducing a whole new concept, concerning one's liability to another person? Is it the first visit to the pictures or the first drink? How far down the road does the relationship begin? Elements of the amendments would probably lead to a fairly large number of cases ending up in court in some pretty complicated circumstances, which would, frankly, add to the general confusion.

I would be happy to receive clarification from the minister on whether it is intended that from the early stages of a relationship, some form of duty—financial or otherwise—would be expected of one of the individuals when the relationship broke up or one of the parties died. I do not think that the amendments would add anything but confusion to what the sections that they would amend are supposed to do.

Fergus Ewing (Inverness East, Nairn and Lochaber) (SNP): In its report, the committee opined that section 18 is perhaps the most radical in the bill. I have studied with interest and care the recommendations that were made.

I want to mention some of the comments that were made by people who took the trouble to respond to the original consultation on the bill. That might help us in considering the changes that are proposed by the minister. With the help of my assistant, Amy Brennan, who is visiting from Oregon, USA, I analysed all the consultation responses to the bill. A number pointed out the huge difficulty—perhaps the impossibility—of the task that the Scottish Executive has set itself in trying to define the indefinable. The Salvation Army put it most clearly when it said, in paragraph 2A of its submission of July 2004:

"As the variety of relationships of cohabiting couples makes a statutory definition of cohabiting difficult, we would suggest that this will present problems in producing a coherent legal framework giving legal protection."

Another significant contributor was CALM—comprehensive accredited lawyer mediators—which is a group of 55 solicitor mediators who are experienced in this area of law. It said:

"The Executive would face a difficult challenge in defining the circumstances in which such rights should apply. It is the experience of our members that many clients are not aware of their legal status as co-habitants. The myth of the 'common law wife' is still live."

There was a huge number of submissions from ordinary individuals, some of whom were involved in the process and some of whom were not. It may be wrong of me to pick out specific individuals, but some made comments that are particularly apposite. I am sure that they would all wish to know that Parliament is taking heed of what they said. Carole Sheridan made the comment that Bruce McFee has just made. She said:

"It is not possible to provide a comprehensive package of rights and responsibilities like marriage, a marriage has a beginning and an end unlike the cohabiting relationship. Those people who cohabit on the same basis as a marriage partnership and who consider themselves to be a marriage partnership without the formalities of marriage are protected in many respects by the doctrine of marriage by cohabitation with habit and repute."

I believe that, as a result of a previous stage 2 decision by the committee, it has been proposed that that protection should cease.

12:00

Carole Sheridan made another point that is typical of those that were made in response to the consultation. She stated:

"People must be free to chose their own way of life and must be given the responsibility to accept the consequences of that choice."

It seems to me that there are significant points to be made against each of the amendments. I will deal with each in turn. On amendment 45, the words "as if" represent the essential conundrum, paradox and irresoluble conflict that the Executive faces. To equiparate cohabitants with married couples is simply wrong, and to say that people who cohabit are the same as, or that cohabitants live together "as if" they were, man and wife is wrong. I suggest that the same applies to people of the same sex who have decided not to avail themselves of the new civil partnership law which has, as the minister knows, just been created. It seems to me that the opportunity for two individuals to enter a legally binding relationship that will confer rights on each of them, which they can choose to take as proof of their commitment to one another, is an opportunity that same-sex couples previously lacked. If they choose not to avail themselves of the new legal status, it seems to me that a fundamental paradox and conflict will be involved in equiparating them with those who have done so.

Some people may say that there is an even more fundamental reason why amendment 45 and, perhaps, the original drafting of the bill are wrong. I refer to siblings. The committee considered in detail the position of siblings, particularly in relation to succession, at stage 1. The annex to its report contains illustrated examples, which we will no doubt come to later. The relevant point to be made at this stage is that the bill will provide new rights to a group of people, who will have a legal definition and therefore a new status. Those rights will entitle them to claim a capital sum inter vivos. They will be able to claim money during their lifetime if their relationship breaks up and they will be able to make a claim on a person's death. Sisters and brothers—siblings—who have lived together and may have spent their whole lives together will have no such rights. Surely that is totally wrong.

Some people would say that the proposals will mean discrimination in favour of people who have sexual relationships or relationships that have a sexual element, and against siblings who obviously do not have such relationships. I appreciate that committee members are ahead of me because they have had the benefit of studying all the evidence—I have read some of it, but I confess that I have not read every word of it. However, it seems to me that what I have described is a fundamental objection in principle, and that there is an opportunity for the committee to decide that such matters should be dealt with separately in relation to the law of succession. The position of siblings in particular should be considered.

Furthermore, no minimum period is involved. In my view, a person can become a cohabitant after a night—that could be sufficient. A few weeks certainly could be sufficient for a person to become a cohabitant. I think that the Law Society of Scotland suggested a minimum period of one year, and the minister could reasonably say that I could have lodged an amendment to that effect. If I was in favour of creating the new rights for cohabitants, I would have done so, but I am not, so I think that it is not my place to try to improve proposals that I do not support.

The minister has not taken up the Law Society's recommendation of introducing a time period—I think that the Law Society recommended a year, although no doubt the minister will correct me if I am wrong. Nevertheless, I would have thought it necessary to create a minimum period that would display some commitment between two people. If there are to be rights and if there is to be status, if there are to be court actions and litigation, and if there are to be difficult claims, surely we should not risk having them after only a few weeks.

Life being what it is, no doubt somebody somewhere will go to the European Court of Human Rights to claim legal aid to make a capital sum claim against somebody with whom they had been biding in for two weeks. How would Parliament look then? Perhaps the minister might want to bear that in mind.

Section 18(4)(a) states that when a court is determining whether a person is a cohabitant, it shall have regard to

"the length and nature of the cohabitation"

With amendment 46 the minister is now saying that the court should have regard instead to the length and nature of the relationship. Cohabitation is a term that in itself does not have a clear definition. However, if that is so, the word "relationship" is about as clear as mud. I can have a relationship with anybody in this room, although it may be a distant relationship or it may be not a cordial or close relationship. That is perhaps an extreme example. However, if we put into the law that the courts "shall have regard to" something it means that it is the duty of the sheriff to consider evidence about it. That would mean, to take an example that could arise, that somebody could get legal aid, go to court and start to introduce evidence about their first date or their first kiss or their first love letter. It could introduce all kinds of considerations of that nature, because they would be relevant to the relationship.

To delete "cohabitation" and insert "relationship" would make the task of the courts even more difficult, because it is their duty to determine whether or not the new status—the new relationship—exists. If they do not have a clear statement of principle in the law, the courts' task will be made impossible.

I have read the committee's report and the criticisms that it made of the definition of "child" and the restrictive circumstances that meant that some children who were regarded as the child of both couples were not included in the definition. The committee also made other important technical points that I respect. I understand the amendment; I do not belittle the minister's response in any way and I understand his justification. However, section 18(4)(c) states that when a court is deciding whether or not a person is a cohabitant, it shall have regard to

"whether the cohabitants have a child of whom they are the parents."

If paragraph (c) had any justification in creating what I call—I am not being facetious—a bidies-in charter in the law of Scotland, it would be for the children of such bidies-in. If the court is not now to have regard to whether or not a couple has children, that is a retrograde step. I know that there are provisions in the bill that talk specifically about the burden of economic caring, and I do not suggest that that is irrelevant.

However, the first task that a court has and its first duty before deciding whether or not any money is to change hands or any order is justified is to establish whether or not people are cohabitants. If, as a claimant, I do not pass that test and cannot prove that I am a cohabitant, I do not move on to stage two, which is to decide whether my claim for property should succeed. In that first test, the minister would remove the requirement that the court must have regard to children. I would have thought that the real basis for supporting cohabitants' rights—if there is one—is that it may in some circumstances prevent hardship to children.

I am sorry that I have taken up some time, convener. I hope that my points have been relevant, and that committee members will bear them in mind.

The Convener: Can I be clear about your position on children? Do you want to draw a distinction between a 20-year cohabitation where there are no children, and a five-year cohabitation where there are children?

Fergus Ewing: No, that is not really what I am saying. The issue is whether or not cohabitants should have rights, for reasons that we will come to. As I understand it, amendments 45 to 47 and 69 to 71 are about the definition of "cohabitant". I prefer to talk later about whether or not there is a case for giving property rights equivalent to those of married couples. My point is that the first matter that any court will have to consider is whether or not a person is a cohabitant.

The one point that I found favourable in section 18, before the minister lodged an amendment to it, was that

"the court shall have regard"

to whether there is a child. That was good, but the minister is seeking to delete it, which is bad. I am not suggesting that there will necessarily be dreadful consequences—I do not wish to exaggerate or inflame the arguments and I appreciate that these are sensitive matters. However, it is important that if any committee member agrees with me that what we are doing is more for the children than for the cohabitants, we should start off by placing fair and square a duty on the court to have regard to the fact that there are children.

Marlyn Glen: I will be brief. I welcome the Executive's amendments 45, 70 and 71, which will update the bill to take account of the Civil Partnership Act 2004, but I can see some of the difficulties with amendment 47. However, I welcome the move away from referring to financial dependence. That is a good move.

The point of the sections on cohabitation is to give protection to couples—whether or not they have children—who decided not to get married or to enter a civil partnership, but who live together. The committee spent a lot of time talking about that. There are lots of different circumstances; we must remember that couples may have children but never live together and so we have to cover lots of different relationships and ways of life. The aim is to give protection to couples who might have lived together for a long time—who may or may not have children—when one of them is left, either through the couple splitting up or a bereavement. It is important that we pass the measures and support them whole-heartedly.

12:15

Margaret Mitchell: Fergus Ewing made a number of points. First, he asked what cohabitation is. It must have a beginning and an end. The bill refers to people living together

"as if husband and wife".

In other words, we are not talking about flatmates. The relationship has to be explored and spelled out. The definition of "cohabitants" applies to two people who live together as if they are husband and wife. In evidence, we were assured that such a relationship could not be short term. The policy intention was that a relationship would be intimate, long-lasting and committed, so the length and nature of the relationship would be taken into account by the court, as would financial dependence.

The policy intention is to take protective and remedial action to safeguard vulnerable people from risk and harm. We have already considered that principle in examining domestic abuse.

The rights that will be conferred will not be conferred automatically. They will have to be applied for and there will have to be proof—for example, of financial input in the form of receipts—to show what someone had put into the relationship and was now seeking to get out.

It is not intended that brief, experimental or non-binding relationships be covered, but rather that mutually supportive relationships—ventures in life's hopes—with choices and financial decisions all made together be covered. The focus is quite clearly on evidence of commitment to a joint life.

There are various reasons why, with the best will in the world, people may want to marry but cannot. It could be that a partner refuses to grant a divorce on religious grounds or that divorce is pending and someone dies intestate during that time. All those things must be taken into account in the complexity of relationships. For those reasons, and on the understanding that the rights that we seek to give under the definitions of cohabitants and relationships are not the same as those which are conferred in marriage, I think that what is proposed is a reasonable way forward that reflects realities and which will protect vulnerable people who, in good faith, have entered into such relationships.

The Convener: I have generally supported the Executive position on the matter. Some action is clearly needed to protect cohabitants, particularly when they have been together for a long time and especially if there are vulnerable partners in a relationship. The law should protect such people. It should make no difference to the definition whether there are children or not. I would be concerned if that were a material factor in the definition, so I support the Executive's suggestion that it should be only one of the factors that could be considered to determine the nature of the relationship.

As has been said, these provisions are probably the most significant in the bill, so it is important that we get them right. I have to say that I still have concerns about the guidance that we are giving to the courts. My reading of the provisions is that they are still quite wide. I would like to hear a bit more about the types of relationships that the Executive expects the court to look for. I worry that, in relationships where there are no children, where the couple have been together for only a short period and where someone relatively wealthy is living with someone of modest wealth, it might be difficult for the couple to know what their legal rights to each other are. That concerns me a wee bit.

If couples have been together for a long time and have children, a lawyer might say that the courts would generally be favourable to considering how dependent the partners are on each other and would take into account that they had children. However, where those factors do not exist, there is not much certainty for people. Although I want vulnerable people to be protected, there are some cases where people enter into a relationship that is not meant to be a permanent cohabiting situation—those people, too, will want to know where they stand.

I would be grateful for some indication as to the guidance that we are giving the courts about what they are expected to look for when considering the nature and extent of a relationship. Are we talking about couples who have been together for a considerable time and are financially reliant on each other? That is an issue that I am not clear about and I would be grateful if the minister could clarify matters on the record.

As no other member wishes to speak, I invite the minister to reply.

Hugh Henry: It is difficult to respond to all the comments that have been made. Fergus Ewing addressed some of the specific issues in the amendments, but he also strayed into the next debate, on the principles behind our amendments. It is difficult to address some of those points at this stage. If I do not address them now, I presume that we will have the opportunity to come back to them when we debate the next group of amendments.

It is fair to say that, generally, cohabitation is within judicial knowledge. As we explained before, judges have an understanding of exactly what we are speaking about when it comes to cohabitation. We have tried to define it to some extent in section 18, which refers to

"a man and a woman who are (or were) living together as if they were husband and wife; or … two persons of the same sex".

We have to some extent specified the situation there.

It would be for the court to consider a wide range of factors. I find it hard to imagine that, in looking at cohabitation, a court would not consider issues such as whether there were any children. I will reflect before stage 3 on whether we need to add anything to define "relationship" more clearly. I am not persuaded that that is the case, but I have an open mind and, if something further needs to be done, it will be done.

This group of amendments contains a range of technical amendments to ensure that other pieces of legislation are consistent with the bill.

Fergus Ewing raised the issue of siblings and friends. I recall that that came up in discussion when we considered the bill at stage 1. We know that there are other types of living arrangements—for example, elderly sisters or adult friends living together in shared accommodation and adults living with younger adult members of the family. Our interest is to have a legal safeguard for families, based primarily on ensuring the child's best interests. I do not think that it would be appropriate for the law to step into the wide range of private living arrangements that adults enter into.

Fergus Ewing also spoke about the duration of a cohabitation. Our intention is to create legal safeguards for the protection of cohabitants in long-standing and enduring relationships, not to address the issue of short-term cohabitation. He and Bruce McFee mentioned people going out for a date and staying together for one night. We gave careful consideration to whether there should be a qualifying time period. We did not think that anything would be gained by specifying such a period, because it would be arbitrary—the cohabitation could be one day short of a year or one day beyond a year. The qualifying time period would be rigid and unresponsive to individual cases in which people had clearly made a commitment and entered into that commitment in good faith.

Mr McFee: I agree that any qualifying period that could be attached to cohabitation would be arbitrary. You mention the possibility of the period being a year and the length of cohabitation perhaps being a day short of that or a day over it. Do you understand a year to be a long-standing cohabitation? Would a cohabitation of a year meet the criteria as far as the Executive is concerned?

Hugh Henry: It would not be for the Executive to determine whether that is the case; that would be a matter for the courts. We have set out factors, including the duration of the relationship, to which the court should have regard. A series of factors will have to be taken into account, but it would be inappropriate for me to say whether an appropriate period was a year or a day short of a year. The court needs to consider all the circumstances. That is exactly why we have not put a time limit in the bill.

The issue of interdependence was also raised. As I explained, amendment 47 is a technical amendment, which we think better reflects our policy intention and better describes what is intended. We have lodged amendment 47 because we think that it is an improvement on the current provision in the bill.

I will consider the issue that the convener raised about relationships. Fergus Ewing raises much bigger and more fundamental issues, which we will come to when we consider the next group of amendments.

I think that the amendments in this group are consistent with everything that has been discussed and that the committee has agreed. We are not attempting fundamentally to redefine what we have done. I intend to press my amendments.

Fergus Ewing: Would it be in order to ask the minister a question, convener?

The Convener: Yes, if you just hold on. Bruce McFee may ask a question first.

Mr McFee: I hear what the minister says. However, the Executive has made it clear that, if someone is going to make a claim under the bill, they must do so within a year of the end of the cohabitation. The minister also said that his intention is to provide those rights not to people who are in short-term cohabitation, but to those who are in enduring and long-term cohabitation relationships. In the Executive's mind, is one year a long enough term of cohabitation to acquire those rights? I am asking not whether the court will agree with the Executive but what the Executive

considered a long-term relationship to be when it drafted the bill.

Hugh Henry: I explained that, for good reason, we did not have a time limit. Bruce McFee is asking whether I consider a year to be a sufficient time. For some couples and relationships a year would be a sufficient time, whereas for others it might not be. I do not see the point of putting on record on behalf of the Executive what I might consider to constitute a long-term relationship without knowing all the factors. One relationship might be totally different from another. In some cases, a year might be an appropriate time limit; in others, it might not be.

The Convener: Is that the point that you said that you would reflect on?

Hugh Henry: You asked about the definition of a relationship and what might be taken into account in deciding whether something constituted a relationship. I think that we have sufficient safeguards, but I will consider that further.

Fergus Ewing: The minister said that the intention is that the cohabitation rights will apply only when there has been a long-standing, enduring relationship. I agree that, if we have such rights, that should certainly be the case; they should not apply to those who do not have a long-standing or enduring relationship. However, he also said that any time limit would be arbitrary. Leaving to one side the question whether that would be right or wrong, might there be a third way? Obviously, I rather hate suggesting that, but a third way could be to provide that no relationship that was less than a specified period—let us say a year—would be regarded as sufficient to establish the status of cohabitants; there would be a presumption that no relationship in which the period of cohabitation was less than a year would acquire the rights of cohabitation.

Of course, the use of a presumption in law is common and is appropriate where there are circumstances in which that presumption can be rebutted. I think that that would cater for the objection that the minister voiced—which may be valid—that a set period would be arbitrary. I do not expect the minister to give an opinion on my suggestion just now, but I would be grateful if he would reflect on it and come back to the issue at stage 3.

The Convener: Minister, do you want to respond to that point now or would you like to hear what issues other members want to raise before responding?

Hugh Henry: On the point that Fergus Ewing raises, there could be particular problems when, for example, one party in a relationship dies before a particular period is out, even though there might have been an established, identified and accepted relationship. I certainly would not want to give a commitment on the hoof on the basis of the discussion that we have had. If Fergus Ewing lodges an amendment on the subject at stage 3, we will consider it carefully.

12:30

Margaret Mitchell: I merely seek clarification. When we took evidence, I understood that the minister's position was not to seek a timescale for cohabitation because the focus would be on evidence of commitment to a joint life. In other words, the couple should demonstrate that they did not have a passing relationship. Perhaps that addresses Fergus Ewing's point.

Hugh Henry: Margaret Mitchell is correct—that is exactly the intention.

The Convener: I will finish our consideration of this group of amendments. I realise that, if certain rights are provided under certain circumstances, other potential rights are sometimes lost as a result. However, the issue of certainty worries me a wee bit. I am concerned that, if a person is living with someone but is not sure whether the relationship is long term, they might not know whether they have any legal obligation to the other person at that point.

At no stage did the committee discuss whether a minimum timescale should be required—we did not go there, although that might be one approach to the situation. Indeed, I wrote to the minister about the question of certainty. Someone who has been in a relationship for a year might not know whether they have a legal obligation to the other person. Perhaps the Executive intends that courts should just build up case law as they see fit and we will wait to see how that progresses.

Hugh Henry: We are not talking about something that would automatically apply in law; the person would need to go to court. You describe circumstances in which a person would not be sure about their legal status, but that person would be asking the court to determine that. We are describing circumstances that a court might take into consideration when making a determination. If a person had some uncertainty about their legal status, it would—as with any other uncertainty about legal status—be a matter for the courts rather than for the individual to determine.

The Convener: But they cannot test their legal status in court—or can they? If a couple were in a relationship that had been going on for a year, but they were not sure how long the relationship might last, they would not go to court to ask its view on whether they had legal obligations to each other. They could test that only if one party left or died.

I am just laying this down for reflection. The provisions leave us with the scenario that I described—someone in a relationship for a year does not know whether the law enforces obligations on them and will not know the answer until such time as something happens. We are finding some uncertainty in the law.

Hugh Henry: There is no uncertainty. I would not want the courts to be used as marriage counsellors to help people to resolve whether their relationship will continue. The courts would make a decision when a relationship broke down and there was a dispute between the two parties about their responsibility or liability to each other. I presume that they would seek legal advice at that point. However, that would not be appropriate for two people who were thinking, "Well, we've been together for a year. We don't know whether we should stay together—let's go to court to determine our legal relationship." That is not what is intended. What would be the case here—

The Convener: I am not suggesting that. I am simply making the point that a couple in a cohabiting relationship do not know at any point their legal obligations to one another, because we do not know what the law is. For married couples, the current law is clear. At the moment, there are few financial provisions for cohabiting couples. We are providing a set of rules that will create uncertainty for some people who live together but do not know what their legal obligations are. Is that not fair to say?

Hugh Henry: I accept that we are doing something that creates a degree of uncertainty. However, we are not creating something that is exactly the same as marriage; we are not creating a new status in that respect. I accept that there will continue to be a degree of uncertainty, but we are trying to introduce a greater degree of certainty and protection for people who are in a cohabiting relationship, which is not the same as marriage. We are attempting to provide limited financial redress on a presumptive basis, rather than having any legal condition apply. Therefore, the circumstances that you describe could arise. That could be resolved with certainty only if we determined that we were going to give cohabitation exactly the same status as marriage, which we have decided not to do.

Amendment 45 agreed to.

Amendment 46 moved—[Hugh Henry].

The Convener: The question is, that amendment 46 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Glen, Marlyn (North East Scotland) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Mitchell, Margaret (Central Scotland) (Con)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Pringle, Mike (Edinburgh South) (LD)

AGAINST

McFee, Mr Bruce (West of Scotland) (SNP)
Stevenson, Stewart (Banff and Buchan) (SNP)

The Convener: The result of the division is: For 5, Against 2, Abstentions 0.

Amendment 46 agreed to.

Amendment 47 moved—[Hugh Henry].

The Convener: The question is, that amendment 47 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

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AGAINST

McFee, Mr Bruce (West of Scotland) (SNP)
Stevenson, Stewart (Banff and Buchan) (SNP)

The Convener: The result of the division is: For 5, Against 2, Abstentions 0.

Amendment 47 agreed to.

The Convener: We are about to come to Brian Adam's amendment 34, on which I think that there might be a lot of debate. I know that Brian Adam has been waiting a long time to speak to his amendment, but I have said that we will finish the meeting at 1 o'clock, as the Parliament is meeting at 2 o'clock and we still have another item of business to take. I think that we should stop now, because I want an opportunity to discuss fully Brian Adam's amendment, which I do not think that we will get today. Is that okay with you, Brian?

Brian Adam (Aberdeen North) (SNP): That is all right. See you next week.

The Convener: We will stop there and pick up on Brian Adam's amendment 34 at next week's meeting.

Subordinate Legislation

Victim Statements (Prescribed Courts) (Scotland) Revocation Order 2005 (draft)

12:38

The Convener: Item 2 is subordinate legislation. I refer members to the note by the clerk on the draft Victim Statements (Prescribed Courts) (Scotland) Revocation Order 2005. I invite Hugh Henry to speak to motion S2M-3523.

Hugh Henry: Just over two years ago—in October 2003—I appeared before the committee when it debated the Victim Statements (Prescribed Courts) (Scotland) Order 2003, which we are now seeking to revoke. I explained that the Criminal Justice (Scotland) Act 2003 introduced a new right for victims to make a written statement to the court about the crime's impact on them. The statements were not aimed at eroding the rights of the accused; instead, the intention was to bring a better balance to a system in which victims sometimes feel alienated and do not have the right to tell the court in their own words how the crime has affected them.

Victim statements have been an important innovation, which I said that we would pilot for two years. It is vital that we test the procedures, because we need to be convinced that they will work before we consider the merits of any wider application of the scheme. The two-year pilot will end on 25 November of this year and the evaluation will be completed by the end of April 2006. It is too early to say what the outcome of the evaluation will be. Once we have reflected on the evaluation, we can decide whether and how to roll out the scheme.

The pilot covered Edinburgh sheriff court, the High Court, the sheriff courts in Kilmarnock and Ayr and the High Court on circuit in Kilmarnock. The order that is before us seeks to revoke the order that prescribed the courts in which victim statements have been piloted. The effect of the revocation order is that victims will no longer acquire the right to make a statement before a court.

I should mention that the Victim Statements (Prescribed Offences) (Scotland) Revocation Order 2005 (SSI 2005/526), which the committee is also considering today, will mean that from 25 November there will be no offences that would give a victim the right to make a victim statement. From that date, no one will acquire the right to make such a statement.

I should also mention that the Subordinate Legislation Committee has commented on the explanatory notes to each order and that we have responded to it. If and when the scheme is rolled out nationally, there will be an opportunity to debate an order that prescribes the courts that are to be involved in a national scheme.

The orders will not take away the right of victims to make a statement if they will have acquired that right before 25 November. Victims who will have acquired that right up to and including 24 November will still be able to make a statement if they wish to do so. I believe that that is the right thing to do. It would be unfair to remove the right to make a statement simply because sentencing in a particular case occurred after the pilot had ended. We are in the process of agreeing with Victim Support Scotland and the Crown Office and Procurator Fiscal Service the resources that will be required to support those victims who are already in the scheme and to ensure that they are not disadvantaged by the end of the pilot.

I move,

That the Justice 1 Committee recommends that the draft Victim Statements (Prescribed Courts) (Scotland) Revocation Order 2005 be approved.

Stewart Stevenson: I am uncomfortable about your ending the facility to make victim statements. Although I acknowledge that you may wish, quite properly, to bring an orderly conclusion to the investigation into what has happened during the two-year pilot, you have not suggested that there are sufficient difficulties to prevent its continuation pro tem, which would be my preference. It would be helpful to get an indication of whether you think that, when the scheme achieves its final form, it will be sufficiently different to justify bringing the present version to a close now—although I recognise that you are suggesting that the scheme may come back in six months' time. Will you share with us whether any particular difficulties have been experienced with the pilot so far that would justify denying victims in the courts in which it is operating the continuing benefit of what I regarded at the time—and still regard—to be a valuable change to the law?

Mr McFee: My points are along similar lines. I understand why the Executive wanted to trial the scheme using a pilot, but I would like an indication of how long the minister thinks the evaluation will take. Will it take the six-month period that was mentioned? I am extremely uncomfortable about the fact that a scheme that was trumpeted from the rooftops will end up being revoked before the evaluation has taken place. I rather suspect that that might be regarded as a retrograde step and that it would send out the wrong message. If the evaluation will take six months, I do not think that there is an argument for revoking the victim statement scheme as it stands. If, at the end of the evaluation period, the Parliament was of a mind to amend or revoke the scheme because it had not

achieved what the Parliament believed that it should have achieved, it would be fair enough to take such a decision.

Hugh Henry: Does Bruce McFee know how well the scheme has worked?

Mr McFee: Well, minister, I could ask you the same question.

Hugh Henry: Right—and I will answer it.

Mr McFee: It would have been useful if you had done so during your remarks.

Hugh Henry: I did.

12:45

Mr McFee: If you are saying that the scheme is not worth anything and that it should be revoked now, that suggests that a decision has been taken before the evaluation has been made. I want to hear more detail on the matter.

The Convener: I, too, want to hear what the minister has to say on that matter, but I should say that I certainly welcome the Executive's cautious approach. I remember the debate on victim statements. They seemed like a good idea, but the forthcoming analysis of the scheme's value needs to be examined seriously. For example, there is the question of being fair to the accused, whereas the victim might doubt a statement's value if references that are considered prejudicial have to be struck from it. Moreover, Scottish Women's Aid expressed concern about victim statements because, in some cases, victims might later retract what they said. The whole process is not as straightforward as we thought at first. I am very aware of what was said in the previous debate on the matter and recall that, at the time, the committee expressed some reservations about it. If the Executive is saying today that it is taking a cautious approach, I think that that is entirely in tune with our discussions two years ago.

Hugh Henry: When I asked Bruce McFee whether he knew how well the scheme had worked, he said no. That exemplifies why we introduced a pilot—we wanted to see whether it would work—and why it is right to evaluate it. Bruce McFee and Stewart Stevenson have asked us to continue—indeed, almost to mainstream—a project that was regarded only as a pilot and to decide on its effectiveness ahead of any analysis of the evaluation. One would be right to ask about the point of introducing any pilot if it was not to be concluded and then evaluated. We would be as well mainstreaming it. When we put the matter before the Parliament, we assured it and the wider public that the scheme was only a pilot. We are doing the responsible thing.

Stewart Stevenson: I do not want to make a mountain out of a molehill; I just want to clarify to the minister where I am coming from. Has he taken a preliminary view on whether, on balance, victim statements are a good thing? If that is his preliminary conclusion, does he think that, on balance, it might be better to allow the measure to continue in its present form, even though the period that he will analyse and report on in depth is shortly to end? That is my simple point; I am not trying to persuade him to adopt any conclusion or other. I just hope that he can help us to understand his thinking.

Hugh Henry: It is too early to take such a preliminary view. People expressed serious concerns when we introduced the measure and it is right for us to pause to consider what has happened since. I do not want to pre-empt anything and I assure Bruce McFee that we have not made any decisions on the matter. However, a decision can go two ways. If we decide on the balance of evidence that the approach is not right, I do not want then to end up with some messy process in which people have been given the right to make a statement not as part of a pilot project but because we have suggested that it is the right thing to do. Why would we not do the same thing across the country? We introduced a pilot for a particular reason; now that it has come to an end, we need to evaluate it. We assured the Parliament that the scheme would be carried out in that way and we are simply taking steps to ensure that we go forward on the basis of that commitment.

Margaret Mitchell: I am content with that explanation, minister. It is the sensible way forward.

Hugh Henry: Thank you.

The Convener: We are required to report to the Parliament on the order. As members have no further comments, I will put the question, which is, that motion S2M-3523 be agreed to.

Motion agreed to,

That the Justice 1 Committee recommends that the draft Victim Statements (Prescribed Courts) (Scotland) Revocation Order 2005 be approved.

The Convener: The deadline for publication of the report is Monday 28 November 2005. However, I take it that members are content with what the minister has said today.

Members *indicated agreement*.

Victim Statements (Prescribed Offences) (Scotland) Revocation Order 2005 (SSI 2005/526)

The Convener: I refer members to the paper that the clerk has prepared on this negative instrument. Are members happy to note the order?

Members *indicated agreement*.

The Convener: With that, I thank the minister for his attendance today.

That brings us to the end of our business. I remind members that the committee's next meeting is on Wednesday 23 November, when we will deal with stage 5—[*Laughter.*] I have invented a new procedure. We will deal with day 5 of stage 2 of the Family Law (Scotland) Bill. It would be helpful if members could pass on to colleagues the news that the new deadline for lodging amendments is 12 noon on Friday 18 November.

Meeting closed at 12:51.

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