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EDUCATION, LIFELONG LEARNING AND CULTURE COMMITTEE

Wednesday 28 April 2010

Session 3

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EDUCATION, LIFELONG LEARNING AND CULTURE COMMITTEE
12th Meeting 2010, Session 3

CONVENER

*Karen Whitefield (Airdrie and Shotts) (Lab)

DEPUTY CONVENER

*Kenneth Gibson (Cunninghame North) (SNP)

COMMITTEE MEMBERS

*Claire Baker (Mid Scotland and Fife) (Lab)
*Aileen Campbell (South of Scotland) (SNP)
*Ken Macintosh (Eastwood) (Lab)
Christina McKelvie (Central Scotland) (SNP)
*Elizabeth Smith (Mid Scotland and Fife) (Con)
*Margaret Smith (Edinburgh West) (LD)

COMMITTEE SUBSTITUTES

Ted Brocklebank (Mid Scotland and Fife) (Con)
Hugh O'Donnell (Central Scotland) (LD)
Cathy Peattie (Falkirk East) (Lab)
*Dave Thompson (Highlands and Islands) (SNP)

*attended

THE FOLLOWING GAVE EVIDENCE:

Bruce Adamson (Scottish Human Rights Commission)
Margaret Burt (Scottish Safeguarders Association)
Philip Jackson (Scottish Safeguarders Association)
Elizabeth Welsh (Family Law Association)

CLERK TO THE COMMITTEE

Eugene Windsor

LOCATION

Committee Room 1

Scottish Parliament

Education, Lifelong Learning and Culture Committee

Wednesday 28 April 2010

[The Convener *opened the meeting at 10:00*]

Children's Hearings (Scotland) Bill: Stage 1

The Convener (Karen Whitefield): Good morning. I open the 12th meeting of the Education, Lifelong Learning and Culture Committee in 2010. I remind all those present that mobile phones and BlackBerrys should be switched off for the duration of the meeting, as such devices interfere with our sound system.

We have apologies from Christina McKelvie, who is unable to join the committee today. I welcome Dave Thompson, who is her substitute.

Agenda item 1 is the committee's continued consideration of the Children's Hearings (Scotland) Bill. I am pleased to welcome our only panel of witnesses for today. We are joined by Elizabeth Welsh, who is the chair of the Family Law Association; Bruce Adamson, who is the legal officer with the Scottish Human Rights Commission; Margaret Burt, who is the chair of the Scottish Safeguarders Association; and Philip Jackson, who is an executive member of the Scottish Safeguarders Association. We will move straight on to questions.

The entitlement to legal aid will change slightly under the bill. Some concerns have been raised not about access to legal aid but about a growing legalisation of the children's hearings system. I am keen to learn the witnesses' views on whether that is likely and what they think of the proposals on access to legal aid for families and relevant persons.

Elizabeth Welsh (Family Law Association): As I am the chair of an organisation of lawyers, I take on board the suggestion that we might be partly responsible for the legalisation of the children's hearings system. However, our association's view is that, in respect of children and relevant persons—our members represent both at hearings and in court—there is a fundamental requirement for legal advice on the interpretation of grounds of referral, the procedure that takes place and the options that may be taken by a hearing or a court if proceedings continue there.

The Court of Session and the European Court of Human Rights talk about effective participation in such proceedings. I see that Professor Norrie is here and I acknowledge what he wrote recently on effective participation in the hearings proceedings. In his words,

"lawyers are trained to act as procedural watchdogs, and to articulate the points of view of those whom they represent."

That is a fundamental requirement for full participation in the system.

On the whole, if lawyers represent relevant persons, they do it on a pro bono basis because they are entitled to legal aid only if they are appointed formally as legal representatives. There is no legal advice and assistance cover for attendance at children's hearings and many of us go along on the basis that we are representing clients who would simply sink in a children's hearing. We represent people who are often inarticulate and struggle to cope with parenting. The question has to be asked how they would cope with a hearing, which is not dissimilar to this committee meeting. There will be a reporter, a social worker, possibly a support care worker, a foster parent and somebody from the school. The relevant person, perhaps the parent of the child concerned, goes into the room and is faced with a range of people who are professionally qualified and articulate and are dealing with a report, perhaps containing a recommendation from a social worker, that the relevant person may strongly object to. They may feel that the report contains factual inaccuracies or they may simply not understand what is being asked of them. There may be issues about the kind of support they have had, compared with what the support plan should have been. To be able to face that room and articulate those concerns is a major challenge, and it is important thet people should have advocacy support for that.

That is aside from all the legal technicalities that arise. Children's hearings proceedings are already legalised. They are very difficult to understand. The legislation and the case law are difficult. There are procedural technicalities about what the reporter and the hearing can and cannot do. If lawyers are there—and I accept the description of us as "procedural watchdogs"—people tend to be on their toes and to make sure that the procedure they follow is right. The procedural rules have been set down for the protection and smooth running of the system, which is geared to the protection of children, so it is important that those rules are complied with.

I do not accept that we are responsible for legalising the system. It is a law-based system that is very carefully monitored. Legislation which allows the state to interfere in family life should be very carefully written and very carefully used in practice. We are part of the process to ensure that it works properly. We are not there to be

obstructive. I accept that there are lawyers who take a different view and tend to be obstructive, but I suggest that they are very much in the minority—they are certainly not members of our association. We go into hearings with a view to facilitating the process but making sure that it works properly from the point of view of the relevant person or the child, whichever we are representing.

Bruce Adamson (Scottish Human Rights Commission): The Scottish Human Rights Commission's role is to promote human rights in Scotland. I can identify with a great deal of what Elizabeth Welsh has said. A useful starting point is that the children's hearings system relies heavily on the United Nations Convention on the Rights of the Child and the European convention on human rights. Those twin pillars are currently set out in the Children (Scotland) Act 1995 and there is a commitment to retain those kinds of principles.

Children and relevant persons have always had the right to legal representation, but this issue is about when state-funded legal representation is necessary. To comply with article 6 of the European convention on human rights, which guarantees a fair hearing, it is often necessary to have a lawyer in complex legal situations or to ensure effective participation in the type of situation that we have heard about. Article 6 does not mean that we need a lawyer in every case and it is certainly not the norm that there would be a lawyer in every case in the children's hearings system. The procedures of the children's hearings system respect article 6 in a great many ways. The European Court of Human Rights has looked at the hearings system in the past and has said that it is not an adversarial model, but that it is legitimate that it is not. It is a legitimate and fair hearings system. It is an impartial and independent tribunal, it is participative, there is full engagement and it is a welfare-based system. Those things are all very much in compliance with the right to a fair hearing, as set out in article 6.

The provision of things such as advocacy to allow a child to participate is very useful. We need to look at what needs to be provided to ensure procedural fairness. However, exactly when a lawyer is necessary will always depend on the situation. The necessary involvement of lawyers can be a great benefit to the system. It can help family members to come to the right decision in the best interests of the child. What is important is that there is a proper code of practice so that the lawyers who are involved in the hearings system buy into the system, operate within its framework and values and the Kilbrandon principles and have a strong awareness of the UN Convention on the Rights of the Child.

This code of practice will go a long way towards ensuring that, when a lawyer is involved in the hearings system, he or she contributes positively to it.

Margaret Burt (Scottish Safeguarders Association): I do not disagree with my colleagues. People should always have legal representation when necessary. However, my experience of the hearings system is that solicitors at hearings sometimes cut across the process, which is interactive and dynamic and involves communicating between people.

The panel chair's responsibility is to ensure that everyone—not just parents, but the child—has the opportunity to participate. Sadly, my experience is of solicitors who are not trained in understanding what hearings are about. Solicitors take instructions from clients before they enter hearings. Although discussion at hearings might mean that clients shift their view slightly, solicitors sometimes continue to make submissions as instructed and ask not to be interrupted while making their submissions, to ensure that their clients' views are heard. I am concerned about how we protect the fact that clients' views might change throughout a hearing. In his evidence, Ian Hart expressed concern that adversarial elements might be introduced.

People need to be represented to establish grounds in court and they need legal representation for appeals and legal proceedings. They might need advice before hearings about accepting grounds. Other people have talked about children accepting grounds that they do not necessarily understand. Serious discussion is needed about what introducing solicitors into hearings would do. The association advises caution about making hearings too legalised. I do not know whether Philip Jackson agrees.

Philip Jackson (Scottish Safeguarders Association): I agree with Margaret Burt. It is difficult to see how the situation can be rolled back, given how far case law and the development of representation in hearings have gone. However, when one thinks back to the original concept of children's hearings—I can think back almost to their beginning—the idea was that the legalistic bits would be sorted out in court as necessary and that the children's hearing would dispose of the case by an informal discussion around the table in which everyone was encouraged to speak and play their part. We have perhaps not been as vigilant as we should have been about ensuring that panel members are as able to achieve that as we would like them to be.

Margaret Burt described the problem of lawyers attending hearings, which is that the hearing is a court to them—it has procedures. If they are the

watchdogs of procedure, that tends to make hearings a little flatter than they should be.

I will mention in passing an ancillary issue. Even with legal aid, unfairness is built in for children who are too young or who are of insufficient ability to instruct a solicitor. If representation is the way in which we are going, are such children to be left unrepresented? That leaps forward to questions about safeguarders, who play a part in that situation. We can also play a significant part in ensuring that the views of older and more articulate children are presented.

The Convener: We will talk about safeguarders shortly, but we will stay on legalisation of the hearings system and legal aid for now. Ultimately, a children's hearing is a tribunal so, by its nature, it has legal aspects. I accept Elizabeth Welsh's point that checks and balances are needed to ensure that the law is adhered to and that nobody is disadvantaged by an inaccurate or inappropriate interpretation of the law. However, there are quite considerable concerns that, instead of the voices of children and agencies that want to represent the best interests of children being listened to, they are increasingly being sidelined by legalistic debates and point scoring, which would not in any way be in the interests of the children whom panel members are considering. Bruce Adamson mentioned how vital the code of conduct will be to the process. Will the code of conduct be able to guarantee that the necessary safeguards exist to ensure that the interests of the children who come in front of panels are paramount?

10:15

Bruce Adamson: It is hard to predict what will happen without seeing the code of conduct, but I hope that that will be the case. A key aspect will be ensuring that panel members are trained in what the code involves and in how the chair of a children's hearing can manage the hearing and ensure that it is fair and does not become overly adversarial. The key point is that lawyers are definitely necessary in some situations in which the loss of liberty and secure accommodation authorisation are being talked about. There can be complex legal tests, and it is essential that children are represented in such situations. A fair hearing needs effective participation, and a lawyer is necessary in cases in which a person would otherwise struggle to engage with the complexity of the hearings system, even with its procedures, and even with support. In other cases, perhaps that necessity is less clear. However, I believe that, with sufficient training, the chair of a children's hearing will be able to manage the situation, and lawyers who comply with the code of practice and understand the principles of the children's hearings system, the rights of the child and our human rights framework should be able to operate within those principles.

Elizabeth Welsh: Many members of the Family Law Association, including me, are safeguarders, so we understand the concerns that exist. We are in favour of a code of practice because we recognise that children's hearings are not courts. I would be unhappy to think that a hearing was treated in the same way as a court, as that would be wholly inappropriate. I represent members of the association who do a lot of work in the area, and they very much support the ethos of hearings. However, it is a matter of representing clients' interests to ensure that the hearing works properly and that children's rights are at the forefront of it. It is not about point scoring, certainly for members of our association.

We are happy about the idea of a code of practice, but we have said in our submission that we are concerned that it has been suggested that the Scottish Legal Aid Board should be responsible in some way for drawing it up. We think that that is wholly inappropriate, as there will have to be a fine balancing act in the code. I endorse what Bruce Adamson said about training and the responsibility that we bear as solicitors when we represent clients in hearings, whether they are relevant persons or children. It is a question of knowing exactly what the hearings system is about and the distinction between hearing procedures and court procedures. We offer training to our members on working with and representing children, and we would be very much in favour of having input into the code of practice and ensuring that it properly reflects the fine line that must be drawn between representing a client's interests and ensuring that one does not obstruct the hearing in achieving its purpose of coming to the right decision about a child.

Margaret Burt: On representing clients' interests, one of our difficulties is that, like our colleagues, we do not know what the code of practice will look like. Representing a client's interests is not necessarily the same as helping that person to participate in the hearings process. That is my difficulty. Representing clients' interests might involve ensuring that they have a role in the hearing, but someone has to be responsible for helping people who are less articulate participate in these kind of public forums. I am not necessarily convinced that providing a legal representative is the best way forward.

I am sad to say that Philip Jackson and I both predate the hearings system. In the early days, people assumed that parents would represent children and that social workers and other professionals would represent the children's interests. By 1975, it was quite clear that adults in the system represented their own interests, so

safeguarders—another layer of adults—were introduced to ensure that people's interests were protected. Having legal representation at hearings would introduce yet another layer. We need to be clear that it will not cut across what is fundamental and we need to get back to young people—or their parents—being able to participate in the decisions that are being made about them. I cannot see how introducing legal representation in the hearings system will get us back to where we started 38 years ago, when we had a dynamic, interactive forum in which people looked to make the best decisions that they could for children.

That perhaps does not answer your question, but I think that we need to be clear about the purpose of a children's hearing.

The Convener: That point was certainly made to the committee last year when the legislation was changed. There is considerable, although perhaps not universal, support for that position.

It is difficult for you to judge the code of practice when you do not have it in front of you. However, given that you are all experts in the field, what would you like to see in the code of conduct? What must be there and what could be there? Those might be two different things.

Elizabeth Welsh has raised concerns about who should write the code of conduct. Do you have a view on how the Government should consult people and involve them in the preparation of the code, so that it gives people the reassurance that they require?

Elizabeth Welsh: It is fundamental to recognise that the children's hearings system is different from a court system. What we are talking about is a code of practice for lawyers who are representing their clients. I understand what Margaret Burt said, but we are where we are and it has been recognised that parents need representation in the hearings much of the time, as do children.

I would not like to start by making a list of the things that have to be in the code of conduct, because it will have to be a carefully fine-tuned document. It will have to allow lawyers to represent their clients in the way that they should, which is by taking instructions and advocating for them. We are advocates—we put forward our clients' position. It is a question of doing that appropriately, not obstructively. I am not sure that the code will be a tick-box list that says, "Do this, but don't do that." It would be much more helpful to have requirements for the experience and training of those who appear at hearings.

We are talking about publicly funded legal representation because, obviously, a client will still be able to have their own choice of solicitor. If we are talking about access to public funds being determined by a lawyer's inclusion on a list of authorised practitioners who qualify under the code of conduct or who have signed up to it, the issues will be their training and good practice. That has not been offered previously; we have trained ourselves as we have gone along. I accept that there will be models of very poor practice in hearings—one hears worrying tales.

I do not know why it is stated that having legal representation at hearings is an increasing trend. I do not know whether any research has determined that there is increasing representation at hearings and has looked at the quality of that representation. It is a question of assessing the quality.

When I first started going to hearings, there was a sharp intake of breath because a lawyer was present—that presence was not welcomed. Partly through my safeguarding work, I am appointed by children's hearings and I attend hearings as a safeguarder. The members and social workers who attend hearings as professionals know that I work towards the interests of the child. I do not take one head off and put a different head on when I represent a client. The members I represent who appear in hearings are able to fine tune what they do in that way; we know that we are in a different place.

When I go into a hearing, whether as a safeguarder or representing a relevant person or a child, I do not get the reaction that I once got initially, because people know that I am not obstructive. I am not talking myself up here; I am talking up my members. Much of the representation in children's hearings is positive and beneficial. I have had that reaction from children's hearings, because I have been able to articulate a point of view on behalf of my client and ask questions that he or she was unable to do. That has assisted the hearing in identifying what the issues are and either meeting the concerns or taking them forward and deciding that a decision against those wishes is going to be taken that can perhaps be challenged in a court, if that is the view of the relevant person. However, much of the representation is welcomed and is not negative.

Philip Jackson: Apart from dealing with training and trying to ensure that lawyers attending are in sympathy with the aims of the system, the essential aim of any code of practice should be to ensure that involvement is not adversarial and that no one is trying to win a case or score points; that it is an inquisitorial process in which a child's situation is being investigated and the child, by the fact that grounds for referral have been accepted or established, is recognised to be a child who may be in need of compulsory measures; and that the object is to determine whether measures are necessary and, if so, what they should be. An

essential element is that there should not be an adversarial process.

Bruce Adamson: I agree with that. It will not come as a surprise to committee members that the SHRC's view is that any code of practice and training needs to include a good understanding of human rights, in terms of both the United Nations Convention on the Rights of the Child and the European convention on human rights. As we all know, there have been lawyers in the children's hearings system for a long time, and there is an entitlement for a relevant person or a competent child to instruct representation. Therefore, what we are talking about here are those situations in which it would be a breach of a person's entitlement to a fair hearing not to have provision for state-funded legal representation. We are talking about cases involving complex legal issues, certainly those relating to loss of liberty and secure accommodation authorisation, and situations where someone might not be able to participate effectively in the hearing. The code of practice should focus on the fact that the lawyer's role is to represent the client in a way that ensures that the client can participate in the hearing and understand that they can have their view represented.

I am a panel member who happens to be a lawyer, so I have a bit of sympathy for the legal position, but I also understand fellow panel members' concerns about lawyers. In the hearings system, where the purpose is to ensure effective participation, I think that necessary legal representation adds something as well as protecting rights. Reflecting on my earlier points, I think that it is important that panel members are trained so that they are empowered to know that lawyers are not a kind of scary thing that will use legalese and change the nature of the hearings system, and that the children's panel and the members of the hearing run the hearing. The chair should be confident enough to challenge lawyers who act in a way that is inappropriate for a hearing. There is probably some work to do with panel members to ensure that they are empowered to do that.

10:30

The Convener: Finally, will the eligibility criteria for legal aid, which are based on reasonableness and the best interests of the child, ensure appropriate access?

Elizabeth Welsh: The test is perfectly sensible, but the concern that we have expressed is that it would be for the Scottish Legal Aid boardd to determine what is in the best interests of the child, which it is not in a position to do and for which it is not the appropriate judge. If the test is included, careful consideration must be given to how it will be carried out. At present, legal aid for court proceedings is determined by the sheriff, so I suggest that sheriffs are in a position to make such judgments, on the basis of information. It is not appropriate for the judgment to be made at administrative level. I do not want to sound negative about SLAB, but if it was to do that job, careful training would be required. Given the size of the organisation, the measure would bring difficulties.

The Convener: So, the Family Law Association would prefer sheriffs to decide what is in the best interests of the child?

Elizabeth Welsh: Yes.

The Convener: As there are no other views on that, we will move on. The next question is from Kenneth Gibson. Sorry—it is from Kenneth Macintosh. There are too many Kens here.

Ken Macintosh (Eastwood) (Lab): You cannot have too many Kens.

I will move us on to the subject of safeguarders and curators. I ask Philip Jackson and Margaret Burt whether the bill is sufficiently clear on the role of safeguarders—for example, on the criteria that are to be used for their appointment—or whether it needs to be expanded.

Margaret Burt: The Scottish Safeguarders Association is happy with most of the sections on safeguarding, because they meet most of the concerns that we raised in the consultation on the system. However, in many ways, the bill will change our role because it will remove our central role of safeguarding the child in the proceedings. Our association believes that, under the functions of the safeguarder as outlined in the bill, we will almost become report writers, which is not what a safeguarder should be.

The term in the existing legislation—

"to safeguard the interests of the child in the proceedings"—

describes a different purpose from becoming yet another person who provides an overview. A safeguarder needs to have an overview, but we are not experts. Some of us are social workers, some are solicitors and some are from other backgrounds. We are not there to provide another assessment, but to ensure that the child's interests are safeguarded. In the bill, that does not appear as one of our functions, but that is where the bill should start.

Philip Jackson: The vagueness in the Children (Scotland) Act 1995, which talks about

"a person to safeguard the interests of the child in the proceedings",

is being narrowed a bit, in theat it seems that the bill will turn safeguarders more clearly into report

providers, as Margaret Burt said. What kind of reports will they provide? At present, safeguarders are asked to do all sorts of things that are beyond our scope and training.

I will quote from some recent reasons for the appointment of a safeguarder. The first was:

"We want the safeguarder ... To establish the truth around the incident which caused the immediate concerns".

One would have to be prosecutor and defence and get the Queen's commission to do that. Another reason was that a safeguarder should

"assess the parenting capacity of all family members (including Gran and sister)",

which would call for a fair amount of social work and other training. A third reason was that the safeguarder should

"assess the impact on [the children] of being removed from the family".

To do that in those terms, one would need to be a qualified psychologist.

It worries me a little that the appointment of a safeguarder is often viewed as being for the purpose of filling in information that is lacking in the existing reports, and information that should have been obtained from other sources. For a safeguarder in that sort of situation, the appropriate way to protect the child's interests throughout the proceedings might be to say that the child has to be referred to a psychologist or whatever.

The way the provisions are framed also worries me and the association because the bill seems to focus on the provision of reports. If what we are expected to do is to be that specific, we are not equipped to provide that.

The bill also seems to detract from another aspect of being a safeguarder, which currently is

"to safeguard the interests of the child in proceedings".

That means that the safeguarder must act in the child's interests, or look after the child's interests in respect of all the participants in the hearing. Children's hearings are wonderful, and I believe in them, but sometimes they can go wrong and sometimes a child gets a very bad time at a hearing. It can be the safeguarder's role to step in and ask the hearing to approach the situation differently, for example. Their role is an active one in the hearing.

On the current situation and Professor Norrie's book, the role of a safeguarder can sometimes be a very simple one—perhaps just to explain to a child the process or the possible grounds for referral. I remember a situation in which a father refused to let his child see the grounds for referral and was not very happy about them being read out at the hearing. The hearing did not really know what to do, so a safeguarder was then appointed to go over the grounds for referral with the child.

I worry that the way in which the new provisions are framed makes them too specific, and that they take a little bit away from the useful vagueness of the current provisions.

Elizabeth Welsh: I very much agree with what Margaret Burt and Philip Jackson have said. The role of safeguarder is difficult to define, but its very flexibility is usually its main benefit to the child. I absolutely agree that there is a tendency to use the safeguarder to fill in gaps in the system. We do see that kind of instruction or rationale being used for appointments, but it is not appropriate.

There is an opportunity in the bill to clarify the role of the safeguarder, but it is not helpful to restrict it in the way that has been proposed.

Bruce Adamson: I agree entirely. Safeguarders are independent people who come in to act in the best interests of the child. That is essential to the operation of a fair hearing. There is some value in the flexibility that exists—of course, those in the Scottish Safeguarders Association are the experts on the matter.

Ken Macintosh: Are the criteria that will be used to appoint safeguarders clear to all our witnesses? Is the difference between a safeguarder, a legal representative and a curator ad litem also clear?

Margaret Burt: We are clear about the differences. The bill says what the functions will be, so the distinction is clear in that respect. The safeguarder is not a sort of advocate or legal rep—even those of us who are legally qualified—and we are certainly not curators, who have a different role. We are clear, and the bill is not confusing regarding expectations.

Ken Macintosh: In what circumstances would a safeguarder, a legal representative or a curator be appointed? From the bill, I am not sure that I am clear about that.

Margaret Burt: Some years ago I was asked to do some work for the Scottish Executive, during which it became clear that some courts favour appointing curators. Sometimes that preference was based on the court's tradition, and sometimes it was based on the fact that if a curator was at the same time jointly appointed as a safeguarder, they might be paid legal aid fees.

In children's hearings proceedings, the sheriff decides whether to appoint a curator. My understanding is that if I were to be appointed as either a curator or a safeguarder, I would look to safeguard the child's interests within the proceedings. The sheriff has the right to decide to appoint a curator.

Ken Macintosh: I want to go back a bit. My understanding from the evidence that we have taken is that there is considerable variation across Scotland. Some areas appoint a lot of safeguarders, and some appoint hardly any. Some appoint a lot of curators, and others appoint legal representatives. Concern has already been raised that a growing number of legal representatives are being appointed. There is a lack of consistency. It is not clear to me who appoints safeguarders. Does the bill spell out when a safeguarder should and should not be appointed? I cannot quite see the grounds on which a safeguarder would be appointed.

Margaret Burt: The bill does not say when a safeguarder cannot be appointed, and reasons do not have to be given for not appointing a safeguarder, even though a hearing has to consider appointing us. The association asked for consideration to be given to that. If a hearing has to consider whether to appoint a safeguarder and it decides not to, it might be useful for it to have to say why not. Hearings cannot appoint curators; that is purely for sheriffs. Sheriffs can appoint safeguarders, as can hearings, and clear criteria are laid down for panel members about when they can ask for legal representation within the hearings system.

Ken Macintosh: So the bill is clear about when legal representation can be appointed—

Margaret Burt: Yes, and there are rules. In 2009—

Ken Macintosh: I am just saying that it is quite clear when legal representatives will be appointed, and about when sheriffs can appoint curators. On what grounds, however, are safeguarders appointed? I cannot work that out. Why would a hearing appoint a safeguarder? What grounds or criteria would it use? How many should they appoint? Where is all that spelled out? I cannot work it out at all.

Elizabeth Welsh: That is not spelled out in the bill. Each hearing has to consider whether or not to appoint a safeguarder. When it is making a decision, the panel will consider that option.

As Philip Jackson said, the hearings can appoint a safeguarder for a range of reasons. Sometimes there is a particular issue, such as a dispute or a question about the child's views, so it might be appropriate to appoint a safeguarder to engage with the child and to build up trust so that they can bring back to the hearing what the child actually thinks about the situation. There might be high conflict within the family, with the child struggling in the middle. There are a range of issues.

It might be that the flexibility of the panel's ability to consider when a safeguarder is necessary is helpful. If panels are struggling with information—if the information is not complete and a lot of questions about care plans or whatever need to be asked of people such as relevant persons or social workers—the safeguarder is a way of obtaining that information.

Ken Macintosh: What I am trying to get at is whether there should be more of that within the bill itself. It is not there at the moment.

Philip Jackson: The interesting thing about safeguarders is that they are there to safeguard the child's interests. The questions are, therefore: What are the child's interests? When are they prejudiced? When might the child need someone to look into that and stand up to give an objective opinion?

Safeguarders are not there to look after the welfare of the child—that is the job of the whole process. They are there to protect the interests of the child, which can—as Elizabeth Welsh said—be manifold. It can be that the child is being forgotten in the process or is simply not being heard. There may be such a dispute with the people who are connected to the child that a little time needs to be taken to find out what the child's position and interests are. What happens at that time very much directs a hearing towards consideration of whether a safeguarder is needed.

10:45

Ken Macintosh: Margaret Burt also talked about variations in practice in the appointment of curators. Apparently, the initial draft of the bill included a section that provided that in order to provide greater consistency, curators should not be appointed instead of safeguarders. Should that provision be reinstated?

Margaret Burt: We supported that section. It was one of the few things that we actually supported in the original bill, although others, perhaps, had a different view. Our view was that, if we need someone to safeguard the child's interests in the proceedings, that should be the safeguarder and the process should be consistent. There is a defined role for the safeguarder in safeguarding the child's interest, and I do not see, whether I am wearing a curator's or safeguarder's hat, that I am any less or more able to do that.

We supported the idea that there would be no choice—if someone was to be appointed, it should be the safeguarder, because it would then be clear what the role is. The roles are slightly different, although they can be interpreted the same way. As I understand it, as a curator I would not necessarily have a right of access to papers, but the practice is that, whether someone is a curator or safeguarder, they get the papers—nobody will try to prevent them from safeguarding a child's interests.

I think that we are right in saying that our association was sorry to see that provision taken out of the bill.

Ken Macintosh: Do the Scottish Human Rights Commission and the Family Law Association agree that there should be more consistency in the appointment of either safeguarders or curators?

Elizabeth Welsh: I would be inclined to agree with Margaret Burt. It seems that practice varies among local authorities and from court to court—there does not seem to be any great rationale for it.

The issue of legal representatives is different and is a matter of when legal aid is made available. Regulations provide for specific circumstances in which they can be appointed, and legally qualified safeguarders are appointed by the panel and through the local authority. Legal representatives for children who are publicly funded in the system are from that specific group.

I do not know whether the committee will address the funding of safeguarders or whether Margaret Burt and Philip Jackson have a view on that, but we addressed it in our submission. There are real concerns in our membership about funding. We have done some research into the payments that are made throughout Scotland. They vary from authority to authority, but they are uniformly low—the average is about £200 per appointment. The figure varies according to the number of children involved and the number of hearings attended, but the basic appointment fee starts at £200 and there is another £200 for attendance at the hearing. That covers all the work that a safeguarder has to do, and I am sure that Margaret Burt and Philip Jackson will agree that it is not reasonable remuneration. The safeguarder will do whatever is necessary, which might involve interviewing a multitude of people, seeing a child several times, speaking to schools, carers and social workers and going through all of the previous reports to get a real feel for the issues. Depending on the question or matter that has led to the appointment of the safeguarder, a lot of investigation can be necessary.

One legally qualified safeguarder did an interesting exercise. He sent off his files to be feed up by his law accountant on a time-and-line basis—basically, to find out what he could have charged for all of the work that he did. He then compared that figure with the amount that he was paid. I can circulate the figures for the six cases. In one, the value of the work was £927 and the amount paid was £177; in another, the value of the work was £358 and the amount paid was £108; in the next, the value was £700 and the amount paid was £138; and, in the worst one, the value of the work was £2,500 and the actual amount paid was £1,000. Not surprisingly, after he had carried out that exercise, he decided not to do safeguarding work.

There is a heavy reliance on safeguarders in the children's hearings system: I am sure that we would all agree on that. Whether the role is flexible or well defined, it tends to be helpful and our work tends to be well recognised. One of the suggestions that we have flagged up and have been advocating for some time is that proper, comprehensive training should be given to safeguarders. Maintaining the panel of safeguarders more formally and nationally, as is proposed in the bill, provides an opportunity to get that right.

Part of what is proposed should reflect the skills, experience and training that safeguarders bring, and it should also provide reasonable remuneration for their work because many work more or less on a pro bono basis. I speak, obviously, with a solicitor's hat on. Solicitors have to earn their keep, but if they take on appointments as safeguarders, they will simply not be able to charge for however many chargeable hours. With the rates at the current level, that means that they are doing the safeguarding work pro bono. That cannot be relied on. We are in a recession and everyone has to look to the bottom line if they are going to continue in business.

There will continue to be quite a squeeze on solicitor safeguarders, certainly. I do not know whether the Scottish Safeguarders Association has a view about that. However, many of the Family Law Association's members do safeguarding work and many of us want to continue to do it. We entirely recognise that it is publicly funded and one has to be realistic about what one can be paid for it, but if we require people to undertake training and be monitored—which is absolutely right—there is another side to the question to be considered.

Margaret Burt: I have a view to express about funding and training, but I am not quite sure whether it would be appropriate.

On funding, I hold my hand up and say that I and our then secretary negotiated the current rates, which were based on an historical situation. When safeguarders were introduced into the system, there was a huge outcry that we were going to be paid at all, because the system was staffed by volunteers. There was a real outcry, as I remember, about the fact we were to be paid £65—£15 of which was taken off because the reporter typed our reports. We then incrementally moved up to a situation in which, in 2003 or 2004, members were rightly asking why they were being paid £85 to do that work. There were huge discrepancies throughout Scotland.

I, the secretary and a representative of the clerk went to the Convention of Scottish Local Authorities and negotiated the current fees. The negotiations were based on consultation of our members about what they wanted. Responses ranged from those who thought that we should still do it for nothing because it was part of the system, to those who thought that we should be paid time and line. However, there was a tranche of members in the middle who wanted to be recognised for the work that they did but did not want to be paid what they would be paid if they were doing it in a professional capacity.

The fees that were then negotiated with the Convention of Scottish Local Authorities took into account matters that they had not taken into account before—additional children and additional work—and clarified what safeguarders were allowed to claim for attendance at court. It is actually a bit of a mess, but we did the best that we could at the time and I thought that we had done quite well.

In 2006, COSLA decided to stop advising local authorities about fees for safeguarders, curators and foster carers. Some authorities continued to increase the fees incrementally, so that the most that a safeguarder will be paid is something like £229 per report, half of which is for attending a hearing. Other authorities have stuck at £214. Already, throughout Scotland, we have a divided view.

I still would not want to be paid time and line. If I, as a safeguarder, want to make a third or fourth visit to a family, I do not want somebody to say that I should not have done it because they are paying me for that time, and ask me whether I can justify it.

I, along with some of our members, still want recognition that we do a worthwhile task. We do not necessarily want to be paid for our time, because we are putting something back into a system that gives us a living in other ways. Equally, I recognise the point that Liz Welsh made. Some of our members say that they really need remuneration that reflects what they do. I do not know whether those comments are helpful.

Ken Macintosh: They are, although there is an extra complication in that some people can claim legal aid, especially under the curator system. A solicitor who is appointed as a curator or safeguarder can claim legal aid in some situations but not in others. The Scottish Legal Aid Board has requested clarification of that point. Would members of the panel like to comment? Local authorities pay safeguarders, but the Scottish Legal Aid Board pays some from the legal aid fund.

Margaret Burt: Local authorities sometimes pay curators. The fees for curators are even lower than those for safeguarders. The fees for curators are about £118 for a joint appointment. I am not legally qualified, so I would not get legal aid to act as a curator.

Ken Macintosh: Am I right in thinking that, although curators get a lower payment, they claim legal aid on top of that?

Margaret Burt: I cannot claim legal aid because I am not legally qualified.

Elizabeth Welsh: There are circumstances in which a curator can claim legal aid and in which a safeguarder can instruct a solicitor to act for them. I am not sure why the Scottish Legal Aid Board is asking for clarification, because it has given us clarification of when it will and will not pay legal aid. It reduced the circumstances in which it would pay legal aid for what a safeguarder does to fairly tight and specific situations. The safeguarder must be providing legal advice and acting with their solicitor's hat on.

Ken Macintosh: Should there still be an overlap? Are there circumstances in which curators or safeguarders should be paid legal aid?

Elizabeth Welsh: The safeguarder can take part in court proceedings, so she can become a party to an action. In those circumstances, she may represent herself, if she feels qualified to do so, or appoint a solicitor to do that. That arrangement must continue, because there will be some circumstances in which non-legally qualified safeguarders, in particular, will want to instruct solicitors to cross-examine witnesses, for example.

Margaret Burt: Practice varies across the country. The Scottish Safeguarders Association understands that, if a safeguarder needs to be legally represented in proceedings, the local authority of whose panel they are a member will meet their legal costs. That happens in some areas. In other areas, people claim and are paid legal aid for the solicitors who represent them. Basically, local authorities should meet safeguarders' legal expenses.

Ken Macintosh: The bill proposes a system of local panels. Are you happy to see the Government provide guidance on the issue? How would you like consistency or national standards on payment, grounds of appointment and so on to be introduced or raised? Did you not originally propose the introduction of a principal safeguarder?

Margaret Burt: No—that suggestion came from the panel chairs.

Ken Macintosh: You wanted a national panel.

Margaret Burt: Our stance has always been that someone at national level should decide whether I am fit for purpose and can serve locally. The only way of having national standards for recruitment, training and monitoring is to have a national panel of safeguarders.

Ken Macintosh: The Government is not going down that road.

Margaret Burt: No. That is why section 30 and what the rules and regulations will say are so crucial. The Scottish Safeguarders Association wants the expectations of safeguarders to be tightly defined. These are not new issues. In 1987 the Scottish Office looked at them, in 1993 Sheriff Kearney chaired a working group that considered them and in 2002 the Scottish Executive looked at them. Twenty-four years on, we still do not have national standards for safeguarders, who are crucial to some of the decisions that are made about our young people.

11:00

Philip Jackson: We remain concerned about matters of accountability, consistency, training and complaints. It is very difficult to work out how to complain about a safeguarder. The association has developed a complaints process, but who will conduct that process? Who has the authority, or even sufficient knowledge, to investigate how a safeguarder has gone about his or her business? The issue of national standards and practices is extremely important to us.

Margaret Burt: The statutory instruments say that it is possible to remove a safeguarder, in consultation with the sheriff principal, if it is decided that the safeguarder is unfit for purpose. However, if we do not have a code of practice, how can it be decided that I am not fit for purpose, unless I do something that amounts to gross misconduct? If I have not been told what to do, how can I be told that I am not fit for purpose?

Over the years for which I have been chair, I can think of two occasions on which people would probably have been removed, but they resigned because people made enough noise in suggesting that they were not fit for purpose. Come the crunch, I am not sure that anyone could have enforced their going. That is what happens. When complaints are raised about safeguarders, sometimes the safeguarder decides not to be a safeguarder any more and sometimes the local authority faffs about for so long that people forget that they have complained and the issue goes away. That is not satisfactory.

Ken Macintosh: I have a final question. Will the bill result in more safeguarders, more legal representatives and more curators?

Elizabeth Welsh: That is very hard to answer because it will remain the duty of the panel to deal with appointments, so I am not sure that anything will change radically from the panel's point of view. I do not necessarily think that any of the bill's provisions will lead to an increase or a decrease in the number of those people.

Ken Macintosh: Will there be any more safeguarders?

Margaret Burt: The number will probably be about the same. Our concern is about how people will view their role, which goes back to the safeguarding of interests, which is not addressed in the bill.

Kenneth Gibson (Cunninghame North) (SNP): The current ground for appealing to the sheriff against a decision of a children's hearing is that the decision is

"not justified in all the circumstances of the case".

Under the bill, the ground for appeal will be that the decision is not justified. In practice, will that change make much difference?

Elizabeth Welsh: It is hard to say. Our view is that the appeal provisions are extremely broad and that they create difficulties. One difficulty, which I think we flagged up, is that the solicitor who is asked to draft the grounds of an appeal is often not present at the hearing. The appeal is about whether the hearing was reasonable in taking the decision that it took on the basis of the information that was before it, so that can be a bit of a difficulty. As I am not an academic, I would not attempt to write a closer definition of the grounds of appeal, but it might be helpful if that were done.

A practical difficulty that we have, and which is not addressed in the bill, is that the appeal is based on the decision as written and the reasons that are given. Those written decisions vary enormously in quality and are, quite frankly, often hard to understand. Some improvement in the quality of decision writing and the provision of better and clearer explanations for decisions would be helpful in focusing appeals.

Kenneth Gibson: Could the bill help with how decisions are laid out?

Elizabeth Welsh: That is probably a training issue as much as anything else.

Kenneth Gibson: Do you think that the new role for sheriffs on appeal, as laid out in the bill, will encourage sheriffs to be more proactive in ensuring outcomes than they have been in the past? If so, would you consider that to be a good thing or a bad thing?

Elizabeth Welsh: I am not sure that I understand the question.

Kenneth Gibson: Would the bill allow sheriffs to be much more proactive in ensuring that the outcomes that they set are achieved?

Elizabeth Welsh: In the current court system, I am not sure that sheriffs are inclined to be proactive or see their role as being proactive. The Gill review recommendations refer to family sheriffs, although if those recommendations were followed, children's hearings matters would be in the remit of district judges, the new tier that the review recommends.

If the Gill review provisions were brought in, we might be talking about proactive sheriffs, because I hope that we would be talking about specialist family sheriffs keeping cases. It might well be possible for them to keep children's hearings cases through their various stages—cases can be in court on any number of occasions at different stages of procedure and to challenge decisions. If the same sheriff kept the case, it could lead to more proactivity in respect of focusing on issues and engaging with the people involved to get a better outcome, which would be one of the benefits of having family sheriffs. As the courts are run now, there is no docketing of sheriffs, so a case can go back and forward to different sheriffs each time that it is called.

Kenneth Gibson: I was going to ask Mr Adamson a specific question, but it looks like he might want to answer that question first.

Bruce Adamson: I want only to agree with that point. Having practised in a jurisdiction that has specialist family court judges, I can see that the difference in outcomes is clear, and the way in which family courts practise and can be more proactive bears consideration, but I agree that it is difficult to predict how sheriffs in the current system would view the proposed changes, and I am not sure whether practice would change.

Kenneth Gibson: The Scottish Government is of the view that if sheriffs have a greater role in the system, it will be more robust in respect of the European convention on human rights. What is your view on that?

Bruce Adamson: The system is pretty robust as it is in respect of the ECHR. The European Court of Human Rights has considered the way in which the hearings system works and has validated it, saying that it is not the kind of adversarial system that you get in the courts, but that that is legitimate. The decisions that we have seen on European convention on human rights grounds have tended to be about quite technical matters, such as improving the system by having legal representation and providing documents, to ensure that the system is fairer where we have missed things. The current system is entirely compliant with the ECHR, in that hearings are fair, impartial and independent and there is an appeal system to a sheriff.

Kenneth Gibson: Do you not see any need for change?

Bruce Adamson: We could look at taking forward the Gill review recommendations on sheriffs' interaction with the hearings system to lead to better outcomes, but the drafting per se is probably not where the change will come. I do not think that there is a huge risk there in terms of being more compliant.

Kenneth Gibson: Would the process be made simpler by stopping appeals direct to the Court of Session without first going to the sheriff principal?

Elizabeth Welsh: I suppose that by definition it would, as it would remove that option.

Kenneth Gibson: Would it be better or worse than the current situation?

Elizabeth Welsh: I am not sure that I have a view on that one way or the other. We want to have a Scotland-wide decision on some issues. For instance, as Bruce Adamson said, some important and difficult legal matters have arisen in hearings proceedings cases. If we go to the Court of Session, we get a decision that everybody is bound by, which is helpful.

Bruce Adamson: I absolutely agree. The only issue that could come into play in such cases is the length of time that things take. In children's lives, things happen quickly, so any undue delay in an appeal could have a disproportionate effect on their lives. There is not necessarily undue delay at the moment, but my main consideration would be the effect of any undue delay.

Kenneth Gibson: In terms of the appeals process, should anything be included in the bill that is not included at the moment, or is there anything in the bill that is superfluous?

Bruce Adamson: Perhaps the only issue is the right that the bill provides to appeal the implementation of an authorisation of secure accommodation, which I know previous witnesses have highlighted. In addition to the right to appeal the decision of a children's hearing to authorise the use of secure accommodation, the additional decision-making process whereby a secure panel decides how that authorisation should be implemented will also be subject to a right of appeal under the bill. Like previous witnesses, we think that some reflection is needed on whether that is strictly necessary. It is probably questionable whether it is necessary to provide an additional right of appeal over the implementation—which is an administrative decision—of a secure authorisation.

Interestingly, although it is difficult to see the need for an extra right of appeal over the implementation of a children's hearing's authorisation of the use of secure accommodation when it is possible to appeal the original authorisation, such an additional right of appeal would allow for appeals in cases in which the panel's decision to authorise the use of secure accommodation was not implemented. There could be situations in which a child or relevant person felt that the decision not to place the child in secure accommodation was the wrong decision. I am not sure whether that adds anything, but that is an interesting point.

The Convener: Aileen Campbell has some questions on secure accommodation that it might be appropriate to ask at this point.

Aileen Campbell (South of Scotland) (SNP): There were concerns that the current situation might not adhere to ECHR requirements because the decision on whether to place a child in secure accommodation is not taken by an "independent and impartial tribunal". Do you think that the ECHR requirements did not apply in the first place and therefore did not need to be addressed in the bill? Are the ECHR requirements adequately satisfied in the bill? Perhaps other members of the panel will want to comment.

Bruce Adamson: Given that the children's panel, which is an independent and impartial tribunal, makes the decision to authorise secure accommodation, it is essential that legal representation and rights of appeal are available in those cases. That will ensure that there is ECHR compliance.

In our view, the implementation of such authorisations is an administrative decision that does not necessarily need a right of appeal. As relevant persons and the child would have the right to appeal the decision to authorise secure accommodation, the normal appeal practice would be to appeal the children's hearing's authorisation decision. Adding an additional right of appeal over the secure panel's implementation of that authorisation does not seem to be strictly necessary. However, an interesting point, as I said, is that such an additional right of appeal would allow a relevant person to challenge a decision not to implement an authorisation decision. Therefore, the additional right of appeal might add something. In our view, the current system is compliant.

Aileen Campbell: So the provisions are ECHR compatible.

A number of complex processes need to be gone through before a child can be placed in secure accommodation, but there is concern about the fact that the removal of a child from secure accommodation requires the decision of only a chief social worker. Do you have any comments on whether the process of removing a child from secure accommodation is too simple?

Bruce Adamson: Yes, there are concerns about that. The process would be appealable by the relevant person or by the child. It might be difficult to think of situations in which a child would argue to be kept in secure accommodation for a longer period and not be removed, but I know of situations in which that has been the case. However, other witnesses probably have more experience of how that assessment should be made and what safeguards should be placed around that decision.

Aileen Campbell: So there is nothing that you would like to be put in the bill, beyond that.

Bruce Adamson: That is correct.

11:15

Aileen Campbell: There have been related concerns about movement and restriction orders. The Family Law Association's submission points out that, under the Antisocial Behaviour etc (Scotland) Act 2004, it has been possible to attach movement restriction orders with means of enforcement, such as electronic tagging. There is a similar set of criteria in relation to secure accommodation, but there is not the same provision for review of repeal. Are the bill's provisions on movement restrictions fit for purpose? Do you have anything to add, beyond what you have submitted to the committee?

Elizabeth Welsh: In practical terms, some of our members were concerned that some kids might use the tag as a badge of honour, therefore it would not be very effective. There would have to be careful safeguards around the appropriateness of using tags, because they could be used as a way of cutting costs, as using tags would obviously be a lot cheaper than placing someone in secure accommodation.

The issue of secure accommodation also has to be approached carefully, but secure accommodation might be exactly what a child needs, as it gets them away from risk, temptation and other difficulties and ensures that they get the kind of support that they would not get in their home circumstance. A movement restriction—a tag—is not going to allow the kind of intensive support that, almost by definition, a child who might be sent to secure accommodation needs.

Aileen Campbell: Do the safeguarders have any comments on that?

Philip Jackson: We would have limited contact with such situations. If, in the process of writing a report, tagging came up, we would form a view.

However, once a decision had been made, our task would be finished; we would no longer be there if it was not carried through, for example.

Aileen Campbell: So the concern about tagging is that it does not offer the same support as secure accommodation.

Elizabeth Welsh: Potentially. You would have to be clear that support would be made available to the child and would be taken up if the child was given a tag rather than placed in secure accommodation.

Aileen Campbell: Should the bill be strengthened with regard to the appeal of a tagging decision?

Elizabeth Welsh: No, we do not have any concerns about that.

Dave Thompson (Highlands and Islands) (SNP): As you know, until September 2009, the reporter was the person who provided legal advice to hearings, but the bill will give that role to the national convener. Do you have any comments about that? Is it right for the national convener to take on that role? How would you like the process to operate?

Elizabeth Welsh: That is a big question. I am not sure that we are entirely qualified to comment on that in any depth, because it concerns the internal workings of the system. Broadly, we are in favour of appointing a national convener. There are issues about separating and defining more carefully the role of the reporter. The reporter's role is difficult, because they draft the grounds and take cases forward but then sit on the sidelines in hearings. Clarifying their role would be helpful. I am not sure whether they have a view on how that is being done. However, we have no particular issues with what is proposed.

Bruce Adamson: There is a real need for that kind of support and advice. Panels are made up of lay volunteers—usually part-time, although the situation is different in different areas—who are called on to make often legally complex decisions and they must strike the right balance with regard to human rights issues. It is therefore important that children's panel members are confident that they have access to advice when they need it and have had the training and support that they need. We have very little detail about how that will take place, apart from suggestions that there could be telephone lines or internet-based information. More work needs to be done on that. Panel members must be asked what they need.

With regard to the decision to change the role of the reporter, there were concerns that they were infringing the impartiality of the hearings system by giving advice. There will have to be a major practice change, as previous witnesses have said. Generally, panels want advice on the procedures that should be followed and on complex legal situations, in dealing with adoptions and secure accommodation. Panel members need to be confident that they know which factors they need to take into account and what the procedures are.

Can that be done as it is done now, in the context of hearings, where the reporter provides procedural advice in the open forum? That can work very well, but panel members really need to get advice about procedures and so on before hearings. There may be someone whom they can call or some way that they can get that advice when they say, "This is the situation that we are dealing with. What processes do we need to take into account? What are the human rights issues?" Such advice must be provided with some immediacy. I look forward to seeing how the national convener will play that role. Everyone is quite clear about the principle that advice to hearings needs to be independent, but we need to go into the detail of how it will be provided.

Dave Thompson: We need more beef on the bones. Obviously, the devil will be in the detail. Are you reasonably confident that the system is sound in principle, that it is ECHR compliant and that it will improve people's rights to a fair hearing?

Bruce Adamson: Hearings need to be fair, but they must also be seen to be fair. The second part of that was probably more engaged with. I do not think that there was a widespread practice of children's reporters influencing panels and straying further than giving procedural advice, but the perception of fairness is inherent to fairness. The idea of a children's reporter discussing a case in advance gives rise to concerns about that. It is clear that there is a need for separation in the role of the reporter, but it is also clear that lay panel members, who have to make complex decisions, need advice and support. I look forward to seeing how that will be provided.

Margaret Burt: We have concerns about how the advice is provided. Will it be provided outwith the hearing, even by a phone link? Will people at the hearing have a perception that someone who has not been part of the process is zooming in to make a decision? While in principle the process sounds good, in practice it will be interesting to see how it is implemented.

Philip Jackson: As a former reporter, I believe that the best hearings were those in which you did not feel the need to say anything, and those were hearings in which panel members were well trained and confident. That is what is important. There are some concerns. Margaret Burt raised a concern about hearings being interrupted to take advice from who knows where. Would such a hearing be seen to be an independent and impartial tribunal? There is also the question of

whether such an interruption would cause further delay to the process. Would the hearing have to continue later in the same day or even, given pressure of business, until two, three or four weeks later? Would such a continuation be in the child's interests?

In an environment where people are more and more represented, panel members need to be better and better informed and more and more confident. One hopes that the situation would be reached where external advice was not required. The emphasis is on training and quality.

Claire Baker (Mid Scotland and Fife) (Lab): The bill proposes a significant change from the 1995 act by limiting the definition of a relevant person only to those who have parental responsibilities and parental rights. The bill will allow pre-hearing panels to grant relevant person status to other people, which moves that judgment—which currently rests with the reporter—to a panel. Could problems arise from what some see as a narrowing of the definition of a relevant person? Do you have concerns about the proposed changes?

Elizabeth Welsh: Narrowing the definition is unhelpful. The current definition has omissions, but they are probably unintentional and could well be remedied. However, a particular difficulty relates to unmarried fathers. A gap remains between fathers whose children were born after the Family Law (Scotland) Act 2006 was passed, who automatically have parental rights if they are named on a birth certificate, and fathers who were not married to the mothers of children whose births were registered before that date.

I have acted for any number of fathers who have been involved to an extent in their child's life but with whom the child did not live, so they were not considered, under current legislation, to be a person with care who would be invited as a relevant person. Such fathers struggle to go anywhere near a panel. People have tried to obtain parental rights simply to attend a hearing. Persuading a court to give a father parental rights in a broader sense is still difficult, notwithstanding the introduction of almost rubber-stamping parental rights for unmarried fathers from 2006.

The gap remains. It will reduce, but some fathers will still not be named on birth certificates and will not have parental rights but might well be involved or be in a position to become involved in their children's lives. If a child is referred to a panel because of difficulties at home, such fathers might have support to offer. I accept entirely that such a father might be a negative influence at a hearing, but that can happen in any event. Limiting who is accepted as a relevant person is unhelpful.

As is obvious, the definition should not be entirely broad. Some grandparents would like to be considered as relevant persons. At pre-panel hearings, perhaps reporters should be able to consider whether anyone from the broader family unit should be invited to the hearing. Grandparents or other family members can step in to offer care in many circumstances, but it can be difficult for them to be recognised by and made known to a hearing as an option and for them to ask to be assessed. Limiting the definition of a relevant person is unhelpful.

Claire Baker: Is the definition in the 1995 act preferable to what is in the bill? The definition in the 1995 act has difficulties, but you prefer it on balance.

Elizabeth Welsh: I understand that the new definition will limit the people who qualify. I am not sure whether that is intentional but, if anything, the definition should be extended, not limited.

Margaret Burt: I understand that the pre-hearing panel might be able to grant relevant person status to whoever it feels is relevant. Previous witnesses have expressed concern that, once somebody has relevant person status under the bill, they will have it throughout a child's life in the hearings system. My concern is that somebody who is relevant today might not be relevant one, two or three years from now.

11:30

Claire Baker: Panel members at previous committee meetings have suggested that we need a mechanism for reviewing the relevant person. Do you support that proposal?

Margaret Burt: Yes.

Bruce Adamson: I agree with what has been said. There seems to be some confusion in how the new definition works. Under section 80, a panel can deem someone to be a relevant person under quite a wide test, but the definition of "relevant person" in section 185 is narrower than the present definition in the 1995 act. As Elizabeth Welsh said, there have been some recent cases involving unmarried biological fathers. We need to improve on the 1995 act, but the drafting of the bill needs serious reconsideration. I do not believe that it provides the right answer, because there are those two conflicting definitions.

Under article 8 of the ECHR, people have a right to family life. The people in each case who are entitled to that right need to be involved in the decision-making process—that is the test that is being applied. You also need to consider changing family structures. The ECHR was drafted 60 years ago and family structures have changed since

then, as has our understanding of the right to family life.

There are some complicated tests for determining whether family life applies in particular situations. It is perhaps unsurprising that we struggle to define who the relevant person is, but it is also important to bear it in mind that a relevant person has a powerful status. The relevant person gets copies of all the papers, they get appeal rights, and they get attendance rights. We need to be clear when we grant that status that it is in respect of family life, but we also need to give some thought to how invasive that can be of the child's rights to privacy and private life. We need to be careful that the bill is not unduly wide but also that it respects our deeper understanding of what family life means and who is a relevant person.

Elizabeth Smith (Mid Scotland and Fife) (Con): I turn your attention to the complex and controversial issue of confidentiality. As you know, the current situation is that confidentiality depends on the parent's acquiescence to it. Are you in favour of the bill's enhancing confidentiality for the child? If so, will that present problems under the ECHR? Perhaps Mr Adamson is best qualified to answer that. Whose rights would be paramount in that situation?

Bruce Adamson: You are right to identify that as a difficult issue. I suppose my answer to your first question is a qualified yes. As previous witnesses and academics, including Professor Norrie and Kathleen Marshall have said, a current issue is whether the decision in the European Court of Human Rights case of McMichael applied too strict an interpretation of article 6 by not allowing any retention of information apart from some tiny, limited things in relation to the non-disclosure of addresses and things like that. The children's sector has strongly expressed the view that there is a problem because the decision might discourage children from actively engaging with the hearings system, being honest with it, and feeling supported and confident.

On the human rights of the relevant person, the starting point has to be article 6, which contains the right to a fair hearing. Someone cannot have a fair hearing if they do not know the evidence on which the decision will be made. There is a real problem with the way in which the bill is drafted. My reading is that it would allow for the non-disclosure of information that was relevant to the decision. That would certainly not be consistent with article 6 or the procedural requirements in relation to determining rights on family life in article 8.

We cannot go so far as to say that the panel could not give the relevant person information that was material to the decision-making process. That needs to be the starting point. However, if there are situations in which a child is giving information that is not material, there needs to be some movement on that. The issue underlines the need for panels to be given good training and legal advice. There is a difficult balance to be struck between ensuring that the relevant persons have all the information to which they are entitled and protecting the child's right to privacy.

Elizabeth Smith: On your penultimate point, do you foresee any difficulties in a situation in which the child wants confidentiality for good reasons but is not best able to assess all the circumstances?

Bruce Adamson: I am not sure that I understand your question.

Elizabeth Smith: For one reason or another, a child may want the extra confidentiality to get their points across. However, the points that they want to make might not be regarded as salient or relevant by the people who represent the child or by members of the panel. Would you see any difficulty with that in terms of the human rights issue?

Bruce Adamson: I go back to the idea that it is a children's hearing. Panel members try to engage with the child directly and ask whether they would like to speak to the panel. They need a high level of training and awareness to enable them to make their decision and explain to the child what level of confidentiality is available. It is essential to explain to the child that any information that they have that may affect the decision must be disclosed.

Elizabeth Smith: But that would be difficult.

Bruce Adamson: Yes, it would be a real challenge. It shows the need to ensure that children receive good advice before hearings and understand what their rights are. Panel members must also ensure that they understand the framework. There is no easy answer; we are talking about a careful balance being struck. I have concerns about the way in which the bill is drafted because it seems to allow for information not to be disclosed that is material to the decision, which would create serious issues for the fairness of a hearing.

The Convener: Margaret Smith has a general question about drafting and human rights.

Margaret Smith (Edinburgh West) (LD): I can ask it, but I was not aware that I would be asked to ask it.

We have covered a lot of issues today and you have covered a lot more in your written submission. Is there anything that any of you wants to put on the record that we have not covered in our questions? Are there any further issues that you would like to bring to our attention?

Margaret Burt: I emphasise the Scottish safeguarders association's view that we need national standards for safeguarders. That would best be ensured by having a national panel decide whether I am fit for purpose as a safeguarder. The national panel would consider what I could bring to being a safeguarder and whether I was able undertake the task. We also need a national responsibility for appointment, recruitment procedures, training and monitoring. We need to serve locally, as the ethos of the children's hearings system is to be based in a community; nevertheless, we need a national panel. I first said that 24 years ago, and I am not sure how hopeful I am that you will deliver it. However, I make a plea for a national panel of safeguarders to set national standards. If, at the end of its consideration, the national panel decides that I am not fit for purpose, that will be fine.

Margaret Smith: In the perfect world for which you have been waiting for 20 years, what would be local authorities' role?

Margaret Burt: In local authorities' perfect world, safeguarders would not be with them. We are a blank cheque to local authorities—they cannot predict how much they are going to pay safeguarders. It would depend on where local authorities were. One of the problems with the bill is that we do not know the role of the area support teams. We will probably need to serve coterminously with them. I am not sure what the role of the local authority should be.

On the whole, the clerks in local authorities are very supportive but, then again, we represent a very small part of what they do. Where we fit with local authorities will depend on where we fit with area support teams and where we sit with regard to the national body, whatever form that takes.

We have been a major concern because no one has felt that they could build the firewalls necessary to keep us independent. Given our position with local authorities and the fact that we sometimes have to look at the work of officials employed by those who also pay us, one might question whether we are indeed independent and wonder whether our life could actually be made difficult. After all, most of the complaints about safeguarders that come from local authorities are a result of other professionals not liking what we have said. The answer to your question is that I do not know where local authorities should fit, because so many of the details are vague.

Margaret Smith: Has the present situation, in which you are paid by the same local authorities who a lot of the time employ the people that you have to be quite negative about, been a major problem?

Margaret Burt: No.

Margaret Smith: Is that because of the situation on both sides between safeguarders and local authorities?

Margaret Burt: Yes, and because most safeguarders can justify their recommendations. I know that tension exists; for example, the Association of Directors of Social Work's view is that we should not dictate where resources go. It is not for me as a safeguarder to do that, but the fact is that, when I see a child at a hearing being offered resources that I know are based simply on the money available, my responsibility is to say, "Could we stop for a minute and see whether there is another option?" I am not allocating resources, although the panel's findings might have a spin-off for the local authority. That said, most of us are responsible, are interested in the child's interests and are all, I hope, singing from the same hymn sheet and I do not think that there are huge tensions.

Bruce Adamson: The children's hearings system is not perfect and this bill will not make it so. However, on a positive note, it is a really good example of a system that takes a human rights-based approach, explicitly looks to the UN Convention on the Rights of the Child and works with the ECHR, reflecting the ways in which the rights set out in the convention have developed over the years. It has been recognised internationally as being at the forefront of human rights thinking and although improvements can be made and certain human rights and other technical concerns should be addressed, we ought to be confident that the system itself is really good. Its commitment to the Kilbrandon principles and the human rights framework that support it must be welcomed and should be the starting point of any discussion.

Elizabeth Welsh: My organisation acknowledges that there is a negative view of some of the involvement of solicitors in the children's hearings system. I regret that, because we feel that our input should be positive and, if it is done well, is usually recognised as such. As some of this morning's discussion has recognised, there is a basic requirement for legal advice to ensure that the system remains compliant with human rights.

I am not sure that the proposed code of practice is the right way forward and think instead that training, experience and recognition of the right background and skills will provide the right kind of legal representation in the hearings system. Moreover, I would like either the code of practice or any requirements for being on a panel of legal representatives to be very carefully drawn up in recognition of the balancing act that we perform in our role in the hearings system.

The Convener: That concludes the committee's questions. I thank the witnesses for their attendance and for providing written submissions in advance of the meeting. The committee's next meeting will be on Wednesday 5 May.

Meeting closed at 11:44.

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