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Pàrlamaid na h-Alba

Official Report

JUSTICE COMMITTEE

Tuesday 2 November 2010

Session 3

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JUSTICE COMMITTEE
29th Meeting 2010, Session 3

CONVENER

*Bill Aitken (Glasgow) (Con)

DEPUTY CONVENER

*Bill Butler (Glasgow Anniesland) (Lab)

COMMITTEE MEMBERS

*Robert Brown (Glasgow) (LD)
*Cathie Craigie (Cumbernauld and Kilsyth) (Lab)
*Nigel Don (North East Scotland) (SNP)
*James Kelly (Glasgow Rutherglen) (Lab)
*Stewart Maxwell (West of Scotland) (SNP)
*Dave Thompson (Highlands and Islands) (SNP)

COMMITTEE SUBSTITUTES

Claire Baker (Mid Scotland and Fife) (Lab)
John Lamont (Roxburgh and Berwickshire) (Con)
Mike Pringle (Edinburgh South) (LD)
Maureen Watt (North East Scotland) (SNP)

*attended

THE FOLLOWING ALSO ATTENDED:

Rhoda Grant (Highlands and Islands) (Lab)

THE FOLLOWING GAVE EVIDENCE:

Sharon Bell (Accountant in Bankruptcy)
Helen Hughes (Family Law Association)
Colin Lancaster (Scottish Legal Aid Board)
Kenny MacAskill (Cabinet Secretary for Justice)
Carl Watt (Stonewall Scotland)
Elizabeth Welsh (Family Law Association)
Catriona Whyte (Scottish Legal Aid Board)

CLERK TO THE COMMITTEE

Andrew Mylne

LOCATION

Committee Room 1

Scottish Parliament

Justice Committee

Tuesday 2 November 2010

[The Convener *opened the meeting at 10:02*]

Decision on Taking Business in Private

The Convener (Bill Aitken): Good morning, ladies and gentlemen. I remind everyone to ensure that their mobile phones are switched off. There are no apologies, as the committee is here in its entirety.

Item 1 is a decision on taking business in private. The committee is invited to decide whether consideration of a draft report on the Damages (Scotland) Bill and consideration of a draft report on the affirmative instruments being considered today should be taken in private at future meetings. Is that agreed?

Members *indicated agreement.*

Subordinate Legislation

Sexual Offences (Scotland) Act 2009 (Supplemental and Consequential Provisions) Order 2010 (Draft)

Legal Profession and Legal Aid (Scotland) Act 2007 (Membership of the Scottish Legal Complaints Commission) Amendment Order 2010 (Draft)

Bankruptcy (Certificate for Sequestration) (Scotland) Regulations 2010 (Draft)

Protected Trust Deeds (Scotland) Amendment Regulations 2010 (Draft)

10:03

The Convener: Item 2 is subordinate legislation. We are required to take evidence from the Cabinet Secretary for Justice and his officials on four affirmative instruments. The formal procedure on the motions to approve each instrument will be taken at the next item. The Subordinate Legislation Committee has not drawn any matter to the attention of the committee in relation to any of the four instruments.

I welcome Kenny MacAskill MSP, the Cabinet Secretary for Justice, and Scottish Government officials Jill Clark, from legal services, Patrick Down, from the criminal law and licensing division, and Kevin Gibson, from the legal directorate. We also have Sharon Bell, the head of policy development at the Accountant in Bankruptcy.

I draw members' attention first to the draft Sexual Offences (Scotland) Act 2009 (Supplemental and Consequential Provisions) Order 2010 and the accompanying cover note. I invite the cabinet secretary to make a short opening statement.

Kenny MacAskill (Cabinet Secretary for Justice): Thank you, convener.

The draft order is being made in exercise of the power to make ancillary provision at section 58 of the Sexual Offences (Scotland) Act 2009. The order makes supplemental and consequential provisions in consequence of the 2009 act, which will be commenced on 1 December. The order makes a number of amendments to primary legislation, which are intended to clarify that the common-law offences of assault with intent to rape and abduction with intent to rape may be libelled by way of reference to the statutory offences of rape at sections 1 and 18 of the 2009 act.

The order also makes provision to add the offence of incest to the list of implied alternatives

to the offence of rape at schedule 3 to the 2009 act. The order also makes consequential amendments to secondary legislation concerning the victim notification scheme, the use of victim statements and adoptions with a foreign element, to take account of the new offences that are contained in the 2009 act.

The Convener: That is reasonably clear. Do members have any questions?

Robert Brown (Glasgow) (LD): I have just one question. The changes are fairly significant and are being made not long after the Sexual Offences (Scotland) Bill was passed into law. Does the cabinet secretary consider that people should be able to know the law and therefore that it should be contained in the statute, if at all possible? Why were the alternative offences not identified as ones that should be included when the bill was being considered by Parliament?

Kenny MacAskill: I will deal first with that latter question. The matters have been under discussion with the Crown. Obviously, there is an interregnum during which alternative matters can be referred to and we have on-going cases that are based on the previous non-statutory law. The position that we are coming to today has been reached after discussion with the Crown, the police and the judiciary to try to ensure that we deal with matters as we move from the old regime, if we could call it that, through the interregnum to the new situation.

Everybody agrees that, wherever possible, everybody should be able to understand the law. However, there are complexities in all areas of law. Sexual offences are a complex area, which is why we had to introduce the statutory basis and definitions. I accept that it is desirable for the law to be understood by everybody and, wherever possible, acts should be clear. However, we are dealing with a specific matter that is deeply complex, which is why we introduced legislation. There are difficulties as a consequence of introducing the legislation. That is because, as I say, some cases are running on the old common law and new cases are coming in. It is almost with a heavy heart that we require the order, but there are some areas of law that will always be fairly complex. I have no doubt that, at some stage in future cases, the matter will be pored over by their lordships and doubtless argued over by learned counsel.

Robert Brown: With respect, that does not quite answer my question, which is about why the alternative offences were not put in the bill to start with. For example, the alternative offence of assault with intent to rape is a fairly obvious one, I would have thought. Perhaps the committee should have picked that up, but the Government has a range of legal advisers behind it. Why were those things not picked up at the time and put in the principal act? That would allow for clarity when people read the statute, so that they know exactly what the legislation is.

Kenny MacAskill: Initially, we predicated the approach on the views of the Scottish Law Commission. Its view was that the offences did not require to be specified as such. There was a difference in interpretation between what the Crown felt was necessary and what the Law Commission felt was necessary. The Law Commission took the view that no specific provision would be required and that the offences of assault and abduction with intent to rape would automatically apply to the new offences of rape in the 2009 act. However, the Crown expressed concerns that the courts might take a different view. We initially predicated the 2009 act on the views of the Law Commission, which felt that belt and braces were not required. However, the Crown felt that there could be an element of challenge and, on that basis—to give assurance to the Crown—we have introduced the order.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): Will the minister update us on and confirm the position regarding the paper that is attached to the order about the Convention Rights (Compliance) (Scotland) Act 2001 and the need to bring forward an urgent remedial order?

The Convener: I think that you are a little ahead of yourself at this stage.

Cathie Craigie: The paper is attached to the order, convener.

The Convener: Fine—please continue.

Cathie Craigie: I want an update on that issue. I note from the paper that the Government was hoping to lay the urgent remedial order before Parliament towards the end of October. Has it been laid?

Kenny MacAskill: To which act are we referring? Is it the Sexual Offences (Scotland) Act 2009?

Cathie Craigie: Yes. My question is regarding a decision that was taken by the Supreme Court on 21 April.

Dave Thompson (Highlands and Islands) (SNP): Convener, it struck me when I was looking at the committee papers that the paper to which Cathie Craigie is referring is totally unconnected to the other papers that we are considering.

The Convener: Unfortunately, there appears to have been a mistake in the committee papers that were issued. In the circumstances, it is totally understandable that Mrs Craigie and I were thrown in that respect.

Kenny MacAskill: Perhaps there are specific matters that need to be clarified. I cannot answer

the question at the moment because I do not quite understand it, but I am more than happy for the committee or Mrs Craigie to write asking for clarification.

Cathie Craigie: My colleagues tell me that the papers were laid last week and that the minister gave a note to the committee. Obviously, we have not seen that yet.

James Kelly (Glasgow Rutherglen) (Lab): Just for the record, there was a note at last week's meeting, laid by the cabinet secretary, that dealt with the issue.

Kenny MacAskill: If any further clarification is required, I ask the committee to get in touch.

The Convener: If there are no more questions on the order, I will underline Mr Brown's concerns. We should bear in mind that there was a long lead-in to the Sexual Offences (Scotland) Act 2009, and every one of us was involved in it. Although the Crown's concerns were presented rather late in the day, it might have been preferable if the provisions in the order had been contained in the primary legislation.

I now draw members' attention to the draft Legal Profession and Legal Aid (Scotland) Act 2007 (Membership of the Scottish Legal Complaints Commission) Amendment Order 2010 and the accompanying cover note. Mr MacAskill, I take it that you do not need to make a statement on the order.

Kenny MacAskill: That is correct.

The Convener: Do members have any questions?

Robert Brown: Sorry to be difficult again, but there is a bit of an oddity in the primary legislation. An increase in the membership of the commission for the purpose of carrying on expertise is a sensible suggestion. However, after 2011, when it is time to reappoint members, is it intended to hold the commission at the new level, which I think would be 12, or will it go back to the original figure of nine, which was generally thought to be more appropriate when the legislation was passed?

Kenny MacAskill: You are correct. There appears to have been an oversight in the drafting of the legislation. If all members had left simultaneously, it would have caused continuity problems. The number of commission members has not changed to being 12 in perpetuity. That is a matter for consideration. The purpose of the order is to ensure that not everyone demits office simultaneously, which would mean that the board would have to be comprised of new members with limited experience. The intention of the order is to provide a period of transition. It will be for an Administration post-2011, in conjunction with the SLCC, to decide what the optimal number should be. The order does not set a clear direction; rather, it deals with an initial problem that, as the convener said about the previous order, perhaps should have been checked when the bill was being drafted. However, we find ourselves in a situation in which, to allow for continuity, we need to change the membership.

Robert Brown: For the avoidance of doubt, is it an increase in the actual number of members of the commission rather than an increase in the maximum number?

Kenny MacAskill: That is right.

Nigel Don (North East Scotland) (SNP): I am probably just extending Robert Brown's thoughts here. There is no point in raking over how we got here. Presumably, an amendment will be introduced to the way in which those folk are appointed so that there is a continuous roll-over, and we get to a point at which we do not have to do this again. There will be nine members, three of whom retire every two years—

Kenny MacAskill: The aim is to get to a position that is now normal in most such commissions, in which there is a rolling turnover so that there is always continuity. There will be a regular turnover, so that there is new blood without losing the wise old heads.

The Convener: If there are no other questions on the order, we will turn our attention to the draft Bankruptcy (Certificate for Sequestration) (Scotland) Regulations 2010 and the accompanying cover note. I ask Mr MacAskill to make a short opening statement on the regulations.

Kenny MacAskill: In response to the economic downturn, my colleague Fergus Ewing invited a cross-section of stakeholder groups, including lenders, advisers, insolvency practitioners, public authorities and expert groups, to join a debt action forum. The remit of the group was to review the current initiatives in relation to personal debt and to consider measures that might create a coherent debt package to protect debtors in the current financial climate.

One of the issues identified by the forum was that there was a group of people who were unable to access the debt relief offered by bankruptcy. Although most debtors who are in need of debt relief are able to apply for bankruptcy, there are still some people who are unable to make themselves bankrupt. In particular, a home owner with low equity, limited income and large debts might be unable to prove apparent insolvency if their creditors were unwilling to fund court action against them, and they would not be eligible to apply for bankruptcy through any other route.

10:15

In order to address that, the Home Owner and Debtor Protection (Scotland) Act 2010, which received royal assent on 18 March, introduces a certificated route into bankruptcy that does not depend on action being taken by creditors. The certificate will extend debt relief to anyone who is currently excluded from bankruptcy and will allow access to bankruptcy as a last resort to anyone who is insolvent. The regulations before the committee provide the framework for an alternative route into bankruptcy on the basis that the debtor is unable to pay their debts as they become due. The debtor must demonstrate to an authorised person that he or she is unable to pay his or her debts as they become due, and the authorised person is entitled to rely on that evidence prior to signing the certificate.

The draft Bankruptcy (Certificate for Sequestration) (Scotland) Regulations 2010 define the categories of authorised persons who are able to issue such certificates, such as insolvency practitioners and money advisers. The regulations also prescribe the form of certificate and stipulate the further information that an authorised person must provide to the debtor, such as the consequences of bankruptcy. The regulations also provide that no fee will be charged for the issuing of a certificate.

Extensive consultation with stakeholders has taken place throughout the drafting of the regulations and comment has been sought on the proposed secondary legislation and its regulatory impact. The comments that have been received have resulted in numerous redrafts of the regulations to ensure that they are fit for purpose.

The regulations will ensure that bankruptcy is available as an option of last resort to anyone in Scotland. In the current economic climate, that is a welcome and timely addition to the options that are available to people who are struggling with debt.

The Convener: Thank you, cabinet secretary. Do members have any questions?

James Kelly: I have a question on those who are authorised to sign the certificates. The note states that there was consultation to ensure that appropriately trained personnel would be in place to sign off the certificates. However, regulation 3 seems to present a rather wide-ranging list of people that includes, for example, as well as insolvency practitioners, those who have been given authority by insolvency practitioners to act on their behalf. What controls are in place to ensure that only appropriately trained people are authorised to sign the certificate, which was the objective of the consultation?

Kenny MacAskill: That is a valid point. The responsible bodies will—

The Convener: I remind you that, at this stage, officials may speak if they wish to. It is a matter for you to decide, cabinet secretary.

Kenny MacAskill: I think that Sharon Bell will be able to put it much more eloquently than I could.

The Convener: So do I.

Sharon Bell (Accountant in Bankruptcy): The responsible bodies for insolvency practitioners, such as the Institute of Chartered Accountants of Scotland and the Insolvency Practitioners Association, are responsible for overseeing the work of any insolvency practitioner and any member of staff who works for their firm. They will make spot checks and the Accountant in Bankruptcy will provide any evidence that is required to ascertain whether the certificates are being completed properly. The Convention of Scottish Local Authorities has assured us that it will undertake similar checks on money advisers who work for local authorities, and Citizens Advice Scotland will carry out a similar process for any money adviser who works for a citizens advice bureau.

Robert Brown: Let me pursue that. It is a bit like getting the secretary or receptionist in a legal office to sign a writ for court under the oversight of a solicitor. There must surely be an issue of the person with the proper professional qualifications having responsibility. Okay, they may receive a report from a more junior member of staff who does such things routinely, but would it not be reasonable to follow normal practice and to have the certificates authorised by the senior person? What is the reason for not doing that?

Kenny MacAskill: Such things are always a matter of judgment. If there is any intimation that matters are not being dealt with appropriately, the professional bodies will check that and the debt action forum will be able to address the situation.

We have to find a balance between the fact that, for example, the senior partner in a major firm may not deal with bankruptcy matters because of the nature of the business, and the need to prevent people from taking liberties, such as having the office junior signing off a certificate while making a cup of coffee. That would be unacceptable. We also recognise that many bankruptcy cases are not dealt with by the partners. If we were to restrict such business to a partner who had no knowledge of or involvement with bankruptcy cases, it might be counterproductive. At present, we think that we have struck the correct balance. If, however, there is any evidence of the process being abused and it is not dealt with by the appropriate body, whether that is the Convention of Scottish Local

Authorities, Money Advice Scotland, the debt advisory service Scotland or indeed ICAS, then action can and will be taken.

The Convener: Are there any other questions on the subject?

Dave Thompson: I have more of a comment. The regulations are important, cabinet secretary, particularly for the money advisers who work for Citizens Advice Scotland but also for councils. The regulations will definitely be advantageous. As someone who, many years ago when I was in local government, set up money advice services in the Highlands, I certainly welcome the regulations.

The Convener: I draw members' attention to the draft Protected Trust Deeds (Scotland) Amendment Regulations 2010 and the accompanying cover note. I invite Mr MacAskill to make an opening statement.

Kenny MacAskill: The Home Owner and Debtor Protection (Scotland) Act 2010, which received royal assent on 18 March, also introduces some of the measures in relation to trust deeds that were discussed by stakeholders in the final report of the debt action forum. Section 10 of the act amends the statutory definition of a trust deed in the Bankruptcy (Scotland) Act 1985, as amended, to allow protection of trust deeds that exclude the debtor's sole or main dwelling-house. The change increases flexibility in trust deeds, giving those debtors entering a trust deed from which their dwelling-house is excluded peace of mind that their property, where they continue to meet mortgage payments, is safe. The exclusion of the debtor's dwelling-house from a trust deed that subsequently becomes protected is subject to consent of first, the secured creditor, then all other creditors.

The regulations before the committee provide the framework for introducing section 10 of the Home Owner and Debtor Protection (Scotland) Act 2010. Where the debtor wishes to exclude a dwelling-house that is their sole or main residence, a form must be completed by the debtor and secured creditor. The regulations set out the actions that a debtor and secured creditor must take for the dwelling-house to be excluded from the trust deed. They also provide where further details are required in a trust deed where a property is excluded. Those details will allow all the creditors who are affected by the trust deed to make an informed decision on whether to accept or vote against the protection of the trust deed.

The regulations allow any estate that the debtor requires during the term of the trust deed to be given to the trustee. That means that should a debtor's dwelling-house be excluded from a trust deed, where property prices rise, where equity is held in the property from the outset, or where the debtor sells the property during the term of the trust deed and equity is released, it can be used to pay creditors, thus protecting creditor interests. Extensive consultation with stakeholders has taken place throughout the drafting of the regulations, seeking comments on the proposed secondary legislation and its regulatory impact. Comments received from stakeholders have resulted in numerous redrafts of the regulations to ensure that they are fit for purpose.

By removing the requirement to realise the heritable asset, reassurance is provided to debtors and their families at the start of the process. It allows people to remain in their home where they are financially able to do so. It also reduces administration costs and provides clarity to all involved. The Scottish Government recognises that the needs of debtors and creditors must be balanced and I believe that the regulations reflect that balance.

The Convener: There being no further questions about the regulations, we move to item 3, which is formal consideration of the motions to approve each instrument. I remind everyone that officials are not allowed to speak during this item. If there is no objection to the cabinet secretary moving the motions en bloc, I invite him to do so formally.

Motions moved,

That the Justice Committee recommends that the Sexual Offences (Scotland) Act 2009 (Supplemental and Consequential Provisions) Order 2010 be approved;

That the Justice Committee recommends that the Legal Profession and Legal Aid (Scotland) Act 2007 (Membership of the Scottish Legal Complaints Commission) Amendment Order 2010 be approved;

That the Justice Committee recommends that the Bankruptcy (Certificate for Sequestration) (Scotland) Regulations 2010 be approved;

That the Justice Committee recommends that the Protected Trust Deeds (Scotland) Amendment Regulations 2010 be approved.—[*Kenny MacAskill.*]

Motions agreed to.

10:25

Meeting suspended.

10:26

On resuming—

Domestic Abuse (Scotland) Bill: Stage 1

The Convener: We will now deal with the third day of evidence on the Domestic Abuse (Scotland) Bill, which Rhoda Grant MSP introduced. Ms Grant has sat patiently while we dealt with the earlier agenda items and will attend for evidence on the bill.

I welcome the first panel of witnesses, who are from the Scottish Legal Aid Board. They are Colin Lancaster, director of police and development, and Catriona Whyte, head of legal services civil—[*Interruption.*] I am sorry—Colin Lancaster is the director of policy and development. Someone is not having a good morning.

We will head straight to questions.

Dave Thompson: Good morning. The Scottish Legal Aid Board has taken the view that the financial memorandum underestimates the bill's overall cost to the legal aid budget, but we have heard evidence from others that savings might be made. In general, will you expand on the bill's financial implications for the legal aid budget?

Colin Lancaster (Scottish Legal Aid Board): Good morning. As we said in our submissions to this committee and the Finance Committee, and as the financial memorandum recognised, estimating the cost impact is extremely complicated for several reasons. Members will have seen our somewhat voluminous submissions, which run through the issues in detail, so I will not go through everything that is in them.

The main point about the fear of an underestimate is that, in many cases that involve protective orders, the protective order is an ancillary crave as part of a wider action, whereas the FM focused purely on cases in which the protective order is the primary crave. If any provisions of the bill applied to ancillary craves, the costs would be higher.

Costs could also relate to advice and assistance. Initially, people approach a solicitor to take advice on the options that are open to them. Support for that advice and assistance can also fund the development and preparation of a legal aid application.

Additional costs could fall on defenders. The bill would increase for a defender the severity of an order that was granted against them, because criminal proceedings would ensue on its breach. We might therefore expect more defenders to seek to defend applications for protective orders, which would mean an additional cost to the legal aid fund for the defender as well as the pursuer.

Finally, costs would be associated with any criminal actions that arose from the provisions. The bill allows for summary or solemn proceedings, so costs could be significant, particularly if solemn proceedings were taken.

Several aspects of legal aid expenditure could increase as a result of the bill.

10:30

The other main question is whether the estimate of a 10 per cent increase in take-up is likely to capture the full extent of what will happen. As the FM recognises, it is difficult to separate out the potential impacts of the different sections of the bill, so an overall 10 per cent was given. However, we are not convinced that the comparison with the Adult Support and Protection (Scotland) Act 2007 (Adults with Incapacity) (Consequential Provisions) Order 2008 is particularly good. It is the only similar provision that exists, so we can appreciate why it was used, but the circumstances of that order are different, as were the reasons for the removal of the means test in that instance.

A 10 per cent increase in take-up would result in 80 additional grants of legal aid per year. Given what the policy memorandum says about the barriers to people taking out protective orders, an additional 80 grants as a result of the first three sections of the bill working together seems to be on the low side.

Dave Thompson: Could you estimate the additional cost over and above that which is mentioned in the financial memorandum? Do you have any idea whether it would double, treble or increase by 10 per cent?

Colin Lancaster: It really could be anything, which is why we did not attempt to propose an alternative figure in our submission to the Finance Committee and why we have great sympathy with those who drafted the financial memorandum. One possibility is 10 per cent, but we could estimate for 25 per cent or 50 per cent increases, which would obviously multiply the costs. If we were looking at a 50 per cent increase in take-up—which might be on the high side—we could be talking about £1 million in additional costs once all the different aspects of legal aid costs were taken into account. We could choose a different figure anywhere between 10 per cent and 50 per cent.

Nigel Don: Thank you, Mr Lancaster, for your comment that, if we change the rules, there might be a greater tendency to defend at the first stage because the defender could see the implications of having an order against them, breach of which might be a criminal offence. Do you have any

evidence at all from any other area of law as to what the impact of that might be? I can understand conceptually how it might happen, but do we have any idea how many defenders are likely to appear at the interim stage?

Colin Lancaster: Defenders already make legal aid applications under the current provisions, but the number is low relative to the number of orders that are sought. We also suggest that a number of those defenders would be unlikely to be eligible financially for legal aid, so there is a potential limitation on the number of applications that might be made.

Also, at present, we are inclined to refuse legal aid on merit as well as, potentially, on means. The argument about the increase in the order's impact on a defender might lead us to be more inclined to consider the merits of an application. Previous evidence to the committee also suggested that, from an equality of arms point of view, it may be necessary to amend the bill to remove the means test from defenders in the same action, which would mean that we would not refuse such cases based on means, as we do at present.

Nigel Don: I may be jumping ahead, but would it be fair to say that a competent lawyer may be more inclined to advise defence at the earlier stage because legal aid may be available and because the consequences of not defending at that stage may mean that the perpetrator might breach an order, which would be a criminal offence? Would not it be the competent lawyer's duty to advise defence at the early stage?

Colin Lancaster: I am not a lawyer, so I cannot necessarily answer that question.

Nigel Don: You have met an awful lot of lawyers.

Colin Lancaster: The consequences appear, on the face of it, to be something that a lawyer would want to advise a client about.

Catriona Whyte (Scottish Legal Aid Board): As matters stand, the profession is relatively familiar with SLAB's approach to applications for legal aid to defend interdict proceedings, which is that unless some significant prejudice can be shown to the defender, it is less likely that the reasonableness test for civil legal aid will be met, so legal aid is more likely to be refused on that ground than on any other. If there are to be more severe consequences, we may be less likely to think of that as a valid reason for refusal. Therefore, I expect that there would be more applications and that more would be granted.

Nigel Don: I hear you saying not only that a lawyer is likely to apply but that the way that you view applications is likely to change. You are the people who make the decisions about whether the defender gets legal aid.

Catriona Whyte: Absolutely.

Nigel Don: Your words imply to me that you would be saying, "We can't turn down quite so many, because the consequences have changed."

Catriona Whyte: We have to consider whether each application meets the test of probable cause and reasonableness. At present, for interdict-related activity in general, most of the issues for legal aid arise around the reasonableness test, rather than probable cause. So, in assessing whether it is reasonable, where the potential impact of an order might be fairly severe for someone, that would increase the likelihood that an application will be seen to be reasonable. We would probably also examine the way in which we look at applications as a consequence.

The Convener: I invite Bill Butler to deal with the course of conduct requirement.

Bill Butler (Glasgow Anniesland) (Lab): Thank you. Good morning, colleagues. The bill makes it competent for the court to grant a non-harassment order after one instance of harassing behaviour. If removing the course of conduct requirement leads to an increase in the number of applications for non-harassment orders, what would be the likely impact on the legal aid budget?

Colin Lancaster: From a budget point of view, the impact would probably be part of the overall increase in take-up. The three elements of the bill would act in tandem with one another. Making an order easier to get—broadening the circumstances in which orders might be available—and removing the means test would have a multiplying effect. I do not know whether Catriona Whyte wants to say anything about the merits of removing the course of conduct requirement.

Catriona Whyte: Obviously, removing the course of conduct requirement could result in a higher number of applications being lodged and meeting the test for civil legal aid, but it is difficult to estimate that number. Currently, applications for interdicts will be made where there has been only one incident, as an alternative to the non-harassment order, so it is difficult to estimate exactly how many additional applications we would see.

Bill Butler: The committee appreciates that it is difficult to estimate. However, difficulties are meant to be overcome. Do you have an estimate?

Catriona Whyte: I am not really sure that I could give an estimate of how many additional applications there would be simply as a result of removing the course of conduct aspect.

Bill Butler: You did not think about that at all when you were discussing it before you came here.

Colin Lancaster: One of the difficulties that we have had in estimating take-up across the board for all the measures is that we see only the cases that get as far as an application for legal aid; we do not know how many people have approached a solicitor, Scottish Women's Aid or any other support organisation and been advised that in their circumstances their options are limited or that they should perhaps not pursue an action. If people do not get as far as submitting an application, we cannot judge what percentage we are seeing.

We had a useful discussion with Women's Aid two or three weeks ago about the bill. It seems that a fairly complex range of thought processes are involved in considering whether to seek a protective order, whether it is a non-harassment order or an interdict. The bill seeks to address some of those issues, but others will undoubtedly remain. In the evidence that you heard last week there was a description of some of the factors that might be weighed in deciding whether to proceed. I stick by what we have said: it is almost impossible to estimate the impact of this one change against the background of all those complex factors.

Bill Butler: Okay. I will not press you on that, because the debate would just become semantic.

Nigel Don: I want to press on. I hear what you are saying: one of your difficulties is that you do not know what does not come to you. That point was well made and is worth repeating.

What proportion of victims of domestic abuse are currently entitled to civil legal assistance?

Colin Lancaster: Again, that is something for which we do not have a figure.

Nigel Don: Exactly.

Colin Lancaster: I saw the figure 90 per cent in the briefing, but I am not exactly sure where that comes from. Our general estimate of the population is that 75 per cent are eligible for legal aid as a result of the changes that were made last year. It is possible that, with the recession, a wider swathe of the population might have fallen into eligibility since then.

On the eligibility of those who apply for legal aid, we have a very low refusal rate on means grounds. I think that we state in our written evidence that, in 2009-10, only 1 per cent of applications—off the top of my head, I think that it was 18 applications—were refused on means grounds in the whole year. That is partly a consequence of the significant increase in the upper income limit in April 2009. The previous year, 3 per cent of applications were refused as ineligible, but at the moment the figure is 1 per cent. Whether that is an indication of the whole population that might be experiencing domestic abuse, I do not know.

Nigel Don: I presume that you should not be turning anyone down for financial reasons. We go back to the point that a competent lawyer would not bring a case to you if it was going to fail the financial eligibility test, in an ideal world.

Colin Lancaster: It will not always be entirely clear to the lawyer whether the client is going to be eligible. The applicant completes a form detailing all their income, capital and outgoings, and we conduct a fairly detailed means assessment on that basis. It is not always easy for the lawyer to work through all of that and to predict with 100 per cent certainty whether the client will be eligible.

Nigel Don: If you are only refusing 1 per cent, that suggests that the lawyers are doing a good job and getting it right.

Colin Lancaster: Yes, and it also tells you that eligibility is very wide.

Nigel Don: Okay. We cannot say what percentage of people who suffer domestic abuse are eligible, but you are clear that 75 per cent of the general population would be eligible, and that that figure is probably increasing.

Colin Lancaster: Yes.

Nigel Don: We can probably assume that domestic abuse is classless and financeless, and therefore the same position probably applies across financial incomes.

I will ask about the other barriers to applying, which you will perhaps know something about in the context of lawyers not being available in places where they do not want to take on legal aid work. Is that a significant barrier? Can you give us any advice on that?

Colin Lancaster: Certainly. From looking at the policy memorandum and some of the extracts from the evaluation of the Protection from Abuse (Scotland) Act 2001, the availability of solicitors is one of the factors that have been identified as making things difficult. We have had a dialogue with Scottish Women's Aid for probably 10 years on the availability of lawyers to undertake civil legal assistance work, particularly in relation to domestic abuse. We monitor supply, the number of applications that we receive from different parts of the country and different areas of law, and the number of firms and outlets that provide that service.

There has been a decline in the past 15 years in the number of firms that provide civil legal assistance, partly because there has been a general specialisation within the legal profession

and partly because other things have been more financially attractive. In the past two years, with the recession, those factors might have changed a little bit; we have seen an increase in the number of outlets that provide a civil legal assistance service. In 2009-10, we received applications in relation to protective orders from 463 outlets. Those are active branches of firms throughout the country. That is about 7 per cent more outlets than the year before, and about 9 per cent more applications are coming from those outlets in relation to protective orders. That number might well be lower than it was a number of years ago, but there has been an improvement in the past couple of years.

Two or three years ago, we were concerned that there were parts of the country where it was more difficult to access a solicitor who provides civil legal assistance. Again, partly, that came out of our discussions with Scottish Women's Aid, and it was one of the factors behind the opening of our civil legal assistance office in Inverness. It had been identified that there were particular difficulties with accessing solicitors in the Highlands and Islands, particularly in small communities where there might be only one solicitor and there are two sides in a case. That is why we established the CLAO in Inverness a couple of years ago, and domestic abuse is part of its broad remit. At that time, we also discussed whether similar offices should be opened in other parts of the country, because there was evidence that activity had declined, but the profession assured us that it did not see particular problems in Edinburgh and Glasgow and argued that such a measure is therefore unnecessary.

10:45

Having said that, we think that there probably are still people who find it difficult to get work done on a legal aid basis, but a number of solicitors will offer to undertake the work on a privately funded basis instead. Certainly, in Edinburgh and Glasgow, it is common practice for that offer to be made to a client who might be eligible for legal aid. Our understanding is that the clients are able to take that on, and will instruct solicitors on a private basis.

Nigel Don: That might be your evidence, but I do not think that that is terribly satisfactory. If assistance should be available on legal aid, it should be available on legal aid. That is where I am coming from.

We have already discussed the probable cause issue, which involves a decision that you have to make. The conclusion that I drew from the earlier discussion is that the bill will make changes in that regard. At the moment, how substantial a factor is the probable cause issue in your decision to turn down cases?

Catriona Whyte: Probable cause is not a significant factor in applications being refused, as things currently stand. It simply asks that someone has a legal basis for bringing their case. That is not a difficult test to meet in terms of interdicts and non-harassment orders. In the case of non-harassment orders, the greatest reason for a refusal on the ground of there being no probable cause will be that there has not been the course of conduct. The changes that are envisaged by the bill would, obviously, deal with that.

The second aspect of the legal merits test that we have to consider is whether it is reasonable to make public funding available for the case. Most applications for interdict that are refused on their merits will fall down based on the lack of reasonableness, as it were, which can depend largely on the nature of the incidents involved. If someone has suffered a violent physical attack, there will be no suggestion that it is not reasonable to make public funding available. At the other end of the scale, however, the board has published guidance to the effect that things that we describe as abuse but which will probably not escalate into physical violence might not be seen as being reasonable cases for public funding. However, that decision depends on the facts and circumstances of each case. The reasonableness question causes the greatest concern in assessing the merits of a case.

Nigel Don: If that reasonableness test is based on evidence from the police and others, am I right in thinking that that would not be changed by this legislation, as it is the facts of the case that speak to reasonableness, not what the legislation says?

Catriona Whyte: That is right. The test is based on the information that we get from the solicitors acting. They put together the application for legal aid, and they might provide medical information, information that shows the position of the police and other such information. That is what we use to decide whether the legal merits test is met. There is nothing in the bill that would fundamentally change that.

Robert Brown: On the financial contribution, your submission indicates that 77 per cent of applications are granted with no contribution. I presume that, by that token—allowing for the 3 per cent or so that are refused—around 20 per cent have a contribution of some sort.

Colin Lancaster: I think that the figure is 77 per cent of those granted—

Robert Brown: Okay. Could you give us an indication of the spread of contributions? What is the maximum that someone can be landed with? I recollect that the amount is now quite substantial.

Colin Lancaster: As a result of the increase in the upper limit, the amount can now be quite substantial. The upper limit of disposable income is now £25,450. In terms of gross income, it is possible to be in the £40,000 band and be working down to a disposable income of £25,000 and at that level of income, one would be asked for a contribution of £14,000. The previous maximum contribution was more like £2,500, when we had an upper limit in the high ten thousands—£10,500 or thereabouts.

It is important to point out that the contributions that are assessed are those that, in terms of the legislation, the client is deemed able to pay. A client is deemed to be able to pay £14,000 if they have a disposable income of £25,000. That does not mean that they will pay £14,000; it would be a highly unusual case that cost that amount. It is a common misunderstanding among client groups that the assessed contribution is the contribution that will be paid. People will only ever pay the cost of the case. If someone's assessed contribution is £14,000 and the case costs £1,000, they will pay £1,000, not £14,000. That is an important issue to weigh up when considering whether to proceed.

Robert Brown: The client will not know the cost of the case at the beginning of the process. In practice, what would someone with a £10,000 contribution, for the sake of argument, have to pay? I think that I am right in saying that payment has to be made within 12 months.

Colin Lancaster: No. We allow someone who had a contribution of that level to make to pay in interest-free instalments over four years—I think that I am right in saying that 48 months is the relevant period.

Catriona Whyte: Yes—the period is 48 months.

Robert Brown: Could you give us a document that would give us an idea of the spread of contributions? It would be useful to get some background guidance on the extent of payments.

I want to press on with the issues of probable cause and reasonableness and apply them to the defender. As I understand it, for a pursuer application for a number of craves including interdict or something of that sort, you would usually want to receive the pursuer's statement and some evidence to back it up, such as a witness statement. I assume from what you said that it would require to be something that evidenced an incident or incidents of a reasonably substantial nature rather than more minor ones. Is that what you said?

Catriona Whyte: That is right. The applicant's statement usually sets out the facts that apply to their case. We will normally get a supporting statement, which tends to be from another family member or a friend, but it can come from social work or the police, for example. If necessary, it could be a medical report.

Robert Brown: You have indicated that relatively few applications by a pursuer would be refused and that the grounds for doing so would be likely to be related to the relative lack of seriousness of the episodes and perhaps the lack of a significant fear of repetition.

Catriona Whyte: Yes. If an application is refused it will tend to be because the incidents are less serious.

Robert Brown: You have indicated that when a defender is faced with having to respond to the prospect of having a court order issued against him, which in certain circumstances might have a power of arrest attached to it—that would certainly be the case with breach of interdict proceedings—reasonableness would be a fairly common ground for refusal. Does the defender also require to provide corroborated back-up evidence for his position?

Catriona Whyte: Ideally, we like to be provided with a third-party statement along with a defender application, but we do not insist on it. We do not insist on it for the pursuer, either. If a supporting statement is not provided, we ask their solicitor to tell us why such information cannot be provided. For defenders, the most common reason is that they cannot provide someone to support them in saying that something did not happen. We tend to get supporting information from defenders as well as from pursuers, which tends to come from someone who can speak about the wider circumstances of the family relationship.

Robert Brown: Okay. There is something else that I would like to clarify. I think that you indicated that quite a lot of defender applications are refused on reasonableness grounds. I am not entirely sure that I follow the rationale of that, given that the defender might have a court order against them. I accept entirely that it is unsatisfactory to have a long dispute about the precise details of what took place in such cases, but surely the fact that someone faces a court order against them, as a result of which various sanctions are available, is quite a significant issue from SLAB's point of view.

Catriona Whyte: As things stand, when an interdict is being sought, we will tend to refuse defender applications unless evidence can be produced at the outset that an order is likely to be abused. A common basis for refusing such an application is that no serious prejudice will be caused to the applicant or that there will be no consequences if the person behaves in a lawful manner.

We are much more likely to grant legal aid to a defender to oppose breach of interdict

proceedings because of the consequences that could arise and because that is one step further along. Breach of interdict is a criminal offence, so we might envisage that we are already at the breach of interdict stage.

Robert Brown: Because of the criminal consequences, yes.

Catriona Whyte: We have a much higher grant rate for defending breach of interdict.

Robert Brown: That is entirely reasonable. Equality of arms has been raised in relation to the pursuer-defender balance. If we change the financial eligibility test or remove it altogether for pursuers, we would have to do the same for defenders. Is that the Scottish Legal Aid Board's position? If so, why?

Catriona Whyte: We do take that position.

Colin Lancaster: Much of the argument about equality of arms has focused on the difficulties that pursuers have in accessing civil legal aid compared with the apparent ease with which defenders are able to access criminal legal aid. However, we are talking about two different circumstances, in one of which the state takes on the prosecution. In an individual action, it would be challengeable if one party was given a favoured position because there was no means test and the other party was means tested. I imagine that the legislation would be challenged the first time that a defender's application was refused on the ground of means.

Robert Brown: There has also been some dispute about whether the bill applies just to stand-alone craves or to craves as part of a divorce action or something of that sort. Assuming that it applies to stand-alone craves, can you tell us how section 2 might operate in practice? What changes in the administration of legal aid would result? Would it be possible for someone to receive funding for part of an action and not for the rest of it? Can you give us a feel for the implications?

Colin Lancaster: That is where a lot of the difficulty has arisen. When we were trying to work through the different scenarios for our evidence, it was difficult to see how multiple crave actions could be disentangled. For single crave actions or where all the craves relate to protective orders, it looks as though the process would be relatively straightforward. An application would still have to be made, as there would still be a merits determination to be undertaken, but we would not require any information about the applicant's resources to determine the application as a whole. There would still be an application process, but we would apply only the probable cause and reasonableness tests, not the means test.

For multiple crave applications, it would get horribly complicated. We would still require to undertake a means assessment for the application as a whole because, as I assume is the bill's intention and as I understand from discussions with others, the removal of the means assessment would apply only to the protective order element of a multiple crave action. The problem would then be how to attribute the protective order element of an action to the cost or, conversely, the cost to the bit to which no means test applies.

Looking over your evidence session last week, I could see some of the difficulties that the Law Society identified with that operating in practice, and I share some of the Law Society's concerns about the practicalities around peeling off a bit of the action from a cost point of view. I do not know whether you want to discuss the idea that a block could be attributed—

Robert Brown: I think that we would appreciate your views on that. I presume that that is a possible remedy, but how practical is it in reality?

Colin Lancaster: That is what the discussion was about last week. Work would have to be done to establish how much of the work within a typical multiple crave action was attributable to the protective order element. Under the fee system that we have at present, that is not straightforward, as we have a block fee system and it is not possible to identify as easily as it once was the individual items of work—meetings, court appearances, letters, phone calls and so on—that would be attributable to one crave but not another. However, I suppose that it would be possible to sit down and work that out, which would be preferable to working it out on a case-by-case basis.

If I understand the idea correctly, we would not propose to pay the solicitor that block in a multiple crave case, as we would be paying for the case as a whole if the parties were eligible for legal aid for the rest of it or if they received a contribution. We would deduct that from the overall amount of the case that the assisted person was liable for through their contribution.

If someone is eligible for legal aid in any event, there is no problem. If they are ineligible for legal aid, there is a difficulty, but in a sense that difficulty is between the assisted person and their solicitor on how they are billed for the other work, which is privately funded. If a block sum were allocated—£200, £500 or whatever—we could pay that to the solicitor for the legal-aided element of the work, but I am not sure how they would render their account to their client for the remaining work. That would be a private agreement between the party and their solicitor.

For the applicant who makes a contribution, under the system that I explained earlier whereby they meet only the cost of the case, it is possible that, even if we were to deduct £500 from the cost of a multi-crave action, an assisted person with a contribution would still pay their total contribution. The average cost of a residence case is about £3,000. If we took £500 off such a case for the protective order element, there would be a net liability of £2,500. If the applicant had been assessed with a contribution of £500, £1,000 or £2,000, they would still pay that full contribution, as it would be towards the other cost of the case. The benefit would derive only if their contribution was higher than the cost of the case minus the protective order block sum. The system narrows the range of circumstances in which the benefit would be felt by the applicant—in many cases, they would still pay the whole contribution.

11:00

Robert Brown: It occurs to me that there is provision under the Legal Aid (Scotland) Act 1986 for protection against the award of expenses against someone if they lose the case. That applies to both sides and is another complication. How might the arrangements in the bill be affected by that provision?

Colin Lancaster: I had not thought of that until you mentioned it just then—[*Laughter*.]

I can see the difficulty. In a multi-crave action, the protection would exist in relation only to the protective order proceedings and not to the cost of the rest. In essence, we are back to the position of trying to attribute the cost. If an award of expenses was made against the pursuer in a multi-crave action, it could relate only to the parts that were not related to the protective order. That would be something for the court, rather than us, to work out.

The Convener: You have to reply to us on another matter. If anything occurs to you on that question, it would be useful if you could give us your updated thoughts.

Catriona Whyte: May I just flag up one point? We were looking at the Law Society's evidence from last week, when reference was made to a case with a private client and the element of a legal-aided block fee. The current provisions of the Legal Aid (Scotland) Act 1986 do not allow for a mix of legal-aided and private fees—I am flagging up that point as something that needs to be looked at. Section 32 of that act does not allow for a combination in particular proceedings of the different ways of payment, so the point must be considered.

Robert Brown: That has been a significant principle from the beginning in the operation of the Scottish Legal Aid Board scheme.

Catriona Whyte: Yes.

Robert Brown: I have one final question, which is on the emergency legal aid arrangements. As I understand it, most of the controversial parts of protective order procedure relate to the interim order stage. There will be a proof in certain cases, but I imagine that the vast majority will be dealt with earlier. The emergency legal aid arrangements come into play in such situations. Will you explain how they operate, what is required and, in particular, the financial implications?

Catriona Whyte: Sure. We have looked at the figures, which show that 92 to 93 per cent of applications for civil legal aid that involve one of the protective orders are made when the Legal Aid Board special urgency provisions have been used.

Special urgency provisions exist to protect a client in their own particular circumstances or in a court action before a legal aid application can be determined. The solicitor acting has to be satisfied that the client is likely to be financially eligible for civil legal aid, and we give them a method of assessing the potential eligibility, although it does not have to be foolproof at that stage. Solicitors also have to be satisfied that the work must be done as a matter of special urgency to protect their client.

Solicitors then get the case under way, which may involve obtaining an interim interdict. They simply have to tell us that they have undertaken the work when they apply for civil legal aid, and they must tell us within 28 days of commencing the specially urgent work that they have done so.

We carry on our conventional assessment of the application in which we make a full financial eligibility assessment and consider whether we are satisfied that the legal merits tests are met. A lot of the work will have been done by that time. Certainly, that is the case in obtaining an interim interdict, which is usually done and dusted by the time that the legal aid application comes to be considered.

There is absolutely no difficulty if we decide to grant legal aid. As matters stand, if we do not grant legal aid, the solicitor is still covered for payment under the provisions of regulation 18, which covers special urgency availability. That said, I imagine that there is always the potential for difficulty—indeed, we dealt with that in our original response. If we are not satisfied with the legal merits aspect of a case, we can continue to work on the special urgency provisions and how they tie in with the arrangements, which can, of course,

cause not the legal merits but the financial eligibility aspects of the case to fly off.

Robert Brown: How does that work? Does the solicitor have to collect the contribution or is it dealt with in another way?

Catriona Whyte: As I said, in signing the form—we call it a mandate form although, strictly speaking, it is not a mandate—the solicitor must indicate that they have carried out an assessment and set out the calculations that they have worked out. The client signs the form and undertakes to pay any contribution that the board assesses. Once we get the application, we carry on with our assessment. On conclusion, the client has to pay whatever is due or the cost of the case, whichever is less. If they do not co-operate, we recover the cost of the work that has been done by way of the special urgency provisions.

Robert Brown: And do the payments go to the board and not the solicitor?

Catriona Whyte: Yes. They all come to us. Before 2002, payments were made directly to the solicitor. That was perceived as being a potential access to justice problem. We now do the assessment and collection.

Robert Brown: I recollect something about that.

The Convener: We turn to section 3 of the bill.

James Kelly: Section 3 grants the power of arrest in domestic abuse cases where there has been a breach of interdict. The committee heard evidence including from the Association of Chief Police Officers in Scotland and the Crown Office and Procurator Fiscal Service that the provision could result in longer-term budgetary savings, but the Scottish Legal Aid Board holds a contrary view. Will you say more on the implications of section 3 on the SLAB budget?

Colin Lancaster: If I am honest, the Crown and ACPOS may have identified savings that we have not identified in our evidence. We looked at the cost of additional criminal prosecutions falling on legal aid, given that we pay for those prosecutions to be defended. If the approach that is taken to these types of cases in practice is such that prosecutions obviate additional activity in the criminal justice system, there may be a reduction in costs on the board. If the argument is that prosecution follows breach instead of multiple interventions having to be made, as happens at present—the police are called out but matters cannot go a lot further—it may be that we will pay for fewer instances of intervention. I am not yet clear exactly how the totals will add up and whether additional prosecutions will cost more or less than a reduction in the interventions that the police make at present.

James Kelly: Do you have anything to add, Ms Whyte?

Catriona Whyte: I do not.

The Convener: That takes us to section 4.

Cathie Craigie: Section 4 provides a statutory definition of domestic abuse. From some of the submissions, we know that the definition is giving rise to concern. If section 2 is implemented, will a statutory definition of domestic abuse be necessary for the board's purposes?

Colin Lancaster: We take legislation as we are given it and apply it. If there were to be no definition, we would work with the common-law definitions that are used at present. We will work with the statutory definition, whatever it is.

If the definition is specific, for instance about the relationships that may be covered, that might assist us in identifying cases that do not involve those types of relationship. If there were no definition, we would work with the ones that operate in practice at present.

The Convener: This is possibly not a matter for you, but there would be some difficulty in arriving at a precise definition. The criminal law is quite specific in this regard. The accused might be charged with assaulting his wife at such-and-such a locus in a prescribed manner, for instance, and that would clearly be domestic abuse as we understand it, but it can be a bit more difficult where the verbals are involved.

Catriona Whyte: It would be more straightforward if there were a definition, as there is currently in the bill. That would make it easier to assess whether or not there is a domestic abuse situation. However, we will work with whatever the legislation is. That is the best way for us to take things forward—we just have to assess things, depending on the circumstances.

The Convener: There are no more questions from committee members, so I invite Rhoda Grant to ask any questions that she may have for the panel.

Rhoda Grant (Highlands and Islands) (Lab): I would like to ask about some factual bits and pieces. I am trying to resist giving evidence and making arguments myself.

The Convener: It is always difficult.

Rhoda Grant: I will stick to facts. Do all defenders get granted legal aid when the pursuers do, in all civil cases?

Catriona Whyte: No.

Rhoda Grant: Why? If it is a matter of equality of arms, why would that not be the case?

Catriona Whyte: Each application for civil legal aid is considered on its own merits. Although there might be situations in which both parties in an action are civil legal aided, there is no necessity, if one party applies for civil legal aid to pursue an action, for the opponent also to qualify if they apply. They have to meet the tests individually. Some people across the range of application types might not be financially eligible, and some will not meet the test of probable cause. For some, it is to do with reasonableness. It just depends on the circumstances that apply to the individual application.

Rhoda Grant: So equality of arms does not come into the current system.

Catriona Whyte: We do not consider that legal aid should be made available—in fact, we cannot make it available—simply because someone else gets legal aid. If there is concern about the equality of arms, it is more about whether there is no financial assessment for one party, whereas there is for another party. If everyone was financially assessed, we would be perfectly comfortable with that, as we have our own rules and procedures in place and we would apply them to the individual's circumstances, as we would do in assessing the legal merits of the case.

Rhoda Grant: I turn now to the figures. We slightly dispute them, but rather than running through them on that basis, we can agree that it is extremely difficult to get the figures, as the information is not collected. Will you confirm that the figures that are currently used include both pursuers and defenders, and that they include all cases, not just those involving non-harassment orders or interdicts with powers of arrest?

Colin Lancaster: Initially, as the bill was being prepared, the figures that we provided covered all cases that fell within the protective order categories. The additional work that we undertook in preparation for giving evidence to this committee and the Finance Committee attempted to break the figures down further. The tables that we included in our evidence identify the defenders and pursuers separately. The domestic/non-domestic split is slightly less cut and dried than the defender/pursuer one—it was based on a judgment about which categories are likely to fall into those two camps. It remains possible that there are some non-domestic interdicts included within the domestic category of interdict. We do not have such a specific code.

Having discussed the issue with the people who process the applications, I understand that the great majority of interdicts that sit within the relevant codes are domestic in their nature—although that is not to say that every last one is. Of the 1,351 grants that we identified, we can split out the ones that are clearly not domestic, given the category that has been used. A protective order is clearly not for a domestic situation. Then, we can separate the numbers for pursuers and defenders, and that whittles the number down to the 802 figure that we were using as our baseline for pursuer-domestic.

Rhoda Grant: But that includes cases that do not involve powers of arrest or non-harassment orders.

Colin Lancaster: Yes. It is a general category, so it will include interdicts that may not specify a power of arrest as an additional crave. Off the top of my head, other categories come under the Protection from Abuse (Scotland) Act 2001, and there are the non-harassment orders and the non-molestation interdicts.

Rhoda Grant: How many civil non-harassment orders are granted? I have the figure somewhere, but not with me.

Colin Lancaster: I do not have it with me, either, but I will forward it to you. We do have the number.

The Convener: Perhaps you could share it with the rest of us.

Colin Lancaster: Yes.

The Convener: There being no other questions, I draw this session to an end. I thank Mr Lancaster and Mrs Whyte for their attendance. Civil legal aid has concerned parliamentarians generally from time to time, and the session has been useful in giving us a somewhat greater understanding of the issues. However, there are outstanding points. Perhaps you could address them in correspondence.

The committee will suspend briefly.

11:16

Meeting suspended.

11:17

On resuming—

The Convener: We will now take evidence from the Family Law Association. I welcome Elizabeth Welsh, who is the chair of the association. She is accompanied by Helen Hughes, who is a past chair of the association.

We will move straight to questions. I have no doubt that you will have read the previous evidence that we heard, particularly from the Law Society of Scotland and ASSIST—advocacy, safety, support, information, services together. Mrs Welsh, do you agree with the Law Society that there has been "no great take-up" of the remedies

that are currently available to tackle domestic abuse?

Elizabeth Welsh (Family Law Association): No, I do not. I agree that there has not been a great take-up of non-harassment orders. I was interested in the question about them. It was identified that the figures are not available. I certainly do not have the figures, so I will speak from my experience. Non-harassment orders have not been widely taken up partly because of the course of conduct requirement. I think that Miss Hughes would concur with me on that. However, other orders under the Matrimonial Homes (Family Protection) (Scotland) Act 1981 and the Protection from Abuse (Scotland) Act 2001 have been very well used, in my view. Interdicts and powers of arrest under both acts are commonly sought and granted, and are often very effective.

Our view is that interdicts and powers of arrest can be very effective protection in many cases at the lower end. Perhaps a step up from them would be exclusion orders, which require more evidence—there is a higher test to satisfy. Fewer of those are sought and, obviously, fewer are granted. Powers of arrest can be very effective in cases in which the perpetrator is the kind of person who fears arrest, a night in the cells and the sanction of being prosecuted. A lot of people look to their actions once that happens, but a number of perpetrators of abuse are not fearful of that sanction. There is a pyramid and those people are at the top of it. There is a concern that for people who are repeatedly lifted under powers of arrest the sanction is not effective.

Helen Hughes (Family Law Association): We have to look at why interdicts and protective orders are not taken up as much today as they were in the past. I have experience of doing this type of work for the past 23 years, so I have seen the way in which protective orders have developed.

Fifteen or 20 years ago, the police would not intervene in domestic cases. When I first began my practice and started doing a lot of Women's Aid work in my area, which is Paisley, we were raising four or five cases a week seeking interdicts and powers of arrest, because the police would not intervene. The advent of the zero tolerance campaign a number of years ago and the Crown Office's changes to its protocol on how domestic abuse cases are dealt with led to a reduction in the number of people having to seek orders themselves, because frequently the perpetrators of domestic abuse were being arrested and bail conditions were being applied. Women—it was predominantly women—who were involved in such situations therefore had the protection of the bail conditions and did not necessarily require to take action themselves.

In my experience, the eligibility issue is a difficulty that has given rise to a reduction in the number of protective orders being sought. I had women—I say women because most of the perpetrators of abuse are male and most of the people who seek advice and protective orders are female—who were clients when tax credits were introduced and when the Child Support Agency was created and maintenance was paid through it. Previously, they had been eligible for protective orders without having to make a contribution, but when tax credits came in they were assessed as having to contribute, because the Scottish Legal Aid Board assesses your contribution for a year after you have been awarded legal aid, so if your circumstances change your contribution can change. Clients who had had to make no contribution and who were able to access protective orders were suddenly being assessed as having to make a contribution, because they were in receipt of either child maintenance, which is assessed as income for civil legal aid purposes, or tax credits, which are assessed as income.

The reason why we do not have as big an uptake of protective orders is perhaps not because there is no need for them—there remains a need for the victims of abuse to be protected—but because other influences have come into play: the police have become more proactive and more victims of abuse are no longer eligible for legal aid with nil contribution.

The Convener: Is it your view that the bill will provide greater clarity and will increase access to justice for victims of domestic abuse if enacted?

Elizabeth Welsh: We would like to comment differently on different sections of the bill.

Section 1, which reduces the requirement for a course of conduct, will make non-harassment orders more easily obtainable and therefore more people will use them. Given that non-harassment orders are probably the most useful orders to have in terms of protection, we agree that that is a welcome change.

On legal aid, there is a difficulty, which has been identified, in the equality of arms. We think that it would be justifiable for legal aid to be available free provided that the merits test is met.

The Convener: May I interrupt you, Mrs Welsh? We intend to interrogate those items specifically later on, so it might be easier if you reserve your answers until then.

Elizabeth Welsh: We can come back to that.

Our main issue with the efficacy of the bill is the definition of domestic abuse, which we do not see as being helpful. The definition of abuse that is set out in the bill, which is taken from the Protection from Abuse (Scotland) Act 2001, is effective. The

difficulty comes with adding the qualification that it is domestic abuse. It is difficult to define exactly what that is. It is not defined in other statutes that address the area. The current protection is effective, so we do not think that the definition in the bill would be helpful. It could be exclusive and could lead to difficulties in practice for people on the ground, such as police officers or those in the courts, in trying to address whether a particular relationship was covered. That would take away from the other benefits that would arise from the bill, should it become an act.

The Convener: Again, you have to an extent anticipated a future line of questioning, which provides us with some reassurance that we are clearly consensus ad idem with regard to the basic principles of the bill.

I ask Bill Butler to proceed on the question of non-harassment orders and to obtain further information to that which we have already received.

Bill Butler: I will do my best, convener.

Mrs Welsh, you said in your responses to the convener that there has been no great take-up of non-harassment orders because of the course of conduct requirement, but you say that, as section 1 would remove the requirement for a course of conduct, the orders would become useful. I hope that I have recapitulated your view precisely. Will you say a little more about why you think that the orders would be useful? In what specific ways on the ground would the provision benefit the victims of domestic abuse?

Elizabeth Welsh: Breach of a non-harassment order is an offence. The provision would provide a similar benefit to that provided by section 3. It would take the prosecution of the offender away from the victim. We see that as providing a distance between the perpetrator and the victim. As Helen Hughes did, I will speak about women, as that is the norm—I agree with her on that. When a woman is looking for such protection, she commonly wants to have no contact with the person who has abused her. If she then has to be the person who raises proceedings and pursues an action, that creates a nexus between them. That continues a level of contact and can of course end up in a court hearing.

Bill Butler: That connection obviously creates more pressure on the victim.

Elizabeth Welsh: Yes, it does. For instance, it is fairly common for a woman to be subjected to a lot of pressure from family other than the abuser and sometimes from adult children. They say, "Don't do this to him—don't put him out of the house and don't take these proceedings, because it's not fair." Of course, the balancing argument is that, if it is in the hands of the Crown, rather than the woman, to take proceedings, she lacks control and might feel that she ought to be the person who makes the decision.

Bill Butler: Do many victims feel that way in your experience?

Elizabeth Welsh: My experience is that, as Women's Aid would say, domestic abuse is not an event; it is a process. We commonly find that a woman comes in repeatedly for advice and goes back to the abusive relationship until the final step is perhaps taken. A woman can decide to go back to a partner, and she is obviously free to make that choice, but if a prosecution is in hand that removes that choice from her, so there is a balance to be struck. With criminal proceedings, the balance is that they are taken not at the instance of the complainer, but at the instance of the Crown, which is exactly where the difficulty arises. Occasionally, women say, "Please apply to the procurator fiscal and ask them to drop the case, because I want to go back to my partner."

Helen Hughes: To enable a non-harassment order to be granted without a course of conduct and therefore an automatic prosecution by the police in the event of breach would also send a wider message to those perpetrators who breach orders that, as public policy, society does not accept that. The prosecution would not be at the instance of the victim of the abuse. We would be saying that, if an order were granted by the court, we would not allow it to be breached. That would send a wider message to the general public.

Bill Butler: My next question is perhaps more technical. Will the definition of harassment still involve an element of recurrence even if the course of conduct element is taken out? If so, will section 1 change the law in practical terms?

11:30

Elizabeth Welsh: The bill will not change the definition. Harassment is more easily identified if a course of conduct is involved and if elements are repeated. If only one element is involved, its occurrence must still be established.

Bill Butler: So you see no problem.

Elizabeth Welsh: Obtaining evidence of such abuse—whether it is called harassment or abuse—can often be a problem. Problems exist because such incidents often occur in the home, where they are not witnessed. If there are witnesses, we experience difficulty in encouraging them to speak up, for various reasons, one of which follows on from what I have said: we are dealing with family situations. Often, people do not want to involve a child, for instance, who might have been present during the abuse. They do not want a child to give an affidavit or to appear in

court to give evidence against their father, which is understandable. Other family members might have the same feeling. Obtaining evidence in such cases can be difficult, whether a course of conduct or one instance is involved.

Bill Butler: Does Ms Hughes concur with her colleague?

Helen Hughes: I concur. The Protection from Harassment Act 1997 says:

"'harassment' of a person includes causing the person alarm or distress".

As with domestic abuse, we all know what harassment is when we see it, but trying to put that into words is difficult. The issue is not the definition of harassment but the course of conduct. Section 1 will simply remove the need to establish the course of conduct; what harassment is will remain the same.

I understand that the bill will not change the meaning of harassment. As the 1997 act says that

"'harassment' of a person includes causing the person alarm or distress",

the definition is wide enough for a sheriff to determine, on the balance of probabilities, whether behaviour constitutes harassment.

Bill Butler: So you see no difficulties arising from the proposed change.

Helen Hughes: I see no practical difficulties arising. I am keen not to overcomplicate the law on protective orders. When someone instructs a solicitor to seek a protective order, an array of choices is available. We have orders under the Matrimonial Homes (Family Protection) (Scotland) Act 1981 and the Protection from Abuse (Scotland) Act 2001 and non-harassment orders.

An interdict cannot coexist with a non-harassment order, so an action would be raised for an interdict with the power of arrest and for a non-harassment order as an alternative crave. One element would probably be obtained. One practical reason why the take-up of non-harassment orders is not big is that, when solicitors draft their writs, they apply for interdicts and non-harassment orders. Whatever they can get is what they receive.

The issue is not that people do not apply for non-harassment orders. The reason why statistics show that such orders are not being granted could be that people have obtained interdicts with the power of arrest, so they do not need non-harassment orders, which cannot coexist with interdicts.

Bill Butler: That is clear—thank you.

The Convener: We move to section 2, which is on legal aid.

Stewart Maxwell (West of Scotland) (SNP): Before moving on to legal aid, I will follow up the questions on section 1 and ask about the practical impact of section 1 on the definition of harassment. Even if we remove the requirement for a course of conduct, which will mean that one incident can constitute harassment, it is clear that it is much easier in practical terms to prove harassment if more than one occasion is involved. Even if section 1 is implemented, is the number of orders likely to increase?

Helen Hughes: I do not think so. I deal with all the Scottish Women's Aid work in my area and I have done so for a long time. I am sure that Women's Aid has given evidence that, traditionally, women seek advice after the third occasion of violence. Few people seek advice after one incident—that is just the way it is. All solicitors in the Family Law Association see many people who require advice on protective orders for whom the matter does not go beyond that initial advice.

I have thought about the issue, and I have found it hard to see that there would be a big uptake, to be frank. Most people seek advice when a series of behaviours—of incidents—has occurred. An application for a non-harassment order after only one incident is likely to be made in an extreme situation—we can think of many examples—whose likelihood of being repeated might not necessarily be provable for the purpose of an interdict with the power of arrest. One test for obtaining a power of arrest is that, if the order is not granted, the behaviour is likely to be repeated. That test need not be satisfied to obtain a non-harassment order.

The non-harassment order with one incident only will cover cases in which there is one extremely serious incident that clearly amounts to harassment, where it is feared that if the behaviour were repeated, it would have serious repercussions for the victim. That is where you would seek a non-harassment order rather than an interdict.

Stewart Maxwell: That is why I assumed that it would be the exception. If it is so exceptional in the terms that you have just described, in that one incident was so serious that it led to the action being taken, is a non-harassment order the likely route that would be taken? I am thinking about the seriousness of the event, and why you would go for a non-harassment order rather than another action or an intervention by the authorities.

Elizabeth Welsh: If you had sufficient cause, you would apply for a non-harassment order, because it is more enforceable—the enforcement procedures are better than for an interdict with a power of arrest. If the event is at the high end, and you can satisfy the test, that is what you would do.

Helen Hughes: At the moment, you would seek a non-harassment order because breach of the order is prosecuted by the Crown; you would not have to raise breach of interdict proceedings. However, if section 3 of the bill comes into force, in which breach of interdict is prosecuted by the police, there might be a better choice—a breach of interdict will be prosecuted, which might be preferable to a non-harassment order. The benefit of the non-harassment order is the prosecution: there is no need to raise separate proceedings. If the power of arrest is prosecuted by the police, to a certain extent it will reduce the need for the non-harassment order.

Stewart Maxwell: Thank you for clarifying that.

Moving on to section 2, on legal aid, is it appropriate for the financial eligibility test to be removed from orders relating to domestic abuse, particularly given the current circumstances, in which legal aid resources are limited and will continue to be limited because of the public spending situation?

Elizabeth Welsh: We are concerned that there is a lot of pressure on the civil legal aid budget. We have lobbied on that on many occasions. There is justification for family actions more generally having the benefit of no means test. If, for instance, one of your children has been abducted or you have been denied contact, you would have thought that having free access to the courts to enable the needs of the child and their care arrangements to be addressed would be a public policy issue.

We have some reservations about the fact that domestic abuse cases have been highlighted as being appropriate for removal of the means test. Having said that, we are concerned that people who have been subjected to abuse have been put off by the cost of taking proceedings. If they are not eligible for legal aid, the costs of private proceedings are significant. Even if they are eligible for legal aid, as the SLAB representatives said, contributions can be high. The eligibility levels have been raised, but that has been done by raising the level of contributions alongside that. The starting point for eligibility remains the same, and there is a higher point beyond which you can still receive legal aid, but you can still pay a very high contribution. Access to justice for protection should perhaps be in a different category from other types of court action.

However, there is the question of equality of arms. If the pursuer is not means tested, the defender might be able to argue unfairness under the European convention on human rights. For instance, he might be excluded from legal aid because he cannot meet the financial test, and therefore has to pay for representation, while the pursuer does not.

Stewart Maxwell: You raised a couple of interesting points there, so I will try to separate them out. You mentioned that people are put off taking legal action by the financial test for legal aid. Can you quantify the extent of the problems that the financial eligibility test causes? Can you give us a figure?

Helen Hughes: I can give a figure from my firm's point of view. It is an anecdotal figure, not one from an empirical study, but as much as 80 or 90 per cent of the clients whom I see do not go to court because they cannot afford the legal aid contribution. They do not seek protective orders not because they are unable to access legal aid or because they lack grounds, but because they cannot afford the contribution. That is the experience of most family law solicitors.

A client does not need to be rich to have to make a legal aid contribution. I have clients who are single mothers who work part time, receive tax credits and perhaps some maintenance and who would not be eligible for legal aid. SLAB will be able to confirm the point in more detail but, from memory, the income threshold at which a client starts to contribute is low.

Stewart Maxwell: I will correct you: they would be eligible for legal aid.

Helen Hughes: Yes, but with a contribution. Eligibility does not mean affordability. Under changes made last year, more people became eligible for legal aid, but that does not equate with affordability.

I agree with Liz Welsh that we must have equality of arms. We cannot have a situation in which a pursuer is automatically entitled to legal aid but a defender is not. However, just because the defender may automatically be eligible without means testing does not mean that they would satisfy the reasonableness test. Therefore, a perpetrator of a lot of abuse would automatically be eligible for legal aid with nil contribution if the proposed rules came into play, but they would not necessarily satisfy the reasonableness test, as Catriona Whyte said earlier.

I do not feel that defenders automatically being eligible for legal aid without means testing would mean a large increase in the number of people getting a full legal aid certificate. In many of the cases with which I deal and in many cases in which protective orders are sought, the defender has no defence. That is why the orders are granted. We have proof, lots of incidents and corroboration. People in those situations will find it hard to satisfy the reasonableness test.

Dave Thompson: You mentioned affordability, which is important. The SLAB witnesses mentioned that contributions have to be paid over

48 months. If that were to be extended, would it become more affordable?

Helen Hughes: I suppose that it would be. However, I agree with SLAB that, although someone may have a contribution of £14,000, that is just their maximum contribution; if the legal expenses are less than that, they pay the lesser amount.

I often have clients with high contributions. In the application, I must give SLAB an estimate of how much the case will cost. Traditionally, protective order cases cost up to £2,000. SLAB, to be fair, will reduce the client's contribution until such time as I tell it that I have exceeded that cost.

The question is not one of affordability. Whether a client pays £2,000 over two, four or 20 years, they still have to pay a contribution towards the costs. The question is whether we as a country and society feel that the victims of abuse should pay anything at all. Should we take a policy decision about whether victims of abuse who have to access protective orders should have to pay towards that, irrespective of how large or small that contribution may be?

Stewart Maxwell: You and Mrs Welsh touched on why we should draw the line at domestic abuse cases. If we accept that the financial eligibility test—the means testing—should be removed for domestic abuse-related orders, why should it not be removed in other important areas of family law? Is your view that it should be removed for other areas of family law or further areas of law beyond that? Where would you draw the line?

Helen Hughes: Where do we draw the line? If we have a big pot of money that is not exhaustible, we do not need to draw the line.

Stewart Maxwell: Sometimes there is a good reason for drawing the line. Just because we have a huge pot of money does not mean to say that we should spend it on legal aid.

Helen Hughes: In an ideal world, eligibility should be automatic if one has a family dispute, whether that concerns divorce, contact with one's children or a protective order. My position would be that people should not be required to pay to get family situations sorted out. They are different from commercial matters.

However, we do not live in an ideal world, and we must be realistic. I think that protective orders fall into a category of their own. Because protective orders are needed so that people can keep themselves safe and be protected, they sit separately from other sorts of court action. Actions for divorce with financial provision or care arrangements for children are very much about disagreements between parents or couples about how to sort out the family and are not about the need for protection.

11:45

Elizabeth Welsh: I might draw the line slightly differently. I think that there is a public policy requirement for there to be no means testing in relation to actions that involve care of children. Of course, that issue is not before the committee. We are conscious that budgets are being heavily scrutinised at the moment.

Stewart Maxwell: We have talked quite a lot about the financial barriers that might prevent people from taking cases forward. To what extent do non-financial barriers prevent people from gaining access to justice in domestic abuse cases? For example, this morning we heard that there might well be a shortage of solicitors who are willing to take on such work. We also heard about issues to do with probable cause.

Elizabeth Welsh: The shortage of solicitors is a financial issue. Because legal aid remuneration for domestic abuse cases in particular and for cases in general is so poor, the number of firms that offer civil legal aid has been falling. Solicitors must do more work in such cases than they would do in a private case, but they are remunerated at a rate that is about a third of the average hourly rate that they might charge in a private case, so it is difficult for solicitors who do a high volume of legal aid cases to make ends meet. There is an issue of access to justice. SLAB's introduction of offices in which advice is provided has been of assistance in places such as Inverness, but we would rather that high street solicitors in every town could provide a service, so that there is broad access to justice and greater choice.

An issue that arises is the difficulty of obtaining evidence in domestic abuse cases, but much of the time we are able to put together evidence from various sources, such as criminal convictions, medical reports and evidence from neighbours or family members. The issue is difficult, for the reasons that I gave earlier.

Helen Hughes: I agree. The introduction of the block fee in October 2003 caused a major decline in the number of solicitors who undertake civil legal aid work. Prior to October 2003, solicitors' accounts were paid on a time-and-line basis—that is, we were paid per meeting, per letter and per time spent at the court. After the introduction of the block fee, solicitors got the same block fee irrespective of how much work they had to do.

Domestic abuse cases and abuse cases in general are labour intensive. We must see a person in a short period of time and we must drop everything else because they need a protective order and need us in court tomorrow, not next

week. We must see witnesses, write to doctors, complete the civil legal aid application, draw up a writ and have at least one or two hearings.

Many solicitors think that the remuneration that is provided under the block fee arrangement does not cover the amount of work that they do. They are running businesses and they have rent to pay and staff to pay. Many solicitors who are involved with the Family Law Association have found that the remuneration does not justify their taking on a case. On average, if we raise proceedings that do not go beyond the initial hearing stage—as most cases do not, because they end after we get the interdictory power of arrest—we are paid in the region of £400. If the sheriff officers have taken ages to find the perpetrator to serve the papers, they will often have been paid more than the solicitor was paid. When we think about a case in terms of man-hours, we find that we are spending anything from four to 10 hours doing the work. There is also work for the secretaries.

It is entirely understandable that many firms decided that they could not afford to do this type of work. The remuneration issue is a major reason why solicitors are no longer undertaking the work. They make the decision with a heavy heart, but they just cannot afford to do the work.

Victims of abuse have different reasons for not raising proceedings. They can be scared, in extreme cases. I have advised clients that there is no point in applying for a protective order, because the perpetrator of the abuse is so abusive. An interdict is a court order, not a wall of steel. If the perpetrator knows where the client stays or where their children go to school, he will find them whether or not they have an interdict. Everyone who does this type of work has a percentage of clients who will not raise the orders simply because they need to disappear and be in another area where the perpetrator will not find them.

Stewart Maxwell: I presume from what you have both just said that the removal of the financial eligibility test will not have much impact on the supply of solicitors willing to take up such cases.

Elizabeth Welsh: That is right because it is not about the client's ability to pay; it is about the rate of pay that the solicitors—

Stewart Maxwell: It is about their level of reimbursement.

I have a final area of questioning. You will have heard evidence today and previously about the potential mix of actions for which private clients pay and legal aid is used. That is different from what happens at the moment. How wise an idea is that and how easy would it be in practice to separate out those bits that would be fundable by legal aid from those bits that would clearly be paid for privately?

Elizabeth Welsh: That would not be too much of a difficulty because an action can be raised as a stand-alone action. If the client is married, for example, or there is a residence issue to do with a child, we could raise an action for divorce and residence that is separate from the action for protective orders. That is perfectly competent and we do that quite often. A client might come in and need a protection order right away, although they might not have reached the point at which they want to instruct us to raise an action for divorce and it might not be apparent that there is any issue with the care of the children. We will often raise an action that is simply about protective orders. Subsequently, other issues might arise and it might become appropriate for the client to instruct us to proceed with those. If the bill is passed, stand-alone actions will become the norm and the other craves will be dealt with by other legal aid applications, which will be dealt with in the normal way or through private feeing. Catriona Whyte referred to the limitation that we cannot charge a client privately for work that we are doing in the same case for which we have the benefit of a legal aid certificate.

Helen Hughes: I agree. In practice, we would have to raise an action as a stand-alone action, which we often do at present anyway. However, for it to be transparent to the client, they need to know what they have to pay for and what they do not have to pay for. The solicitor needs to know what they are being paid for under legal aid and what they are being paid for by a private client. To make it clear and simple, the eligibility test would have to be in relation to stand-alone actions in which only protective orders are sought.

Stewart Maxwell: I assumed much the same and that the obvious outcome would be for you to separate out the actions and have a stand-alone action for a separate crave. What would be the impact of that on the system? Given some of the arguments and discussions that we have heard with previous witnesses about the likely cost impacts if the bill were brought into being, if solicitors reasonably separated out the actions and made them all stand-alone actions and there was no longer a financial eligibility test, what would the impact be? Surely the number of actions would go up whereas, before, they were dealt with collectively as one mixed action, or one action that contained all the different elements. If they were separated out, two actions would have to go before the court.

Helen Hughes: I raised an action for divorce and residence a week ago as well as for exclusion orders and interdicts and so on. All that the court is dealing with just now are the interdicts and the

exclusion orders and that is all that it will deal with because they are covered by the emergency regulations for legal-aided clients. To be fair, those parts of the actions are normally dealt with in the first two to three weeks of the action being raised and they are never revisited. Normally, we are granted a power of arrest and the legislation grants that power for up to three years. Unless the case is to do with extreme behaviour, most sheriffdoms will grant it for a year and we will revisit it in a year's time because we are sitting with our power of arrest. The vast majority of cases will be resolved by the time we reach that stage.

Although there might be a separate process, that would not result in additional hearings because, at present, even when there is one action with many craves, they are dealt with as separate entities by the courts. If anything, the change would simplify matters. We would deal with the protective orders and when we raised the separate action for divorce or whatever other orders we were seeking, they would be distinct as they should be.

Elizabeth Welsh: As Helen Hughes said, emergency orders would be sought at the beginning in interim hearings. If there were issues with regard to the children, they would be dealt with at child welfare hearings, where the protective orders would not be considered. There is a separate procedure, if you like, within the action itself for dealing with the different craves. If there were financial orders to deal with, they would have to be dealt with either by motion procedure, if an interim order were being sought in relation to financial matters, which again would be dealt with separately from the protective orders, or by a proof at the end of the case. I agree with Helen Hughes. I do not think that the system would be clogged up in any way.

Stewart Maxwell: You both mentioned the emergency procedure. Do the comments that you made in answer to that question apply both to emergency circumstances and to non-emergency, normal circumstances?

Helen Hughes: I will clarify what I mean by emergency. Under regulation 18, someone can get emergency legal aid, but only for certain aspects of the case, such as interdicts, exclusion orders or orders in relation to children. Although I would raise an action where there would be craves for divorce, financial provision and residence and so on, the only bits that I could pursue at the early stages would be the interdict, the exclusion order and the orders in relation to children. That is what I mean by emergency regulations—that is what they cover.

Equally, if I were raising the same action for a client who was not in receipt of legal aid, the only things that the sheriff would deal with immediately would be the emergency matters. All court procedures are that the exclusion orders and interdicts and so on are dealt with within a hearing where that is all that is being addressed. If there are issues over the children, a separate child welfare hearing is assigned.

Stewart Maxwell: I understand that. In effect, you are saying that it does not matter how it is taken forward; it is dealt with separately. It is identifiable within the case.

Helen Hughes: Yes.

The Convener: Section 3 relates to the breach of interdict with power of arrest. To some extent, we went over this earlier. Time is finite, I am afraid. Unless there is some pressing need for others to speak, I ask that only one of the witnesses responds to questions.

Robert Brown: On the breach of interdict, presumably the possibilities are a breach of interdict action, the arrangements whereby, under the power of arrest, someone can be kept in custody for two days and perhaps contempt of court. I do not think that contempt of court is used to any significant extent. Is that your experience?

Helen Hughes: That is my experience. You can raise breach of interdict proceedings only if the Crown is not prosecuting. Before we can raise breach of interdict proceedings, we have to ask whether the case is being prosecuted. If an incident is serious, it will be getting prosecuted. That is the major reason why a lot of breach of interdict proceedings are not raised. The other reason is that there is a separate legal aid application, which requires a separate legal aid contribution, and people cannot afford it. In my experience, contempt of court is not used because those proceedings are raised at the instance of the pursuer, whose order is being breached and they have to apply for separate legal aid to raise them. Those proceedings are not raised, simply because of the cost.

Robert Brown: The implication of that is that in effect the criminal law would deal with the more substantial issues. The two-day arrangement would presumably apply in situations short of that, where there was abuse of modest significance—enough to have had an interdict with a power of arrest attached and to have had it breached. How effective is the two-days-in-custody arrangement at sorting out immediate problems, in that it cools the situation down and gives people the breathing space to do what they need to do?

Helen Hughes: In my experience, it is reasonably effective. My understanding is that the reason for the two-day arrangement is to give people enough time to raise breach of interdict proceedings, but breach of interdict proceedings

are a civil process, so the raising of them does not afford any additional protection. To a certain extent, it gives people breathing space to decide whether they want to raise breach of interdict proceedings, but it does not afford any additional protection.

Robert Brown: It is also a shot across the bows of the defender in that situation, is it not?

Helen Hughes: Yes.

Robert Brown: It is a penalty of a sort. Linked into all that, under section 3 there is the new criminal offence of the breach of the interdict with a power of arrest. That raises the issue of corroboration of the breach itself, but does it have any implications for the establishment of the need for the order, which is often granted on an emergency or interim basis in the first place?

12:00

Helen Hughes: If we raise breach of interdict proceedings at present, we must prove beyond reasonable doubt that a breach happened. Under civil evidence rules, corroboration is not required. If breach of interdict becomes a criminal offence, the rules of criminal evidence, which require corroboration, will apply. We may just have to live with that. If we want someone to be prosecuted under the criminal system, the ECHR and so on require there to be corroboration.

At the end of the day, breach of interdict is a serious matter. I would be concerned if corroboration were not required. Part of me says that we should not want corroboration, because it will then be easier to prove breach of interdict. However, if the matter is prosecuted under the criminal system, it will be difficult not to have corroboration, given the need to be fair to everyone who is involved. I do not think that such an arrangement would be ECHR compliant.

Robert Brown: Does Mrs Welsh have a different view?

Elizabeth Welsh: No.

The Convener: Finally, we turn to the definition of domestic abuse, which has already attracted comment.

Cathie Craigie: Mrs Welsh, you said that you did not agree that the definition needed to be included in the bill. Your position on the issue is clear. However, if no definition is provided, will it be sufficiently clear to the courts, the police, the Scottish Legal Aid Board and others what the term means, especially in relation to the criminalisation of breaches of interdict?

Elizabeth Welsh: I would ask whether the protections that sections 1 and 3 add require to be limited to cases of domestic abuse. Removing the word "domestic" would make slightly more sense of section 1, which provides that

"Every individual has a right to be free from harassment".

If that is the case, why is the protection that is then offered limited to people who have been subject to domestic abuse?

Like Helen Hughes, I have a great deal of experience of acting for women who have suffered domestic abuse. I recognise that it is a specific problem and that specific protections are needed. However, I am not sure that that is helpful in this context. If the word "domestic" and the restriction that it creates were removed, the bill would be perfectly effective and would offer protections to people who should have them and should benefit from the additional assistance that the bill offers.

There is a difficulty in defining "domestic". The definition of abuse in the bill is the same as the definition in the Protection from Abuse (Scotland) Act 2001, which is perfectly effective. That is a non-exclusive definition. It defines abuse as including certain behaviours, which means that any behaviours that are not specifically listed can still meet the test of being abuse. That is helpful. If we define domestic abuse in the bill, we will encounter situations in which we recognise abuse as domestic but that abuse does not correspond to the definition.

There is a difficulty in section 4(1)(a)(ii), which refers to

"a partner in an established relationship of any length".

How do you define "an established relationship" without reference to its length? If it is "of any length"—for example, a brief relationship of one or two dates—it cannot be described as "an established relationship". There is a contradiction. We are aware of situations in which there is abuse or harassment of people following an internet relationship, when those people have never met physically. There may also be abuse following a very brief relationship—which could barely be described as a relationship—when a perpetrator decides that he wants there to be a connection and harasses a person who went out with him once or twice. In our view, those situations would not fall within the definition, which would cause more problems than it would solve.

In our view, we should limit ourselves to defining abuse. The police have definitions of domestic abuse that they use in determining who fits the criminal criteria, but in other legislation such as the Children's Hearings (Scotland) Bill, which contains a new ground on domestic abuse, there is no definition. That is yet to be tested, but in practice we have not previously required to define domestic abuse and I believe it would be limiting rather than helpful to do that.

Cathie Craigie: How do legal practitioners currently understand domestic abuse?

Elizabeth Welsh: We do not need to define it. For example, the abuse provisions in the Matrimonial Homes (Family Protection) (Scotland) Act 1981 are quite limited. The act does not define domestic abuse, but it defines the parties who can access orders as those who have been in a relationship. They would be spouses, cohabitants or former cohabitants. The Protection from Abuse (Scotland) Act 2001 is open on the matter. Under its provisions, there does not have to be any relationship between the parties before it is possible to apply for orders.

The issue is relevant in the children's hearings provisions, and it can also be relevant in relation to contact actions. The Family Law (Scotland) Act 2006 introduced an element whereby domestic abuse can be a factor when someone is looking at a contact action. Again, however, I do not think that the definition there has been particularly helpful, because the courts previously looked at abuse as a factor in such actions. That might be a good example because, arguably, the provisions of the 2006 act have not particularly helped. I think that there are pros and cons on both sides.

James Kelly: Just to develop the discussion on the relevance of a definition of domestic abuse, in relation to the black and ethnic minority communities, do you believe that the current law is adequate where there is abuse from extended family members in relation to honour-based crime?

Helen Hughes: I have some experience of that. I act for quite a few clients from the Asian community. I do not think that the definition of domestic abuse as it is stated in the bill would necessarily help, because it does not include cousins or uncles or what have you. I think that we need to define abuse, which is defined quite specifically in section 7 of the 2001 act. The word that is the problem is "domestic". If we endeavour to define that, all that we will achieve is to exclude people. The definition will not be inclusive because we will always find someone who falls outside the definition. For example, if a woman's boyfriend is being abusive towards her teenage children, they would not be covered by it. The problem when we define something is that someone will always find a way to exclude a person.

If the purpose of the bill is to protect the victims of abuse, surely it would be better simply to define abuse and to have as the test the need for protection rather than the need to prove that the abuse was domestic. Otherwise, we will exclude people who need as much protection as someone who is married or in a relationship with someone. Why should they not be afforded the same protection when they are experiencing similar or perhaps more severe elements of abuse?

The Convener: Rhoda, do you have any questions?

Rhoda Grant: Just a quick one on the costs of cases. You talked about the difference in costs—or perhaps the lack of difference—between primary and ancillary cases. When someone is eligible for legal aid, what is the usual amount payable for protective orders in primary and ancillary cases? Do the amounts differ or are they the same?

Helen Hughes: By "amount payable", do you mean their contribution or the amount that the solicitor receives?

Rhoda Grant: The amount that the solicitor receives from the Scottish Legal Aid Board.

Elizabeth Welsh: We think that £450 is a baseline. There is an initial instruction fee, which I think is £210, and then a fee for an interim hearing, or possibly two. After the interim interdict is moved, there is a continued interim hearing to move for power of arrest or a non-harassment order, and the fee would probably be about £100 for each of those, so the total would be about £400 for an action that did not go any further. As Helen Hughes said, such actions commonly do not go to full proof, often because they are not defended.

Rhoda Grant: And that would be the same regardless of whether it was a primary action or part of an ancillary action?

Elizabeth Welsh: It would be different if, for instance, it was an ancillary crave in a divorce action, as the divorce, if it were defended, might progress to a proof or to undefended affidavits, so there would be further procedure to conclude a divorce, which would be an additional cost. However, again, that might be only another £400, if it were undefended.

Rhoda Grant: But if the divorce part were not covered by the action, that £400 would not come into play.

Helen Hughes: I deal with many cases that involve neighbour disputes, and we have to raise actions for interdict with powers of arrest. They are a good example, and that might be a way of getting some figures. I do not know the figures, and can speak only from my experience, but you might want to examine SLAB figures for cases in which people have raised actions under the 2001 act as a stand-alone action. Those actions commonly finish after a few hearings because they are often undefended. On average, the fee is about £400 to £500 at the most, plus sheriffs officers' fees, which are at least £100 or so, because they have to serve papers twice—first the initial papers, then the powers of arrest—but can

be as high as £250 or more, if they have to find the perpetrator. There are no court fees, because people with legal aid are exempt from paying court fees.

If the actions are going to be viewed as being stand-alone actions, the best way of sorting out the cost is to look to how much is being paid in relation to cases under the Protection from Abuse (Scotland) Act 2001, which definitely are stand-alone actions. I have raised quite a few of them, so there must be quite a few of them about.

The Convener: I thank you both for your attendance. Your evidence has been exceptionally helpful.

12:12

Meeting suspended.

12:13

On resuming—

The Convener: The final witness today is Carl Watt, the director of Stonewall Scotland. I am sorry that you have been kept waiting so long, Mr Watt, but we have had a fair amount to get through.

Bill Butler will open the questioning.

Bill Butler: Mr Watt, to what extent do you feel that domestic abuse is an issue within the lesbian, gay, bisexual and transgender community?

Carl Watt (Stonewall Scotland): I thank the committee for inviting us to share information with you. It is quite difficult for us to do so, as there is a lack of evidence out there, but we have done some work, as have some other LGBT organisations in Scotland.

The good thing about the bill is that it treats same-sex partners and civil partners equally. Domestic violence takes place in same-sex relationships, just as it does in heterosexual relationships, and we welcome the fact that that is accepted in the bill.

12:15

Some things regarding domestic abuse are going to be the same, regardless of the sexual orientation of the individuals involved. However, some additional things also need to be taken into consideration when looking specifically at LGBT people in relationships. I will give you two examples. First, someone coming out to their partner as lesbian, gay or bisexual can be a trigger point for domestic violence, and the threat of being outed to family, friends and colleagues could be a factor in that domestic abuse. The second example would be the stress that is placed on family relationships when someone starts gender reassignment treatment, which creates a major risk point for abuse from partners and, possibly, family members.

Stonewall did some research into the health of lesbian and bisexual women, the results of which were published in "Prescription for Change". It found that one in four lesbian and bisexual women has experienced domestic violence. That is the same as the national figure for women in general. The finding echoes an earlier UK-wide survey of LGBT people, which identified the same ratio.

In two thirds of the cases that were covered in "Prescription for Change", the perpetrator was another woman, and four in five of the incidents of domestic violence were not reported to the police. In cases that were reported, between a third and a half of victims were not happy with the outcome.

I should mention two other projects: LGBT Youth Scotland's domestic abuse project, which is a mainstreaming project that supports people to support LGBT people who are experiencing domestic abuse; and a new publication that shows the experiences of transgender people in Scotland who have suffered domestic abuse.

Dave Thompson: The Law Society has suggested that it might be preferable to improve existing mechanisms rather than bring in new legislation, and ASSIST has said that the current legal framework is not tenable. I know that you have said that there is a lack of evidence out there, but can you comment on how effective the existing mechanisms are for dealing with domestic abuse, particularly in relation to same-sex couples?

Carl Watt: As I said, the figures suggest that the incidence in same-sex couples is the same as it is in heterosexual couples, but we have not drilled down to find out exactly what the situation is on the ground. We know that there is a lack of visibility of support for LGBT people who are suffering domestic abuse. They might not feel that they can access the services. That is a broader issue in relation to LGBT people and access to many public services. Often, they feel that they might be indirectly discriminated against. Some simply do not feel comfortable or included, and some feel that they have not been taken as seriously as they would be if they were heterosexual.

There are a few reasons why people are not coming forward. A community safety report that we produced in relation to the Offences (Aggravation by Prejudice) (Scotland) Act 2009 showed that around 80 per cent of LGBT people in Scotland did not report to the police instances of physical or verbal abuse in the streets.

I think that those statistics will change, as a lot of work is being done with ACPOS and police services across the country. Since the 2009 act came in, proactive steps have been taken by the police to engage with LGBT communities, give them the confidence to come on board and assure them that they will be treated equally when they go to access the services.

Either new, additional services must be put in place around Scotland or we must ensure that the services that are in place are LGBT inclusive and are able to handle the issues of an LGBT person as well as they can handle those of a heterosexual person, and that is a matter of training and awareness raising for some people involved in those services.

Dave Thompson: Do you think that the bill will encourage people to report? Will the bill improve the situation that we have at the moment?

Carl Watt: I think that the bill is about raising awareness—raising awareness of the legislation and encouraging LGBT people to use it and to understand their rights. The key issue is what we need to do behind that to develop some sort of training and awareness work for, for example, the police and legal services and to support services that encourage engagement with the LGBT community. There is an element of work that needs to be done. It is not insurmountable, but it will take some time and energy.

James Kelly: Do you agree with the Law Society that there has been no great take-up of the current remedies that are available to deal with domestic abuse?

Carl Watt: I could not comment on that. I am not going to guess the reasons for that view as I am not fully aware of the evidence. If I was speaking on behalf of LGBT people, I think that I would say that the issue comes back to awareness and the fact that there is a bill on domestic abuse that includes them.

James Kelly: If you reflect on the issue after the meeting and have any additional thoughts on the bill, you could supply them to us in writing—if that is appropriate, convener.

The Convener: That would be helpful.

Carl Watt: I certainly will.

Stewart Maxwell: You will have heard our earlier discussion about the meaning of domestic abuse and whether how it is identified and defined in the bill is appropriate or helpful. Do you think that a statutory definition of domestic abuse would be helpful in tackling cases in the LGBT community?

Carl Watt: In Stonewall, we often use the term "domestic violence", which includes violence in a partnership and violence related to a young person who comes out in their home environment and is then a victim of abuse. The term is broad in that regard.

That said, having listened to everyone else and read some of the documentation, I see that people seem to be divided on the issue. I think that we should worry less about the term "domestic abuse" and what it is and more about ensuring that the legislation and policies are in place to ensure that nobody falls through the cracks in terms of the different forms of abuse that have been identified in the committee's proceedings of the past couple of months.

There is a question whether hate crime legislation can be used in the home as well as in the community and the workplace. I am happy with the fact that domestic abuse includes partnerships. I would have to leave it to other legal services to decide whether the definition should be extended to the wider family, but ultimately it is a case of ensuring that the gaps that were identified earlier are filled in before the bill is finalised.

Stewart Maxwell: Do you not think that the common law and the current understanding of domestic abuse is a more flexible tool to address the issue than a definition in statute? The current understanding covers partners and ex-partners—which includes those in same-sex relationships—whether those people are married, civil partners or just in a relationship. Is that not a more helpful way of dealing with the subject rather than trying to put a definition of domestic abuse in legislation? You will have read about and heard this morning some of the arguments on who should and should not be included and how such matters are defined.

Carl Watt: Widening out the definition would obviously add complications, but I also heard the gentleman from the Scottish Legal Aid Board say that it could work either way—with the general definition of domestic abuse or with the term being defined in a much more structured manner. Again, I think that that decision has to be taken by people with more of a legal mind than I have. My main concern is that some of the individuals that have been identified would fall through the gaps. If the bill looks formally only at partnerships, we should look at other ways to ensure that other forms of abuse are picked up.

Stewart Maxwell: I suppose that the nub of my question is: do you think that it is helpful to put in statute, in black and white, that a partner is somebody who is

"in an established relationship of any length"

and that that can be, for example, a civil partner? Is it helpful to say in the legislation that members of the LGBT community are clearly included, or is the application of the current common law good

enough? Do you think that the specific definition in the bill is helpful?

Carl Watt: I am sorry—I obviously picked you up wrongly. You should not have let me continue for so long.

I would say that it is good to see the definition in writing and in the bill. It shows an inclusiveness, and it is very positive to acknowledge civil partnerships and same-sex relationships at this point in time, when we are still working towards achieving a much higher level of equality.

The Convener: Are there any specific issues with regard to legal aid—there may not be—in so far as the gay community is concerned, or do you simply adopt the arguments that we heard earlier?

Carl Watt: I would just say more of what I said earlier. By encouraging and giving support to the organisations that provide legal aid and ensuring that their services are equality driven and that all individuals who come through the door are treated equally, further accessing of services in the future can be encouraged. There is some two-way work to be done: confidence building to encourage the people who suffer domestic abuse to come forward, and skills supporting for legal services.

The Convener: I was actually more concerned about individual access to legal aid. You will have heard what was said earlier. Does Stonewall know of any incidents in which access has proved a problem? If there have been no incidents, just say so.

Carl Watt: We have a general problem. We have a project called the good practice programme, which is funded by the Scottish Government and which has identified major barriers to LGBT people accessing public services and services in general. There is a lot of detailed documentation on that, and the situation for legal services will not be much different—there will be the same problems and experience of discrimination. The issue is about building, supporting and giving front-line service staff within organisations an understanding of how to deal with situations that can sometimes be slightly more complex than others.

The Convener: Does Rhoda Grant have any questions?

Rhoda Grant: To follow on from the previous question, has there been any case in which civil legal aid or the like has not been granted, or in which the courts have looked at domestic abuse between same-sex couples differently from abuse within heterosexual relationships?

Carl Watt: I do not have evidence on that, but it is something that I am interested to look into after today. Perhaps someone around the table knows, but I am not sure how such incidents are recorded and whether cases are recorded as such when they take place in a lesbian, gay or bisexual relationship or involve a transgender person.

The Convener: Mr Watt, thank you very much. I think that this is the first time that you have given evidence before the committee. The committee appreciates the clarity and brevity of your answers.

Carl Watt: Thank you.

The Convener: The committee will now move into private session for the remaining agenda items.

12:28

Meeting continued in private until 13:16.

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