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Pàrlamaid na h-Alba

Official Report

JUSTICE COMMITTEE

Tuesday 9 November 2010

Session 3

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JUSTICE COMMITTEE
30th 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 GAVE EVIDENCE:

James Clark (University of Glasgow)
Clare Connelly (University of Glasgow)
Fergus Ewing (Minister for Community Safety)
Rhoda Grant (Highlands and Islands) (Lab)
Colin McKay (Scottish Government Justice Directorate)
Simon Stockwell (Scottish Government Justice Directorate)

CLERK TO THE COMMITTEE

Andrew Mylne

LOCATION

Committee Room 2

Scottish Parliament

Justice Committee

Tuesday 9 November 2010

[The Convener *opened the meeting at 10:05*]

Decisions on Taking Business in Private

The Convener (Bill Aitken): Good morning. I issue the usual reminder that people should ensure that their mobile phones are switched off. There are no apologies for absence, but there is an apology for the slightly late start, which is due to the fact that the trains from Glasgow are running significantly behind schedule.

Under item 1, I ask the committee to agree to consider in private at future meetings the main themes arising from the written and oral evidence that we receive on the Double Jeopardy (Scotland) Bill at stage 1, and a draft report on the affirmative instruments that we will consider later in today's meeting. Do we agree so to do?

Members *indicated agreement.*

The Convener: Although it is not specifically mentioned on the agenda, the committee is also invited to consider in private at next week's meeting its approach to the proposed long leases bill. In the past, consideration of approach papers for bills and inquiries has taken place in private. The bill is expected to be introduced tomorrow and to be referred to this committee formally at next week's meeting of the Parliamentary Bureau. Do we agree to the suggestion that we consider the approach to the bill in private next week?

Members *indicated agreement.*

Subordinate Legislation

Regulation of Investigatory Powers (Scotland) Amendment Order 2010 (Draft)

Regulation of Investigatory Powers (Prescription of Offices, etc and Specification of Public Authorities) (Scotland) Order 2010 (SSI 2010/350)

Number of Inner House Judges (Variation) Order 2010 (Draft)

Bankruptcy (Scotland) Amendment Regulations 2010 (SSI 2010/367)

10:07

The Convener: We move on to consideration of subordinate legislation. Under item 2, we will take evidence from the Minister for Community Safety and his officials on the two affirmative instruments and the first negative instrument.

We will deal first with the draft Regulation of Investigatory Powers (Scotland) Amendment Order 2010 and the Regulation of Investigatory Powers (Prescription of Offices, etc and Specification of Public Authorities) (Scotland) Order 2010 (SSI 2010/350).

The formal procedure on the motions to approve the two affirmative instruments will be taken under agenda item 3.

The Subordinate Legislation Committee has not drawn any matter to the attention of this committee in relation to the affirmative instruments, but has drawn attention to a minor drafting error in the Regulation of Investigatory Powers (Prescription of Offices, etc and Specification of Public Authorities) (Scotland) Order 2010.

I welcome to the committee Fergus Ewing, the Minister for Community Safety; Lisa McCann, from the Scottish Government's legal directorate; Margaret Watts, from the legal services division; and Graeme Waugh, from the organised crime unit.

The Minister for Community Safety (Fergus Ewing): I welcome the opportunity to contribute to the committee's consideration of the draft Regulation of Investigatory Powers (Scotland) Amendment Order 2010 and hope that these explanatory comments are of assistance.

Section 8 of the Regulation of Investigatory Powers (Scotland) Act 2000 lists the public authorities within which prescribed persons may grant authorisations under section 6 for directed

surveillance and under section 7 for covert human intelligence sources.

As part of plans to make a small number of necessary organisational changes, it came to light that the word "Scottish" was missing from the entry at section 8(3)(d) of the act. The reference to the

"Common Services Agency for the Health Service"

should be a reference to "the Common Services Agency for the Scottish Health Service".

Although there is no body called "the Common Services Agency for the Health Service" and the Scottish Parliament, when passing the act, could only have intended to include a body within the Scottish health service, we are taking the opportunity to correct the matter in the interests of the avoidance of doubt.

The draft Regulation of Investigatory Powers (Scotland) Amendment Order 2010 achieves part of that process by adding the correctly named body. A separate order, the Regulation of Investigatory Powers (Prescription of Offices, etc and Specification of Public Authorities) (Scotland) Order 2010, achieves the other part by removing the incorrectly named body. That order, which is subject to the negative resolution procedure, also updates other named offices and ranks following structural reorganisation within the Common Services Agency and the Scottish Environment Protection Agency. We have also taken the opportunity to consolidate the various offices, ranks and positions orders that have been made since the 2000 act came into force.

I invite the committee to recommend that the draft order be approved by Parliament.

The Convener: Members have before them the accompanying cover notes on the draft Regulation of Investigatory Powers (Scotland) Amendment Order 2010 and the Regulation of Investigatory Powers (Prescription of Offices, etc and Specification of Public Authorities) (Scotland) Order 2010, which are papers 1 and 2. Do members have any questions on the orders?

Robert Brown (Glasgow) (LD): I have no particular objection to the orders as such. Are any statistics kept on the extent to which the powers are used? One is struck by the reference to the Common Services Agency. The circumstances in which that agency would have to use the powers are not immediately obvious. It might be of interest to know the extent to which they are used.

Fergus Ewing: I anticipated that matters relating to surveillance might engender some general interest from members beyond the mere technical changes that I have described, which have a very narrow focus. I did not anticipate, however, that members might be interested in particular statistics. If any member writes to me about that, I will obtain statistics for them.

Counter-fraud services use covert surveillance to investigate when less intrusive forms of investigation have failed to provide the intelligence required or are not appropriate in the circumstances. The provisions in the Regulation of Investigatory Powers (Scotland) Act 2000 are used only when it is necessary and proportionate to do so. The act sets out a framework for the regulation of surveillance to ensure that the European convention on human rights is complied with and that the functions for which surveillance is required are narrowly focused. There is a surveillance chief commissioner to whom those who carry out surveillance are ultimately accountable.

My understanding is that, in 2000, when the Parliament passed the act, it established a framework to make appropriate checks for the purpose of ensuring that the powers are used properly and appropriately.

I hope that that is of help. If any particular statistics are required, we could look into the matter, although I am told that no statistics are kept by the Scottish Government. Public authorities, such as SEPA, are entitled to use the powers, in limited circumstances. For example, SEPA could be pursuing a case in which someone was accused of fly-tipping, and it might want to check whether there was evidence to substantiate suggestions that such an activity was taking place. In that circumstance, somebody might be followed or pursued in order to see whether such an activity was taking place.

Public authorities provide information to the Office of Surveillance Commissioners, but they are not required by law to provide statistics, as I understand it.

The Convener: There are no further questions, so we move on to the draft Number of Inner House Judges (Variation) Order 2010. I draw members' attention to the accompanying cover note, which is paper 3. The minister does not feel the need to make an opening statement.

There being no questions from members, we will move to item 3, which is formal consideration of the motions to approve the two affirmative instruments. No member objects to motions S3M-7152 and S3M-7291 being moved and disposed of together, so I invite Fergus Ewing to move them.

Motions moved,

That the Justice Committee recommends that the Regulation of Investigatory Powers (Scotland) Amendment Order 2010 be approved.

That the Justice Committee recommends that the Number of Inner House Judges (Variation) Order 2010 be approved.—[*Fergus Ewing.*]

Motions agreed to.

The Convener: Item 4 is consideration of the two negative instruments that are before us today. The Regulation of Investigatory Powers (Prescription of Offices, etc and Specification of Public Authorities) (Scotland) Order 2010 (SSI 2010/350) was discussed under item 2.

Members will see from paper 2 that the Subordinate Legislation Committee drew the order to the attention of the Parliament on the general ground that there is a drafting error in schedule 2, which the Scottish Government has acknowledged. Is the committee content to note the order?

Members *indicated agreement.*

The Convener: The second negative instrument for consideration under item 4 is the Bankruptcy (Scotland) Amendment Regulations 2010 (SSI 2010/367). I refer members to paper 4. The Subordinate Legislation Committee did not draw any matters to the attention of the Parliament in relation to the regulations.

Members have no comments to make. Are we content to note the instrument?

Members *indicated agreement.*

The Convener: The terms of the regulations are therefore noted. I thank the witnesses for their attendance.

10:15

Meeting suspended.

10:16

On resuming—

Domestic Abuse (Scotland) Bill: Stage 1

The Convener: We now come to item 5, the fourth and final evidence session on the Domestic Abuse (Scotland) Bill, which was introduced by Rhoda Grant. Ms Grant has indicated that she will attend for the evidence given by the first panel of witnesses before she gives evidence as part of panel 2.

I welcome the first panel of witnesses: Fergus Ewing, the Minister for Community Safety, whom we have not seen for absolutely ages; Colin McKay, of the Scottish Government's legal systems division; Simon Stockwell, of the family and property branch of the civil law division; and Lesley Irving, of the gender equality and violence against women branch of the equality unit.

I invite Mr Ewing to make a short opening statement.

Fergus Ewing: We all agree that domestic abuse is abhorrent, repellent and a stain on Scottish society. Therefore, any measures to tackle it are welcome. I also welcome the debate that the bill has generated. It has shown that changes to the law are needed in this area.

The evidence that has been submitted to the committee also shows that progress has been made. In particular, witnesses have said that the way in which the police and the Crown Office deal with domestic abuse has greatly improved in recent years.

Turning to specific provisions in the bill, we support the removal of the requirement to show a course of conduct from non-harassment legislation in domestic abuse cases. We also support the criminalisation of breaches of interdicts, with powers of arrest that are designed to tackle domestic abuse.

We have concerns about the costs that the bill might bring. I recognise the points that have been made by the Association of Chief Police Officers in Scotland and the Crown Office that the costs to the police and to the Crown Office would be negligible. There might indeed be some savings if changes to the law enable effective action against perpetrators to be taken more quickly.

However, as the Scottish Legal Aid Board has said, there could be substantial costs to the legal aid budget. That will very much depend on the increase in the volume of applications and orders, which is of course very hard to predict. There will also be costs to the Scottish Court Service, through an increase in the number of cases and

because people who receive legal aid are exempt from court fees.

I have a great deal of sympathy for the view that people who are required to take legal action to protect themselves from domestic abuse should not have to pay to do so. Regrettably, however, we must be mindful of the costs to public funds at a time when the legal aid budget is under severe pressure.

In considering public expenditure in this area, there is much to be said, in my view, for expecting those who are convicted of crimes to meet the cost of those crimes if they can afford to do so. That is beyond the scope of the bill before us, but if we were to move in that direction in future, it might free up some money to offer victims of abuse greater protection.

We have noted some technical and drafting points in respect of the bill. The legislation in this area is complex, and some technical amendments will be required. I will write on those detailed points to the member in charge and the committee, with whom the Government is happy to work.

I recognise the need to examine the definition of domestic abuse in section 4. I understand why the definition is there, and I note that the Crown Office's evidence showed that prosecutors would need certainty on whether an offence had been committed. Equally, however, evidence to the committee has demonstrated significant doubts about the proposed definition. Again, we are happy to work with the member in charge and the committee to consider the options in that area.

I look forward to the committee's questions.

The Convener: You have anticipated a number of them, which is useful for our question session. James Kelly will begin.

James Kelly (Glasgow Rutherglen) (Lab): Good morning, minister. No one who listened to the committee's evidence sessions could have failed to be struck by the impact that, sadly, domestic abuse still has throughout Scotland. We would all agree with the minister that it is a "stain on Scottish society".

Some of the evidence that we have taken suggests that the current legal remedies are not accessible—Scottish Women's Aid stated that they are "toothless" and "ineffectual". I am interested in the minister's views on the current process and the criticisms of its weaknesses.

Fergus Ewing: I tend to agree with you and with the witnesses who suggested that the current remedies are not sufficient and are to some extent not used frequently, if at all. That is why I have broadly indicated our support for the principal measures in the bill. There is a consensus in principle on that. The work that we must all do to move forward involves sorting out the detail and the definitions, and is extremely important.

The main problem as I understand it—I hope that I am not misrepresenting anyone; I did not have the opportunity to listen to the evidence but I have read parts, although not all, of it in the *Official Report*—is that breach of interdict is a very difficult process. It is extremely difficult for the female to put her head on the block and pursue the matter in court, so the proposal to criminalise such breaches and to require the state to take over the responsibility for pursuing them is absolutely right.

However, that proposal carries with it the concomitant responsibility on Parliament that, if we create a crime, we must define it, so that the prosecution authorities know in which circumstances they should prosecute and in which they should not. That means that the definition assumes a great deal of importance. In one sense it is a technical matter, but in another it is an important issue that infringes on prosecution and on human rights. I hope and suspect that there may be a measure of consensus in relation to that analysis of the situation. It certainly seems to be borne out by practitioners in the field, who said that in their experience the current system is not working as effectively as we would all wish it to.

James Kelly: I think that we would all agree that it is important in these matters to ensure that the detail is precise and accurate.

What is your assessment of the particular problems with civil actions in relation to domestic abuse? What could be done to tackle those?

Fergus Ewing: As I said, the measures in the bill will go some way towards improving access to justice. Different orders are available at present; I understand from some of the witnesses that non-harassment orders are regarded as being a more effective method of protection than interdicts. That may be because the process of dealing with breaches of interdict has not been effective—I hope that if it becomes more effective in future, the perspective of practitioners will change.

We quickly get into issues of definition and technical issues when we study exactly how we propose to improve the law, but we all recognise that we should support in principle the measures in the bill—particularly those in sections 1 and 3—and sort out the details so that the measures work as we would all wish them to. That would improve access to this important area of remedy in Scotland so that women—it is the norm for the victim of abuse to be female—who may have been subject to a long series of assaults on many occasions over many years are able to come forward and are not inhibited from doing so. Indeed, when they come forward, they should find

that they have a fair and effective legal system that provides them with a more effective remedy than has been available in the past.

That is why we believe that the bill would contribute to greater success.

The Convener: Is Mr Kelly satisfied with those responses?

James Kelly: Yes.

The Convener: Minister, you said that section 1 was generally acceptable, but do you have any specific objections on the detail?

Fergus Ewing: I am aware that there has been some argument about the meaning of "harassment", which, from my recollection of the *Official Report,* I think that Mr Brown raised. He suggested that the word implies conduct that takes place more than once.

We have looked into the matter in some detail, and it is probably more appropriate that I reply in detail in writing, because the note that I have is long. I have studied it. We need to consider the matter carefully, but we are reasonably satisfied that "harassment" does not seem to require conduct that takes place on separate occasions.

We will write to the committee on that point rather than take 15 to 20 minutes to go into a long series of largely technical points, if that is okay.

The Convener: That is perfectly acceptable. There will have to be correspondence not only with the committee but with the member in charge of the bill.

You dealt with finance and legal aid. I ask Robert Brown to pursue that aspect.

Robert Brown: Before I do so, I will comment on the point that the minister raised about harassment. To borrow a phrase from elsewhere, is harassment perhaps a process as much as an event? Is some element of things going on into the future the essence of the definition? The minister said that he would come back to us on the matter, so I will not pursue it too far at the moment.

Fergus Ewing: The first question is: what is the dictionary definition of harassment? I do not think that all the definitions—there are several—necessarily entail there being two separate, distinct events. There is perhaps an implication that the conduct not only happens over a second or two of an event but may happen over a period of two hours, for example. In the subject matter that we are talking about, a female may be the subject of a row, with the verbal abuse continuing over two or three hours and eventually becoming physical abuse. I do not think that anyone would say that that is not harassment.

Robert Brown: That is helpful.

The Government made some changes to the legal aid arrangements a while back, one of the consequences of which was that someone with a disposable income of more than £25,000 could be assessed for a legal aid contribution of up to £14,000. We were told by the Scottish Legal Aid Board that that contribution could be paid in instalments over four years. That sounds like a pretty significant deterrent for people on a relatively modest income, particularly in the context of domestic abuse. Do you have any comment about the limitations that a contribution at the higher end can cause in such situations?

10:30

Fergus Ewing: I think that you questioned Colin Lancaster on that. You put it to him that contributions would have to be paid over 12 months. Perhaps, like mine, your recollection of private practice is a bit rusty, because he was able to say that any contribution would, in fact, have to be paid over 48 months. That means that any contribution can be paid over a longer period, which makes it more affordable for someone who does not have a large income.

I will make two points about that. First, I recollect that the evidence shows that no contribution at all is payable in 77 per cent of cases. Secondly, and more relevantly, I repeat another point that Mr Lancaster made in his evidence. Although the contribution that is payable in a case might be £14,000—from memory, that is the figure that he mentioned—the actual fees in the case might be £1,000. There is a difference between the contribution that is assessed and the actual payment, and one might expect the payment to be somewhat lower than the contribution in such cases. The committee might well want to dig deeper into that area. Perhaps it has already done so; I am not sure. Mr Brown characteristically threw a googly into the debate, quite rightly, when he raised the further factor that the Legal Aid (Scotland) Act 1986 allows for special provision to be made on expenses in some cases, which Mr Lancaster acknowledged. It is a complex area, but I repeat that there is a difference between the contribution that is assessed and the actual payment.

I could be wrong, because I do not have the statistics, but I would be surprised if the proceedings in the cases that we are discussing are typically or ordinarily hugely protracted, as they might be in, for example, residence and contact cases. We have seen recently that some of those cases last for several weeks because of disputed evidence about incidents involving the children. The cases that we are discussing probably tend to be a bit less complicated, a bit more straightforward and a bit shorter, so the

expenses tend to be a bit lower. However, I am sure that the Scottish Legal Aid Board will provide—if it has not already done so—statistical evidence that shows whether what I have just said is correct or not. That might help the committee to make a judgment on the difficult question of the costs to the public purse that might be created by the bill.

Robert Brown: There is no question but that the legal aid provisions in section 2 are one of the difficult areas of the bill in a number of respects. We have had evidence from some sources that some people are put off by the financial implications. The woman—it frequently is a woman—might have left the house, she might be off sick from work, she might have had to give up work because of the background, she might have responsibilities for the children that were previously shared, or she might not have access to the value of the house. There are a number of reasons why her circumstances might be much more financially straitened than they would otherwise be if she had a normal income.

First, does the Government accept that? Secondly, has any thought been given to how the availability of legal aid might be improved for people in that situation, even if the mechanism in the bill is not the right one to use to achieve that?

Fergus Ewing: It is reasonable to say that the Government has extended the availability of civil legal aid to cover about half the population. Admittedly, those at the upper end of the income scale have to make a contribution, but it provides a great deal of confidence and assurance that at least there is legal aid, which removes the uncertainty about having to meet costs in such circumstances.

It would be difficult for me—and it would probably get me into deep trouble—to commit to making more money available from the legal aid fund at a time when it looks as if the budgetary decisions that the Parliament will have to take shortly will lead to an expectation of some reduction in expenditure across the board, or in most areas of expenditure. Looking at the issues in the wider context, it would be extremely difficult for me to make that commitment. I said in my opening remarks that I have some sympathy with the predicament of a female who is being beaten and who then has to pay to get justice. There is a principle here, and it would be open to the committee and the Government to look further at the specific implications of removing the means test for women, or men and women, in those circumstances.

However, it is not even as simple as that, is it? Elizabeth Welsh told the committee:

> "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."—[*Official Report*, *Justice Committee*, 2 November 2010; c 3698.]

A case can be made for that, too. If there were to be a change in, or an exception made to, the requirement that legal aid in civil actions be means tested, it would be incumbent on us all to consider the issue in the round, and not solely for this particular type of action and litigant.

That does not begin to address the complexities that have taken a great deal of the committee's time. Those cases in which an interdict is being sought may also be cases in which the pursuer is seeking divorce, making financial claims or seeking residence or contact in relation to their children. It would be difficult to disaggregate from the rest of the action the work done on the interdict or the domestic abuse crave if it were not to be means tested, as I presume that the work for the rest of the action would be means tested. How would that work? The committee has received a lot of evidence about that, and it is clearly a complex area.

As I said in my opening statement, I am basically sympathetic to the proposal that the means test should be removed. However, that would raise complex issues that I am sure the committee is already well aware of and has appraised.

The Convener: The matter will require considerable thought. We know where our sympathies lie, but the practicalities and expense immediately come to mind.

Robert Brown: I understand the Government's reservations in that area. Let us turn to the question of non-financial barriers, on which we have received evidence, such as the shortage of solicitors who are prepared to work in the field and the lack of probable cause. Does the Government have a view, beyond what we have already heard from the Scottish Legal Aid Board and others, about whether access to justice in domestic abuse cases is restricted because of such factors? Is the Government doing anything to address the broader issues such as the availability of solicitors and the levels of remuneration for civil legal aid, which have been mentioned? I know, from past experience, that the latter was a substantial issue for practitioners in the field.

Fergus Ewing: We have no plans to increase the levels of remuneration that are provided for in the legal aid budget, given the financial pressures that I have just described. That is a realistic and sensible approach, although it will not be welcomed by some.

Having said that, I note that, in discussion of the recently passed Legal Services (Scotland) Bill, there was agreement on the proposal—I asked civil servants to put it in the bill for this very reason—that there should be a new duty on the Legal Aid Board to be proactive in identifying areas in which there are serious gaps in the provision of legal advice. I put forward that proposal because I was aware of the seriousness of the issue, having attended a Scottish Women's Aid conference and spoken on the matter and on other issues of which I was apprised. Sheriff Mackie, a lady sheriff, has argued that there is a lack of expertise among some practitioners in this work, as it is a specialised area, and there is general concern that some of those who undertake the work may not be sufficiently experienced in it.

We have, therefore, already taken action on the matter in the Legal Services (Scotland) Bill by giving the Legal Aid Board a proactive monitoring duty. Normally, the Legal Aid Board's job is to dole out the legal aid money prudently, properly and appropriately in considering legal aid applications. However, the new duty establishes a forum for access to justice, and I have asked that Scottish Women's Aid be on that forum, for the reasons that have led to the question being put. Of course, that process does not guarantee that any more money will be available, but it will assist us all considerably in assessing whether there are serious gaps in this area in particular. I expect that work to bear fruit sooner rather than later.

Colin McKay (Scottish Government Justice Directorate): I have a couple of points to add. It is important to put on record that we have already increased the remuneration for civil legal aid. As the Scottish Legal Aid Board's evidence showed, the number of civil legal aid applications has gone up dramatically over the past year. That may be due partly to increased eligibility and partly to increased remuneration for solicitors. I think that it is largely a consequence of the recession, which means that people are having more problems and that solicitors are making less money out of other business, with the result that legal aid has become slightly more attractive to them. That suggests that, overall, it is not that legal aid is set at an unaffordably low level but that, when solicitors can make more money doing other things, they might be inclined to do so. The recent evidence is that more solicitors are returning to legal aid work and that the numbers are going up quite substantially, as is the cost of the fund. Some of the evidence in the bill documentation relates to research that was done in 2007, and I think that the picture has moved on significantly since then.

The other thing to say about rates is that increasing them would be a bit of a blunderbuss approach to improving provision, because it might mean that people would come in just because the money was good, not necessarily because they were the best people to do the work, and there might still be a lack of people in particular areas. There are other ways of increasing supply. In the past, the board has done that through services such as the civil legal assistance offices, which I think Colin Lancaster mentioned.

Where there is evidence that the profession cannot provide a service—particularly now that, as the minister said, the board has a new duty to monitor access to justice—an alternative to simply bunging up the rates for everyone would be to put in targeted provision, which we have already had some success in doing.

Nigel Don (North East Scotland) (SNP): Good morning, minister.

The committee heard evidence from the Legal Aid Board that it tends not to award legal aid in what it regards as less serious cases of domestic abuse because that would be an unreasonable use of public funds. I put it to you that that would seem to be trial by Legal Aid Board rather than trial by court. Is that really how we should operate? When it comes to domestic abuse, should it not be a matter of zero tolerance? In other words, should legal aid not be available in all such cases?

Fergus Ewing: I read some parts of that evidence on reasonableness, and I understand the point that is being made but, as I understand it, it is part of the statutory process—I think that this is set out in the Legal Aid (Scotland) Act 1986—that, in order to get legal aid, one must do a number of things. One must establish that one has a probabilis causa litigandi; one must show that the case is reasonable; and, if one has money to pay, one must make a contribution in accordance with the rules. It is a sort of three-legged stool—all legs of the stool must be established before legal aid can be found. That is the general process that applies to such cases. As I understand it, the law places the duty on the Legal Aid Board, which is independent of the profession, of the Government and of the judiciary, to carry out its functions in that way.

It is not for me to opine on the circumstances in which the Legal Aid Board would say that an application for legal aid was reasonable or not reasonable. That process is clearly set out in statute. If the member wants to challenge the position, he would have to lodge amendments to the Legal Aid (Scotland) Act 1986 that addressed that whole process. I can imagine that there might be some circumstances in which the case shown might not be reasonable, but I do not really want to be drawn into giving specific examples. If the member wanted to pursue the matter, he would probably need to drill down further with the Legal

Aid Board, to follow up on the questions that have already been put.

I think that Mr McKay is itching to cast some further light on the topic.

10:45

Colin McKay: Not much more light, I have to say, but my reading of the evidence suggests that it sometimes comes down to the reasonableness and efficacy of the action—in other words, the difference that the action will make to an incident that appears to be a one-off and is unlikely to recur or is at the lower end of seriousness. Those are difficult judgments that the board has to make in all kinds of litigation but, as the minister has said, it is difficult to think of an alternative to allowing the board to judge what constitutes a reasonable use of public funds in an individual case.

Nigel Don: I take—and indeed agree with—your point. It seems to me that anything serious will be a criminal matter anyway, but the fact is that in less serious cases the division between civil and criminal is somewhat blurred. Although I understand the process, I think that the events that come before might well be something of a blur.

Is there a general obligation to provide equality of arms? Where the pursuer has legal aid, is it fair to ensure that the defendant does not?

Fergus Ewing: That argument was considered in the course of the committee's evidence taking; indeed, I believe that the convener himself raised the issue in a different way by wondering whether, if legal aid is given to pursuers, the European convention on human rights will require the same to be given to defenders. Although I think that it would be prudent of me not to speculate on the ECHR, I take the point that the availability of legal aid for pursuers will raise difficult questions for SLAB in relation to defenders, particularly when the consequences of breaching a domestic abuse interdict with the power of arrest will become more serious following its criminalisation in the bill.

Nigel Don: Earlier, you were good enough to mention the question of sorting out legal aid for multiple-crave actions. Is that really as much of an issue as you have suggested? I am of the impression that a single sum—several hundred pounds has been suggested—could be set apart for the domestic abuse part. Would it be sensible to have a lump sum for that bit and allow everything else to be argued over?

Fergus Ewing: I am sorry—can you repeat your suggestion?

Nigel Don: In actions involving multiple craves, could the bit for domestic abuse be separated out? It has been suggested that, regardless of the case, a single sum for legal aid—several hundred pounds has been mentioned—could be set aside. Would such a move be practicable or impracticable?

Fergus Ewing: Rhoda Grant pursued the issue in a series of factual questions to witnesses, asking whether a block fee—what you have termed a lump sum—could be paid. I believe that the response was that that approach might create some difficulties but might merit further consideration. Indeed, it certainly needs to be considered in some respect. Given that in criminal work, at a summary level in particular, fees operate in a way that was not the case when Mr Brown and I were in active practice, it was perfectly legitimate for Rhoda Grant to pursue that line of questioning. However, I am not sure how it would apply to multiple-crave cases. It would be very difficult to predict the amount of work—and therefore the appropriate level of fees—that one would reasonably expect to be required in cases involving arrangements for children, residence and contact. The amount could be small or massive. I imagine that there will be huge resistance in the profession to an overall block fee for all the work that is required in a multiple-crave action.

It might be possible to have a block fee for the domestic abuse element, but one would have to disaggregate that from the rest of the work. I realise that I am speculating—perhaps imprudently—on how that might be done in practice, but I picked up from the responses to Rhoda Grant's questions that, although such a move might be possible in theory, an awful lot of difficulties would have to be worked out in practice. It is quite difficult to work out such issues in a bill, and I assume that the committee will consider the matter further in its deliberations.

The Convener: Yes, the issue has exercised us thus far.

Dave Thompson will lead the questioning on section 3, which deals with breach of interdict with power of arrest.

Dave Thompson (Highlands and Islands) (SNP): The minister mentioned costs and we have had a discussion of legal aid. We heard evidence, including from the Association of Chief Police Officers in Scotland, that criminalising breaches of interdict might result in longer-term budgetary savings because of a deterrent effect. That was countered by the Legal Aid Board, which feels that the measure might lead to an increase in the number of applications for interdict and that people who are subject to interdicts might be more likely to defend cases. In that context, are there any other ways in which the Scottish Government could increase the effectiveness of existing remedies for dealing with breach of interdict, or is

there another less costly mechanism by which a breach of interdict could be criminalised?

Fergus Ewing: As indicated in our written submission, we support the proposal in section 3. We believe that the oral evidence that has been given by a wide range of bodies shows that the current arrangements are not working as effectively as they should. We need to listen to that evidence. We have done that and have broadly accepted that that evidence should be regarded as reliable and as a good indicator of what is wrong with the current system. We will have some technical amendments to suggest to section 3 and other sections to make them effective. I repeat that we are happy to work with the committee and the member in charge of the bill on that.

To respond to Mr Thompson's question, I am not aware of any possible alternative approach, although my officials might want to comment. I have indicated our broad support for the measure as set out in section 3, subject to the caveats that I have described. I am not sure whether I can be of much more assistance to the member, but I see that Mr McKay is helpfully coming to the captain's deck to help out.

Colin McKay: On the specific question about criminalisation of breach of interdict, it is difficult to think of any other way of doing that that would not have the same costs. I guess that the costs would arise from things such as legal aid for the defender. Because the person would be charged with a criminal offence, and potentially a serious one, they would inevitably get legal aid. It is not obvious to us what other vehicle we could devise that would be any better than the remedies in the bill.

The Convener: We turn to the meaning of domestic abuse and the complications that might arise from a definition.

Stewart Maxwell (West of Scotland) (SNP): I take the minister back to his opening remarks, in which he referred to the Crown Office's support for a statutory definition of domestic abuse if section 3, on breach of interdict with power of arrest, remains in the bill. Is the statutory definition that is proposed in section 4 absolutely necessary if section 3 is to be retained?

Fergus Ewing: We have problems with the definition in section 4, which we have outlined and which were identified by some of the witnesses. The witnesses from the Family Law Association made that point, as did the Crown Office. However, there needs to be a definition so that the Crown Office knows clearly the circumstances in which it should prosecute and those in which it should not. That goes to a fundamental principle of Scots law: that conduct that is criminalised should be clearly capable of being understood and defined. The principle is that there should be no vagueness or lack of clarity in general about what constitutes a crime.

Having said that, I can offer the committee potential solutions, in principle. I am happy to run through them.

The Convener: That would be useful.

Fergus Ewing: The first potential solution is to slim down the definition, but I appreciate that it might be difficult to agree a definition. We could require sheriffs to provide in the interlocutor that an interdict is a domestic abuse interdict—but sheriffs might look for a definition, and there will be older, pre-existing interdicts, which were granted before the bill was passed. The bill could specify that interdicts that are granted under specific pieces of legislation are domestic abuse interdicts, but there could be interdicts under other legislation or under the common law. The bill could criminalise all breaches of interdicts with a power of arrest, but that would widen the bill's impact and might not be within its scope.

I have simply given a headline for, and necessarily brief description of, possible solutions, but we can write to the committee with more detail. There might be solutions of which we have not thought, and the Crown Office, the Law Society of Scotland, the Family Law Association and Scottish Women's Aid might suggest solutions. It is important that we get the matter right, for the principled reason that I set out.

Stewart Maxwell: That was helpful. It has been suggested that the word "domestic" should be removed and the behaviour defined just as abuse. What is your view on that?

Fergus Ewing: There are perhaps two ways to reply to your question. First, I am here as the minister rather than as someone from the Scottish Government legal directorate, and what you are talking about is partly a drafting issue, in relation to which the SGLD's specialist knowledge and expertise are necessary, so that the law is clear and is properly prepared.

Secondly, I have always had misgivings about the word "domestic", for this reason: when women are beaten up—over a long period, on many occasions—by their spouse or partner, to call what has happened to them "domestic" violence somehow implies that it is a lesser form of violence than the more serious violence that might happen in a pub, or as a result of a knife attack by a thug. That is not the case. The implication that it is a lesser form of violence does not follow of necessity when the phrases "domestic violence" or "domestic abuse" are used, but it is there. It has always seemed to me that the opposite is the case: a woman who is beaten up by her partner

over a long period is sustaining not just one but a series of assaults.

Research by Jaffe in 1982 showed that, ordinarily, there might be 35 assaults before action was taken by the female. I think that that research has been supplemented and that not so much reliance can be placed on it; nonetheless, it illustrates the point. We are talking about vulnerable women who are often looking after children and are feeling trapped by the necessity of staying with their children, who therefore put up with all that violence, which ordinarily would be treated as outright assault and sometimes assault to severe injury—indeed, I think that Rhoda Grant pointed out that there were 13 murders in a recent year.

I feel strongly that in no circumstances must we downgrade, downplay or underestimate the seriousness of the problem, which I do not think that any member would do. It is a hugely serious problem. Therefore, I hope that, whatever definition we come up with—I hope that we will come up with a definition—will take account of such factors.

11:00

Stewart Maxwell: I heard what you said about the necessity of having the Scottish Government legal directorate's advice. May I push you a bit on the definition in section 4(1)(b)? What is your opinion on the part of the definition that deals with

"the perpetrator's parent, child, grandparent or grandchild (whether by blood or by adoption)"?

This morning, you have repeatedly used the words "partner" or "spouse" and referred to the female involved in a relationship—in other words, you are using the common-usage definition of domestic violence or domestic abuse, which is that the perpetrator is the partner or ex-partner. However, the definition that I quoted goes much wider than that. Could you comment on that?

Fergus Ewing: There is an argument that the definition at section 4(1)(b) is too wide, which is along the lines that I just suggested. On the other hand, we all accept that an assault is an assault and that, irrespective of whether the assault victim is a partner, wife, husband, child or other relative or anyone else, the law should provide means of bringing the assailant to account and prosecution in every case. That is undoubtedly so.

The problem that we have here is in providing a definition of domestic abuse and domestic violence, because it is a difficult one. I understand that there has been much discussion in evidence about technical aspects of the definition that the member in charge has come up with. I understand that she has, rightly, obtained it from another formal source—previous statute—but it has been criticised by others in their evidence. I am not sure that I want to supplement the reasons and arguments provided by those others, but I will ask my officials to expand on the suggestions that I made about possible alternative approaches that we could adopt.

I am aware of particular concerns in ethnic communities about aspects of the bill. The Forced Marriage etc (Protection and Jurisdiction) (Scotland) Bill attempts to deal with some of those issues, but perhaps that is only part of the problem of which Mr Maxwell was thinking.

Stewart Maxwell: Indeed. You have pre-empted my follow-on point, which was that, if that definition were included, it might have an impact on certain ethnic communities and families who have a much wider group within a household. The counter-argument is that its removal might have a different effect.

I understand your reluctance to go into the detail of exactly what your position is on section 4 but, in the list of changes that you thought would be helpful—I hope that I have written this down correctly—you said that you would like to "slim down the definition". Given your later comments in answer to our questions, I am not sure what you mean by "slim down". Whereas I gave the example of possibly removing section 4(1)(b), you did not seem keen to define what you meant. Can I push you and ask you what you meant when you talked about slimming down the definition?

Fergus Ewing: I will make a general point and then ask Simon Stockwell to supplement it. We appreciate that violence might come from and be supported by wider family members but, if we have too wide a definition of domestic abuse, the term begins to lose its meaning and focus, which would not be consistent with what we want to achieve. Having made that general point, with the convener's permission I ask Mr Stockwell to supplement my answer.

Simon Stockwell (Scottish Government Justice Directorate): We have spent quite a bit of time looking at section 4. To be frank, we have wrestled with the same issues as the committee about how section 3 would work if changes were made to the definition. The minister read out a series of options that we could pursue further.

Slimming down the definition would mean that it would be shorter than at the moment and it would concentrate on partners, whether they were spouses, civil partners or other people in an intimate relationship. That is just one option and not necessarily one that we would advocate. It gets rather more difficult when we start talking about what we mean by "intimate relationship" if the person involved is not a spouse, civil partner or cohabitant. The member in charge has had

difficulties with how to define somebody who does not have a formal piece of paper in that regard but who is still in an intimate relationship with somebody. Slimming down the definition would enable us to concentrate on intimate relationships, rather than the longer types of relationship that are mentioned in section 4(1)(b).

The Convener: We may have a problem if we seek to change definitions. I can see why we might want to do that, but it might be difficult to keep the definitions within the scope of the bill as drafted. The minister's officials will have to bear that firmly in mind when making suggestions.

Nigel Don: I return to the suggestion that the interdict should be marked as a domestic one, either by dint of statement by the sheriff or judge or because it derives from a statute that has been predefined as domestic. That seems to be a better way to go, although it may be just one route. Does taking that route raise any technical issues? Is it practicable?

Fergus Ewing: It is a potential solution that we have suggested should be examined and tested further. I am conscious of the fact that the committee has already taken a great deal of evidence from the key players and witnesses. We—and, I imagine, the committee—will want to get the views of the Sheriffs Association, the Crown Office and the Law Society; if we propose such a solution, that will be part of the process that we may need to undertake.

In principle, one potential solution is to require sheriffs to provide in the interlocutor that an interdict is a domestic abuse interdict. However, as I pointed out, if sheriffs are asked to do that, they may seek a definition—in other words, they may look to have the law indicate to them the circumstances in which they should conclude that an interdict is a domestic abuse interdict. One can understand that sheriffs will want to seek a legal basis on which to make their decision—that is their job.

Nigel Don: Forgive me, minister, but do they not already know that? Sadly, does the issue not arise daily in sheriff courts? Do sheriffs not recognise such cases when they see them?

Fergus Ewing: In nine out of 10 cases—probably, 99 out of 100—it is pretty obvious to sheriffs that they are dealing with a domestic abuse situation. We are talking about possible grey areas in which the answer is not quite so obvious—cases in which the relationship is not so intimate and another family member is involved.

Nigel Don: Forgive me again, minister, but do we not pay sheriffs to work out the 1 per cent of cases that are not defined? Surely that is what judgment is about. If all cases were defined, we could do everything by computer. That is a philosophical point. Do we really struggle with the issue?

Fergus Ewing: We have no plans to replace sheriffs with computers. Savage though the spending cuts may be, they have not led us to that somewhat novel and drastic solution.

Nigel Don: Computers would not necessarily be cheaper.

Fergus Ewing: Sheriffs' job is to apply the law. They may ask us to tell them what the law is so that they can apply it, instead of being expected to exercise wide discretion. However, I accept Mr Don's point. We will consider the issue further and write to the committee on it.

The second and more practical difficulty that we identified with this potential solution relates to older interdicts granted before the bill is passed that have not been marked as domestic abuse interdicts but are still in force. How will such interdicts be treated if they are not categorised as domestic abuse interdicts and criminal proceedings are raised? Today's discussion has indicated that more thought needs to be given to the proposal. We are happy to co-operate with the committee and the member in charge to that end.

The Convener: Cathie Craigie will explore further the financial implications of the bill.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): After the previous discussion, it seems that we are moving on to a slightly simpler issue. In your opening remarks, minister, you spent a considerable amount of time talking about the financial impact of the bill.

The financial memorandum that accompanies the bill indicates that it would be impossible to accurately quantify the cost that would arise from the bill. We have heard evidence from the Scottish Legal Aid Board that the bill would have an impact on the legal aid budget. As you reminded us this morning, the Association of Chief Police Officers in Scotland and the Crown Office said that the costs would be negligible. Given that evidence, and the complexities of the bill, can the Government estimate the cost implications of the bill?

Fergus Ewing: I thank the member for her question. Cathie Craigie has raised an issue that causes the greatest concern. We hope to be able to deal with the other difficulties, although they are significant.

As I indicated during my opening remarks, the costs of the bill are uncertain. The prime reason for that is that no one can know with certainty how many more cases will be raised. In the worst case scenario, we think that the cost to the public purse could be significantly more than the financial memorandum estimates. I understand that the rationale in the financial memorandum is that there

would be a 10 per cent increase in applications. If that were the case, we envisage that the costs would be broadly in line with what the financial memorandum has suggested. If there were to be a 50 per cent increase in applications for orders, the costs, as far as we are able to ascertain, would be around £1.4 million per year.

That range, from £300,000 or £400,000 to £1.4 million, is a significant amount of money and additional cost. Incidentally, that cost is largely made up of additional costs to the legal aid budget, as one would expect. However, there might be some additional costs to the Scottish Court Service through an increase in the number of cases, and because those who are in receipt of legal aid are currently exempt from court fees. A 50 per cent increase in the number of protective orders might cost the Scottish Court Service £160,000 a year.

I have received some figures from SLAB—I am not sure whether the committee has them yet—showing projected costs if there were increases of 10, 20 and 50 per cent. My recollection of its evidence is that SLAB mooted the idea that it would be able to model the costs at those assumptions. I have the headline figures here and can share them with the committee.

Plainly, the costs could be substantially higher. If the bill works and more women come forward, that would be a good thing, but the more successful the bill is, the more it will cost the public purse. On the one hand, we must welcome that, but we must also take into account the additional cost and all the other priorities that face us as parliamentarians, as a Government, and as elected representatives. That includes the other costs that arise from helping the vulnerable women whom Scottish Women's Aid has rightly highlighted in today's *Herald* in making its case for the cost of providing refuges, for example. None of us wants to look in isolation at individual costs, but plainly there will be serious consequences.

There is also an aspect that I do not think is covered in the financial memorandum, convener; forgive me if I am wrong. It goes back to the point about equality of arms. If more defenders are awarded legal aid, partly because of the fact that if an order is made against them and is breached it might lead to criminal proceedings, or if anyone was to successfully pursue an ECHR case, there might well be additional costs in providing legal aid to those defenders. I do not think that any allowance has been made for that in the financial memorandum, which is a factor that I am sure the committee will take into account in its further deliberations.

11:15

The Convener: It would be helpful if you could let us have a copy of the figures that you mentioned.

Cathie Craigie: As members might imagine, the Parliament's Finance Committee took detailed evidence on the bill. The member in charge of the bill raised with it the idea that the bill could result in overall savings in the legal aid budget. She said:

> "At the moment, people who are receiving legal aid and who need to go back to court because of a breach of interdict find that they have to push the issue as contempt of court, which is a civil issue not a criminal issue. The costs of that fall on the legal aid system."—[*Official Report, Finance Committee*, 21 September 2010; c 2504.]

Have you had a look at that evidence, minister? Do you have any comments on it?

Fergus Ewing: I hope that I have not picked up Cathie Craigie's question wrongly, but my recollection is that any potential savings might be made by the police in the long term. I think that when Rhoda Grant pressed them, the police agreed that that might happen, but I am not sure that any evidence has been given that the legal aid costs are expected to reduce. I am not aware of any such evidence, but if there is such evidence, we will look carefully at it. Perhaps I have overlooked some of the evidence. There is three days of it, and I tried to read it all, but I may have overlooked that.

Our view is that, although it is difficult to be precise because, sadly, tens of thousands of women face domestic violence, if a significant number of them come forward partly as a result of the bill, there will be the possibility of substantially increased legal aid fees. [*Interruption*.] Our overwhelming concern is that we will pass a bill, the costs of which could be substantially greater than they are estimated to be in the financial memorandum. I do not think that any notional potential savings would be a significant factor—certainly not in the short term.

The Convener: I ask everybody to ensure that their phones are switched off, as we seem to be getting a little interference from somewhere.

Rhoda Grant (Highlands and Islands) (Lab): I have no questions for the minister, but I put on record that I am grateful for his offer of help in working on the technical amendments to the bill. We will be in touch with him shortly.

Fergus Ewing: I look forward to that.

The Convener: I thank the minister and his officials for their attendance. The session has been useful. We are not yet at the acute time stage, but it would be helpful if the correspondence that the minister said will be forthcoming arrived timeously.

Fergus Ewing: I will ensure that it arrives as soon as possible.

The Convener: I am obliged to you for that.

11:18

Meeting suspended.

11:26

On resuming—

The Convener: I welcome the final witnesses in our evidence taking on the bill: Rhoda Grant MSP, who has assiduously attended every session; Clare Connelly, senior lecturer, and James Clark, postgraduate student, University of Glasgow School of Law; and Liza Gilhooly, researcher to Rhoda Grant MSP. We move straight to questioning.

Bill Butler (Glasgow Anniesland) (Lab): Good morning, colleagues. How will removing the course of conduct requirement benefit victims of domestic abuse?

Rhoda Grant: It is well recognised that removing the course of conduct requirement would be a huge benefit. Indeed, the Government did that for criminal cases in the Criminal Justice and Licensing (Scotland) Act 2010, which the committee spent a lot of time on recently.

The nature of domestic abuse is such that it is very difficult to get evidence of it, given that it happens in the home and there are seldom witnesses. Putting a course of conduct requirement into a non-harassment order would mean that someone would be likely to be abused many times. The evidence that we have heard is that people are abused a number of times before they come forward to seek any kind of protection. When looking at domestic abuse, it is not helpful to have a course of conduct requirement in a non-harassment order.

Bill Butler: Over the weeks, we have heard evidence on the definition of the word "harassment", including that an element of recurrence will still be involved. We have heard what the Government has to say. Do you agree with the minister that no more than one occurrence is required? I think he said that the definition could mean two or three hours of harassment on one occurrence.

Rhoda Grant: I agree with what the minister said. Indeed, we make that very clear in the bill. In proposed new section 8(3)(a) of the Protection from Harassment Act 1997, as inserted by section 1 of the bill, we say that conduct

"may involve behaviour on one or more than one occasion".

We are specific. The bill covers behaviour on one occasion.

Bill Butler: So, you think that the concern that some witnesses have raised can be met.

Rhoda Grant: I certainly think that it can be met. Obviously, we need to reflect on the evidence and see whether we can reassure people, either by amending the bill or clarifying the position to them. As it stands, the bill is clear on the matter.

Bill Butler: That seems clear.

11:30

The Convener: We turn now to the issue of finance and legal aid.

Robert Brown: The legal aid issue has become quite prominent, in terms of the bill's potential effect on it. I will ask about the equity and fairness of the changes that are proposed in the bill.

Why is it appropriate to single out abuse remedies from family law remedies, disputes about children—which can be extremely trying and important for families—and issues around, for example, reparation claims for horrible damages, or deaths and so on?

Rhoda Grant: We would agree with concerns about other important issues, but we are quite clear that domestic abuse is different from the other issues that you mentioned. That is laid out quite constructively in the submission from Scottish Women's Aid, which points out that Scotland could be in breach of the ECHR by not offering protection to people who suffer abuse. The state has a duty to protect people from abuse. A victim should not have to pay for their own protection.

Robert Brown: That is quite a significant claim. There is protection under criminal law, and there are remedies available on the same terms as anyone else in other actions. Why do you think that Scots law will fall short if it does not provide what is in effect free legal aid in domestic abuse situations?

Rhoda Grant: It is to do with the nature of domestic abuse. ACPOS supports the bill because the police are having difficulty offering protection in cases of domestic abuse because there are no corroborating witnesses to the crime—it happens within the home. That is what makes domestic abuse different from any other crime. The fact that by its very nature it is private means that it is difficult for the police to get the evidence that they need to ensure that they can protect the victims. That is why the bill seeks to provide protection for them.

Earlier, Nigel Don put the point to the minister that, surely, such cases would be dealt with by the

police and prosecuted through the criminal justice system, but that is only the case where there is supporting evidence, and the nature of domestic abuse means that there is seldom supporting evidence. That means that we need to offer protection to victims.

Robert Brown: That leads to another point. Does the barrier to access to justice not really involve non-financial aspects, such as the ability to provide probable cause of action, back-up statements and so on? The Scottish Legal Aid Board told us that, although it was not absolutely necessary that there should be back-up statements from family members and so on, it would normally look for them. Is that not the real issue, rather than the financial question?

Rhoda Grant: I am not suggesting that those issues do not need to be dealt with, which is why we want to remove the precondition that a course of conduct be demonstrated in the consideration of criminal non-harassment orders. However, the financial barrier is also large. The Government states that, following the extension of the legal aid provisions, 75 per cent of the population is now covered by legal aid, which says to me that 25 per cent of the population is not—the Scottish Parliament information centre has examined the figures and has told us that that figure would be 10 per cent for victims of domestic abuse.

The financial barrier is significant for someone who is fleeing an abusive relationship. That is the most dangerous point for someone in such a relationship, as that is the time when the violence tends to increase—indeed, people have been killed at that point. An individual might not have access to their own funding if they are leaving a relationship. Their money might be in joint bank accounts and it would be quite easy for someone with internet banking to remove that money very quickly and thus stop them leaving. They might also be afraid to access their own finance, because a bank statement would show where they had removed the money, which might give clues as to their whereabouts. All those things create barriers. We are saying that if somebody needs protection—we are often talking about people who fear for their lives—they should be able to get it. If the state is not able to afford that protection by proving a criminal offence, the person should be given the tools to do that at no cost to themselves.

Dave Thompson: I want to focus in on the figures for the proportion of legal aid applications in domestic abuse cases that are refused on financial eligibility grounds alone. Are you saying that that is the 10 per cent?

Rhoda Grant: No. In earlier evidence it was made clear that most solicitors know the boundaries and where legal aid will come in and will make an estimate. If somebody arrives at a solicitor's office, the solicitor will quickly be able to tell them—apart from a small 2 per cent, I think—whether they will qualify for legal aid and will ask them whether they want to take the matter further. That is not the percentage that we are talking about. We are talking about the percentage that the Government is saying is covered by legal aid. Furthermore, we have taken advice from the Scottish Parliament information centre, which has looked at the figures and drilled down a bit further. Its percentage is different from the Government's, because it looked at domestic abuse cases. We have used that figure as our starting point. In the financial memorandum, we have provided figures on the basis of a 10 per cent increase in cases for which civil legal aid is applied. When we went to the Finance Committee, we took on board the point that the recognised figure was that 75 per cent of adults already qualified for civil legal aid and we therefore calculated figures on the basis of a 25 per cent increase, too.

Dave Thompson: Thank you. What about the knock-on effect? If pursuers are automatically entitled to legal aid, would defenders need to be entitled to it, too? That would push up costs. Do you have any comments on that argument?

Rhoda Grant: Yes. I will write to the committee about the ECHR issues that that raises.

The reason why we put the provisions on legal aid in the bill is that we do not believe that victims are receiving equality of arms. That is why we are seeking redress. Although on paper a victim might have finances, in fact they have joint bank accounts and jointly owned property to which they do not have access. We want to create equality of arms. We have heard a lot of anecdotal evidence of cases in which a victim has to pay for their own protection against a defender who is receiving legal aid. That is a reasonably common problem that underlines the unfairness of the current system.

The figures that we received from SLAB included defenders and pursuers. We have used its figures. The figures that we give in the financial memorandum and which we gave to the Finance Committee already include pursuers, although our argument is quite clear: what we are proposing would not breach ECHR. I can either expand on that just now or we can write to the committee about it.

The Convener: I would prefer it if you expanded on it, because it might lead to other questions.

Rhoda Grant: Okay. It is important first to distinguish between the two parts of the issue. The civil part is about the application for a non-harassment order or an interdict. If the interdict is breached, that becomes a criminal issue. In a way, that is out of the equation, because if the issue

were a criminal one, the pursuer would need to apply for legal aid for the action against the state.

Let us concentrate on the civil side of the issue. The ECHR looks at interference with a person's civil rights and obligations—that is where an ECHR breach would come in. If a person interferes with someone's civil rights and obligations, they would have to have equality of arms. Taking out an interdict against somebody is actually not interfering in their rights or obligations, because nobody has a right of access to somebody else. All that the interdict is doing is to remove that right of access.

I will write to the committee more fully on that, with a breakdown—but that is the matter simply put.

The Convener: That would be helpful.

Dave Thompson: Yes, that would be helpful. I am happy to leave it at that.

Robert Brown: On the point that Ms Grant made about the resources to which the applicant did not have access, for example money in a bank account, I might be wrong, but my recollection is that the Legal Aid Board has some powers to disregard resources in certain circumstances. Can you help us on that, Ms Grant?

Rhoda Grant: I can investigate that point and come back to you. That might be the case, but I am not 100 per cent clear on it. Ministers have powers, I guess, to extend legal aid to other people under legal aid legislation.

Robert Brown: It might be more for us to check that point with the Legal Aid Board, but I think that there is some provision of that sort. That casts a certain light on the issue of people being deprived of legal aid, if that is indeed the case. I might be wrong, but it is worth checking the matter.

Stewart Maxwell: That covers one of the two points that I wanted to raise. Rob Brown is correct—that shines a different light or puts a different complexion on your earlier comments, Rhoda.

I will push you a bit on the ECHR issue. I am struggling to understand how it is, or might be, a breach of the ECHR to have means testing of pursuers, yet it would not be a breach of the ECHR to provide pursuers with automatic access to legal aid while denying that same right to defenders.

Rhoda Grant: Can you repeat that question? I am not 100 per cent clear about it.

Stewart Maxwell: I think you said that you believed that it was a breach of the ECHR for pursuers to have to go through a means test in order to access legal aid, which is the current situation, but would it not be a breach of the ECHR to provide pursuers with automatic access to legal aid while denying that same right to defenders?

Rhoda Grant: James Clark seems to understand what you are driving at.

James Clark (University of Glasgow): In cases of breaches of the ECHR relating to domestic violence and abuse, the breach arises not out of article 6 but out of articles 2, 3, 8 and 14, which cover the right to life; the right to be free of torture and inhuman, degrading treatment and punishment; the right to a private life; and equalities. If we do not provide protection for victims of abuse, that is a breach of the ECHR, as we are not respecting the right to life if the victim is killed.

Stewart Maxwell: I am sorry to interrupt you, but I return to Robert Brown's point that we are providing protection—the protections are there in both civil and criminal law. In what way is there a breach?

James Clark: The criminal law does not actually provide protection; it responds to offending. It cannot get in there and stop the abuse, unless there is evidence of it.

We know that the civil law, as it stands, is not working—people are not able to access the civil remedies. If they cannot get access to the law to prevent the abuse, that breaches their rights under the ECHR.

Stewart Maxwell: I am not sure that I agree with your definition regarding criminal law and what it provides. I am also not sure that I agree that access to civil protections is denied to people. There is a test. I accept that that test is partly financial, but it is partly non-financial. That does not seem to me to deny the right of access; it involves tests, and both parties have to go through them equally. I am struggling to understand how you can differentiate between pursuer and defender in such cases.

James Clark: The position under the ECHR is that people have a right to be protected from abuse and violence. Putting barriers in the way based on whether people have a case to bring to court is different from not giving protection to someone because they cannot afford it. Those are two different arguments. We have no objection to someone needing to present a case in court, but not being able to afford access to the protection is a different matter.

11:45

Stewart Maxwell: No—you are broadening it out substantially. You are saying—excuse my common-man understanding—that we are effectively denying access to protection under the law. That suggests that all of us should have

automatic access to legal aid to protect ourselves against any act of abuse or violence, which I do not think is the case. I am struggling with your definition of how the ECHR would operate in that case. I cannot understand why you think that it should operate in that way in domestic abuse cases and yet the same interpretation would not apply in all other cases.

Rhoda Grant: There are two separate issues; we are muddying the waters. One is a person's access to protection, and the other is the equality of arms argument. Those are quite different issues. We will deal with access to protection first. I will bring in Clare Connelly.

Clare Connelly (University of Glasgow): I appreciate Stewart Maxwell's concerns about clearly applying ECHR principles to access to a protection order. The minister was supportive of the position that the policy memorandum sets out, which is that there is an anomaly. Someone who perpetrates abuse will appear in court from custody, and will automatically be awarded legal aid without means testing for that court appearance. The current position in the domestic abuse court in Glasgow rests on special arrangements by which all the accused who go through the court get non-means tested legal aid for the entire court process.

There is an anomaly by which those who perpetrate domestic abuse receive legal aid, which is not means tested, while those who are subjected to domestic abuse may not be able to get protection because the means-testing aspect of legal aid means that they cannot proceed with the application. They cannot apply for a civil protection order on their own, as they require legal representation to do so because of the complexity of the law and because there are rules on the right of audience.

My understanding, from reading the evidence that the committee has heard, is that the equality of arms issue relates to awarding legal aid to a person who applies for protection—the pursuer—but not automatically awarding legal aid without means testing to the defender. That is the article 6 issue; as Rhoda Grant said, certain tests must be met for article 6 to come into play.

In this instance, granting an interdict or a non-harassment order interferes with a person's right of access to another person. You are telling someone that they are not allowed to contact or abuse that other person. Article 6 can only protect legal rights that already exist. In law, we have no right of access to another person, so awarding legal aid to a pursuer to protect their person from another does not interfere with article 6 rights or raise an equality of arms issue. There is no equal right to legal aid for the defender because of the ECHR. I hope that that clarifies the issue—it is complex, which is why Rhoda Grant is keen to put something in writing to the committee.

The Convener: It is complex, and I for one am having real difficulty in getting my head around it. It seems that there is a basic injustice: the ECHR holds the principle of equality of arms very strongly, and we are not getting that result in this case. Robert Brown will pursue the matter.

Robert Brown: Ms Connelly, you said that there is no right of access to another person, and we all accept that. However, the type of interdict or order that you have mentioned might, for example, prevent someone from having access under the Matrimonial Homes (Family Protection) (Scotland) Act 1981 to a house that they own or would have access to, or from walking down the street in certain circumstances or going within a certain distance of another person. Those are undoubtedly things that people have the right to do other than when an interdict is made against them. Are we overstating the case a bit, if I have understood the matter correctly?

Clare Connelly: I would say not, because you would not have unfettered rights. None of the interdicts would stop a person having access to their home; they would operate to protect the individuals within the home. There is no right of access to other individuals—it does not exist in law.

Rhoda Grant: I can provide further information on that. We came under pressure to include exclusion orders in the bill, but we did not do so because we would have been excluding people from the right to enter their own property, which would have had ECHR implications. We felt that we should not do that in a member's bill. It is an issue of fundamental human rights and is beyond the scope of what we are able to do.

Robert Brown: With respect, I mean the breach of interdict with the power of arrest in section 3. That can arise out of the circumstances of the exclusion order, can it not?

Clare Connelly: They are separate legal orders, although previously they could be applied for in the same process.

Robert Brown: Yes, but the exclusion order is to get someone out and the interdict is to stop them coming back.

Clare Connelly: The interdict normally provides wider protection. Clearly, stopping an abuser returning to the family home would not be adequate on its own because, as we know, abuse does not just take place in the family home. The orders are separate.

The jurisprudence of the European Court of Human Rights shows that

"there is no obligation upon a State to ensure a total equality of arms through the use of public funds so long as each side in the dispute is not placed at a substantial disadvantage".

That is the key point. If you do not award protection to an individual, they are at a substantial disadvantage. The person who is told to carry out no further abuse is not at any disadvantage.

Robert Brown: With great respect, the disadvantage is that if they do certain things, some of which would normally be legal, they would immediately be the subject of a criminal offence that would not otherwise be a criminal offence. Surely there is a big disadvantage in that respect.

Clare Connelly: Those consequences arise from the breach of a court order. They do not arise from the awarding of the order. Those issues must be separated. In the process of seeking the order, we consider whether there is substantial disadvantage. If an individual takes a non-harassment order against me or has an interdict with a power of arrest against me, I am at no disadvantage as a result of the existence of that order. If, however, I choose to breach that order, I am breaching a court order and will be subject to punishment for that.

The issues are separate. We must not confuse awarding a protection order and what happens if the person does not comply with that protection order—which, one would have thought, was evidence to justify the order being granted in the first place. They are separate issues, in terms of access to justice, in terms of protection and in terms of the equality of arms argument.

Robert Brown: You are trying to make what appears to be an artificial distinction.

Nigel Don: To drag us back a bit from the looming conflict, I am now a lot wiser on the principles, so thank you for what you have said in the past 10 minutes. However, just to extend the previous conversation, I am struggling to understand why I am not disadvantaged if my wife gets an interdict against me that effectively means that I cannot go back home. Regardless of the cause, I cannot go home. Is that not to my substantial and severe prejudice?

Rhoda Grant: That is the reason why exclusion orders are not included in the bill. As I said, we were asked to include exclusion orders in the bill and we have not done so, for that reason. We would be asking for legal aid to be granted automatically to somebody who was applying for an exclusion order that interfered with someone's human rights. We recognised that in some circumstances there is an equality of arms issue, which is why exclusion orders were not included. We were clear that the bill would not interfere with human rights.

Nigel Don: I am with you—if it is an exclusion order. If my home is sufficiently small that I cannot go home without effectively being deemed to harass my wife, is there any difference?

Clare Connelly: The evaluation of the Protection from Abuse (Scotland) Act 2001, which also looked at all the other civil protection orders, revealed that the majority of people who seek protection—largely women—do not stay in what was the family home. After all, these people are seeking protection from someone who has abused them, has threatened their life and has promised that, if they leave, they will be found and killed. We should bear in mind how the orders manifest themselves. It is not that the woman and the family are in the family home and the man is not allowed to walk along the street; the woman and the family are in hiding, and the man is interdicted against approaching and abusing them. People are excluded from their homes as a result of exclusion orders, which are not part of the bill.

Nigel Don: I do not have a problem with the fact that the bill does not cover exclusion orders. The scenario that you have just set out is entirely plausible and no doubt very normal, but does it actually represent 99 point something per cent of the occasions that we are discussing?

Clare Connelly: I do not have the statistics with me but, as one of the those who evaluated the 2001 act and the other civil protection orders, I have to say that we did not find that kind of evidence. An interdict does not in itself exclude someone from the matrimonial home; you have to get an exclusion order. Are you with me?

Nigel Don: Yes.

Clare Connelly: We are talking about separate orders. The court might grant an exclusion order, but we are not suggesting that in such cases there should be free access to legal aid. The individuals in question might well stay in their own home, but when we looked at the orders that were granted we found that they usually moved elsewhere. Indeed, that was evident from the initial writ, which did not reveal the individual's address because of the threat of further abuse if the abuser found them.

I do not think that anyone has gathered these particular statistics. I will go back to our evaluation and correlate whatever information I can on the number of cases in which the person was resident in the home when they applied for the order.

Nigel Don: I simply want to tease out what is normal in these circumstances.

Clare Connelly: Having carried out empirical research in this field for 15 years now, I think that,

normally, the woman and any children have to leave the family home. If they stay there, the abuser knows where they are and they can be found easily and subjected to further violence and abuse. Of course, that has a domino effect and leads to problems with access to refuge and other support. Also, we should not forget the additional financial hardship that is faced by these women who, after all, often have to leave their home with nothing or very little and might have to rehome, reclothe, feed and emotionally support their children.

Nigel Don: I think that the implications are very obvious to us all.

Clare Connelly: That is the norm, rather than the exception.

The Convener: As we are not entirely clear on this yet, I suggest that a letter on this subject would be helpful.

I now ask Nigel Don to pursue what might prove to be the less controversial question of breach of interdict with powers of arrest.

Nigel Don: Indeed. What are the benefits of criminalising such breaches?

Rhoda Grant: There are several. First of all, the victim will not have the huge burden of having to go back to court for a breach of interdict. Indeed, given that many of the people who have applied successfully for an interdict are eligible for legal aid, the provision will not place such a huge burden on that system.

Secondly, as they said in their evidence, the police will find it a lot easier to protect victims. More than 60 per cent of the domestic abuse cases that the police respond to involve repeat offending, so if the police have the sanctions to deal robustly with such incidents, they will be able to cut that number down. At the moment, people arrested for breach of interdict are held for perhaps a couple of days, which gives victims only a very short period of time to move again and no time at all to protect themselves properly. If the police were able to act, there would be bail conditions and the like; in fact, the person could be arrested and held until they appeared in court.

12:00

Nigel Don: Do you have any information on why contempt of court is not often used in cases of breach? That has come up in evidence, but we have not heard any justification as to why it does not happen. There just seems to be a shrug of the shoulders.

Rhoda Grant: There is anecdotal evidence, but I do not think that there is any empirical evidence to explain that. I think it is because it falls to the victim to go back to the court and prove that the breach has happened, and it might be that they have to do that at a time when they are fleeing again, when they have to find new schools for their children and a new place to live. Also, the sanctions are not huge. If it is the victim who is pursuing the abuser again, that heightens the aggression that comes back against the victim, whereas if it is the state that is pursuing the abuser, that diverts the aggression away from the victim and on to the state. There are complex reasons for that.

Nigel Don: What standard of proof should be required if breach of interdict is criminalised? You will be well aware of the issue. All the other examples that I am aware of where corroboration is not required are instances where the person who is bringing the matter back to court is—firmly in inverted commas—"an officer of the court". In the situation that we are discussing, the person who brings it back to the court will be either a police officer or the pursuer. How do you see the balance? Do we need corroboration or should this be one of the instances where corroboration is not required?

Rhoda Grant: I heard the evidence that the committee took on that. I have sympathy with the position of Scottish Women's Aid, but the bill does nothing to remove the need for corroboration, because the breach is criminal, and in Scots law criminal cases need corroboration. The bill is a member's bill, and I am not going to start rewriting Scots law on the back of it, so although I have sympathy with what has been said on the issue, the bill does nothing to remove the need for corroboration.

Nigel Don: I have to say that that makes our lives a great deal easier, too, because I am not sure that we are in a hurry to rewrite the whole of Scottish criminal law on the back of the bill. Thank you.

The Convener: We turn to the definition of domestic abuse, with Cathie Craigie.

Cathie Craigie: Good afternoon to the panel. At one point, we said that the meaning of "domestic abuse" was probably one of the most controversial aspects of the bill, but after this morning I think that we should leave that one sticking to the wall and see if anything else comes up to take the prize.

What was the thinking behind creating a statutory definition of "domestic abuse"? You have worked closely with Scottish Women's Aid and, presumably, family law centres. The evidence that we have heard over the weeks and the written evidence that we have received suggests to me, anyway, that the meaning is well defined already.

Rhoda Grant: I listened to that evidence and I have taken on board what was said. I also listened to the counter-evidence. This morning, the minister talked about the need for a definition—not in all cases, but where cases are borderline. It is clear from the evidence that we need to amend section 4. I have sympathy with removing it, but I want to review the evidence of the minister and others who said that the definition is necessary. Scottish Women's Aid quoted other legislation where "domestic abuse" is used but not defined, such as the Children (Scotland) Act 1995.

I am keen to go back to some of the organisations that are concerned about our definition to find out where those concerns lie. We worded our definition to make it as wide as possible, given that domestic abuse can be perpetrated by the wider family and the like, as you heard in evidence. We did not want to make the definition narrow, because that would prevent people who are suffering domestic abuse from accessing the protections that the bill provides.

There are probably ways round our definition. This morning, the minister talked about naming the interdicts that would be granted under the bill. We realised that we needed to do that and we would amend the definition to allow it to happen.

However, we need to take some further evidence on the greater definition from those who are concerned about and involved in the matter to determine whether we need a definition. If we do, the definition will need to be amended to take those concerns into account. It may be that the bill will talk about a partner or someone acting on their behalf rather than detail family members.

Cathie Craigie: The committee is grateful to hear about that approach, because committee members feel that some more work is required on the definition.

Rhoda Grant has answered the points that we need for that question, convener.

The Convener: As no members have any other points on that question, we will pursue the final one.

Stewart Maxwell: In light of some of the evidence that we have had and this morning's debate on sections 2 and 4, do you think that the bill would still be viable if those sections were removed entirely from it?

Rhoda Grant: Yes, probably. The jury is out on whether we need section 4 but, having heard the evidence, I think that the bill would cover the majority of domestic abuse cases if no definition were given and the normal definition were taken.

Removing section 2 would create issues about access to the remedies in the bill, but we also need to bear in mind that the minister already has powers to make the changes that section 2 would make. They do not need primary legislation; the power is available under legal aid legislation.

Stewart Maxwell: That is what I was thinking about. I presume from your answer that you agree. The implementation of sections 1 and 3 on their own would improve on the current situation, although I am not suggesting that sections 2 and 4 will be removed.

Rhoda Grant: Of course.

Stewart Maxwell: There is some debate about whether sections 2 and 4 are needed and how they should be defined. I am glad that you have cleared that up, because you are correct that sections 1 and 3 are vital but there is some debate about section 2, given that ministers have the power to do what it does, and section 4.

I note that section 4(3) says:

"The Scottish Ministers may by order made by statutory instrument amend subsection (1) by adding further types of relationships."

So, even if the definition were narrowed or tightened—however we want to define it—by amendment, it could be further amended by order at a later stage if section 4(3) remained in the bill.

Rhoda Grant: Yes. Alternatively, we could leave powers in the bill for ministers to define domestic abuse if required—should the courts not recognise it and what it stands for—rather than define it in the bill. That would allow them to view how the law was working and amend it if necessary.

Guidance is important. We can legislate and say what abuse is, but it might take guidance to emphasise to the Legal Aid Board and other bodies what it encompasses and what they should look for.

Stewart Maxwell: It would help the committee—it would certainly help me—if the member in charge of the bill gave us her considered views on where section 4 should go in light of the evidence that we have taken on it. There is clearly still a lot of detailed debate to be had on what should happen to that section.

Rhoda Grant: Do you mean on what should happen to section 4?

Stewart Maxwell: Yes, you have agreed to write to us, and it would be helpful if we got your detailed consideration of the evidence that we have heard on that section, because there is still a lot of debate to be had about it.

Rhoda Grant: Yes, I will certainly do that. I will consider the matter further, but I do not know whether my consideration will have ended by the time the committee pulls together its stage 1

report, because we need to speak to the minister and the organisations concerned with a view to reaching a consensus. If we cannot reach a consensus, the simplest way forward would be to remove section 4 and to allow ministerial powers to deal with any issue that arose in that regard.

The Convener: I have a point of information. The deadline for completion of stage 1 is 22 January, but that covers the holding of the stage 1 debate, so time is of the essence.

Is there anything else that you would like to add?

Rhoda Grant: No. I am just grateful to the committee for its consideration. I enjoyed listening to the other evidence more than I enjoyed sitting at this side of the table.

The Convener: It was probably a unique experience.

I thank you and your colleagues for your attendance. We have been left with some outstanding issues, and we look forward to their being addressed in correspondence in early course.

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

12:11

Meeting continued in private until 12:22.

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